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EVALUATING IMPLEMENTATION OF THE WHO SET OF RECOMMENDATIONS ON THE MARKETING OF FOODS AND NON-ALCOHOLIC BEVERAGES TO CHILDREN

Progress, challenges and guidance for next steps
in the WHO European Region



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Evaluating implementation of the WHO Set of Recommendations on the marketing of foods and non-alcoholic beverages to children

Progress, challenges and guidance for next steps
in the WHO European Region

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Abbreviations

ASA	Advertising Standards Authority (UK)
AVMSD	Audiovisual Media Services Directive
CJEU	Court of Justice of the European Union
CRC	United Nations Convention on the Rights of the Child
EU	European Union
HFSS	high in saturated fats, trans fats, free sugars and/or salt
NCD	noncommunicable disease



Executive summary

In May 2010, the World Health Assembly unanimously adopted the WHO Set of Recommendations on the Marketing of Foods and Non-alcoholic Beverages to Children. These recommendations urge Member States to reduce the impact on children of the marketing of energy-dense, highly processed foods and beverages that are high in saturated fats, trans fats, free sugars and/or salt (HFSS). However, despite unequivocal evidence that HFSS food marketing has a harmful impact on children's eating behaviours and body weight, and repeated commitments made by Member States to halt the rise of childhood obesity by 2025, implementation of the WHO Set of Recommendations has been patchy.

A growing body of independent monitoring and research indicates that existing policies and regulations are markedly insufficient to address the continuing challenges in this field. Policies and regulations tend to use narrow definitions and criteria (they frequently apply to pre-digital media only, to younger children and not to adolescents, and to "child-directed" media, rather than those with the greatest child audiences), and they almost never address the complex challenges of cross-border marketing. This situation can be explained, in part, by the strong scrutiny and opposition that countries have faced from parts of the private sector, and by weak self-regulatory schemes. As a result, and in order to ensure that States uphold their legal obligations to protect the child's right to health and related rights, the World Health Assembly has requested that WHO provides additional technical support to Member States in implementing the Set of Recommendations.

This paper serves to describe the status of the implementation of the Set of Recommendations in countries across the WHO European Region. It also identifies loopholes, ongoing challenges, and factors that Member States need to consider in order to effectively limit the harmful impact that HFSS food marketing has on children, their health and their rights.

The paper first highlights the substantial body of evidence on the extent, nature and impact of food

marketing to children, which unequivocally supports the adoption of HFSS food marketing restrictions. It then summarizes key points from the Set of Recommendations:

- Governments as key stakeholders in policy development are encouraged to set clear definitions, thereby allowing for uniform policy implementation.
- "Marketing" should cover not only advertising but all other commercial communications that are designed to promote, or have the effect of promoting, HFSS foods.
- Reductions in both the exposure of children to marketing of HFSS foods and the power of such marketing should be sought, as both influence food preferences, purchase requests and consumption.
- A comprehensive approach has the highest potential to achieve the desired impact.
- Member States should cooperate to reduce the impact of cross-border marketing.
- Monitoring and enforcement mechanisms should be specified to ensure effective policy implementation.

Next, the paper reviews the state of implementation of the Set of Recommendations in countries, based on the best available information derived from the WHO European Region via the Global Nutrition Policy Review and complemented with a review of existing literature and consultation with experts. Of the 53 countries in the WHO European Region, 54% report that they have taken steps to limit marketing of HFSS foods to children. Some countries have adopted legally binding rules which specifically restrict HFSS food marketing and/or prohibit or aim to reduce exposure to, and the power of, all marketing to children for commercial products in certain media, at certain times. However, many countries still report no action, and there remains an overwhelming preference for self-regulation by the food and advertising industries – an approach that

is often found wanting by independent review and consistently criticized by civil society organizations. To date, most policies have focused on broadcast media. There seems to have been some progress in regulating in-school marketing, though implementation of the Set of Recommendations in schools and other settings where children gather remains understudied in Europe. Overall, however, the impact of existing policies on reducing children's exposure to HFSS food marketing has been limited, particularly within the context of changing media usage and the increasingly integrated nature of marketing across a number of different media and platforms.

Based on this analysis, the paper identifies existing loopholes and ongoing challenges in implementation, drawing on evidence to offer guidance to help countries formulate policies in line with the Set of Recommendations. Definitions adopted in any policy are critical and will influence its scope and impact. In particular, Member States should consider the following:

- Most action focuses on broadcast advertising only, despite clear evidence that children are exposed to marketing through many other communication channels and mechanisms: in the digital sphere, via product display, and through packaging and sponsorship of HFSS foods. Member States therefore need to adopt a more comprehensive approach to HFSS food marketing regulation.
- Existing regulations typically limit their scope to child-oriented programming and focus primarily on advertising, leaving a broad range of programmes, media and marketing techniques to which children are exposed unregulated. Member States should therefore ensure that they focus on the actual exposure of children to HFSS food marketing, rather than on the classification of content or media.
- Children are protected by existing rules only if they are below a certain age (typically 12 or 13

years), even though a growing body of evidence suggests that adolescents are negatively affected by HFSS food marketing. The scope of rules should be extended to protect all children.

- Member States have not always adopted effective food categorization systems to determine what foods should not be marketed to children. They should ensure that they develop evidence-based nutrient-profiling systems that define food according to nutritional quality.
- European Union (EU) Member States have failed to effectively regulate cross-border marketing at regional level; they should reflect on how better cooperation and EU harmonization could avoid weakening national HFSS food marketing restrictions.

The paper concludes by discussing the potential of a children's rights approach to regulating HFSS food marketing, arguing that States should, as part of their legal obligation to respect, protect and fulfil children's rights, restrict such marketing. Article 3 (1) of the United Nations Convention on the Rights of the Child mandates States to ensure that "the best interests of the child shall be a primary consideration in all their actions". In particular, a children's rights approach to food marketing regulation requires that the outstanding challenges and loopholes that this paper has identified are both recognized and effectively addressed at national and European levels. It is only if the factors underpinning implementation of the Set of Recommendations are defined broadly and independently that States will ensure effective protection of all children, including adolescents, from the harm caused by HFSS food marketing.

The paper is accompanied by an [online annex](#) that provides details of many of the most relevant legislation, regulations and policies from across the WHO European Region.

Introduction

Childhood obesity is reaching alarming proportions in many countries and poses an urgent and serious challenge to health and society, with immediate negative consequences for the children concerned.¹ In addition, excess weight gain and unhealthy diets during childhood are associated with higher risk of disability and premature death in adulthood, representing a major barrier to well-being and contributing to growing health costs associated with noncommunicable diseases (NCDs).^{2, 3, 4} Prevention is recognized as the only feasible option for curbing the epidemic.

Excessive consumption of energy-dense, highly processed foods and non-alcoholic beverages that are high in saturated fats, trans fats, free sugars and/or salt (hereafter termed “HFSS foods”) has been particularly implicated in encouraging obesity.^{5, 6, 7} While the determinants of dietary behaviours operate at individual, family and environmental levels, promotional strategies used by food companies to encourage greater purchase and consumption have been identified as an important factor in the continued excess consumption of HFSS foods.^{8, 9, 10}

In 2010, the World Health Assembly endorsed the Set of Recommendations on the Marketing of Foods and Non-Alcoholic Beverages to Children, calling for global action to reduce the harmful impact on children of marketing of HFSS foods.¹¹ This call was based on unequivocal evidence that children’s diets and, therefore, risk of obesity are influenced by exposure to marketing of these products.^{12, 13} Subsequently, the World Health Assembly reiterated its call for countries to fully implement the Set of Recommendations. In 2016, the World Health Assembly adopted the report of the WHO Commission on Ending Childhood Obesity (ECHO Commission), which noted that, despite some action and voluntary efforts by industry, the marketing of HFSS foods remains a major public health issue worldwide.¹ It called for change – specifically, for governments to produce clear definitions, adopt enforcement and monitoring mechanisms, and consider legally binding approaches in order to provide equal protection to all children, including adolescents. Further, the WHO Regional

Committee for Europe, via the Vienna Declaration on Nutrition and Noncommunicable Diseases and the WHO European Food and Nutrition Action Plan 2015–2020, called for countries to “adopt strong measures that reduce the overall impact of marketing to children, in line with the Set of Recommendations”.^{14, 15}

The evolving position of WHO has been informed by a growing body of independent monitoring and research which indicates that implementation of the Set of Recommendations is patchy. Existing policies and regulations are found to be markedly insufficient to address the continuing challenges in this field.^{16, 17, 18, 19, 20} Policies and regulations frequently apply to pre-digital media only, apply only to younger children and not to adolescents, use narrow definitions and implementing criteria, and almost never address the complex challenges of cross-border marketing.²¹ This can be explained, in part, by the strong opposition and scrutiny that countries have faced from some parts of the private sector, and by weak self-regulatory schemes.²² As a result, the World Health Assembly has requested that WHO provide additional technical support to Member States in implementing the Set of Recommendations.

Effective implementation of the Set of Recommendations requires guidance to countries on how to design comprehensive policies that provide the greatest possible protections to all children, including adolescents, and cover all forms of marketing, including digital and non-advertising forms of promotion. Such implementation also requires legal support to countries in developing the definitions that are embedded in policies in such a way that they effectively close regulatory loopholes and reduce the impact of marketing of HFSS foods on children’s diets.

Eight years after the adoption of the WHO Set of Recommendations, this paper serves to describe the status of their implementation in countries across the WHO European Region. After briefly summarizing the evidence in favour of restricting HFSS food marketing to children and recapping the scope of the Set of

Recommendations, it provides an overview of policy implementation in countries, based on the best available information obtained from countries in the WHO European Region via the WHO Global Nutrition Policy Review and complemented with literature review. From this situation analysis, the paper then explores the extent to which countries have implemented policies in line with the Set of Recommendations and highlights any continuing challenges and gaps. Using the most up-to-date literature on the effectiveness of different approaches, the paper provides guidance to countries to help them overcome challenges and close existing loopholes. The paper concludes with

a discussion of the potential of a children's rights approach to the regulation of HFSS food marketing, arguing that effective implementation of the Set of Recommendations would help States meet their obligations under international human rights law, and in particular Article 24 of the Convention on the Rights of the Child (CRC) on the right to health.

The paper is accompanied by an [online annex](#) that provides details of many of the most relevant legislation, regulations and policies from across the WHO European Region.

Summary of the existing evidence on the impact of HFSS food marketing to children

A substantial body of evidence exists in relation to the extent, nature and impact of food marketing to children; specifically, there have been four large systematic reviews – by Hastings et al.,¹² Hastings et al.,¹³ McGinnis et al.,²³ and Cairns et al.²⁴ Subsequent reviews have reaffirmed and strengthened the evidence base; for example, a review by the Federal Trade Commission.²⁵

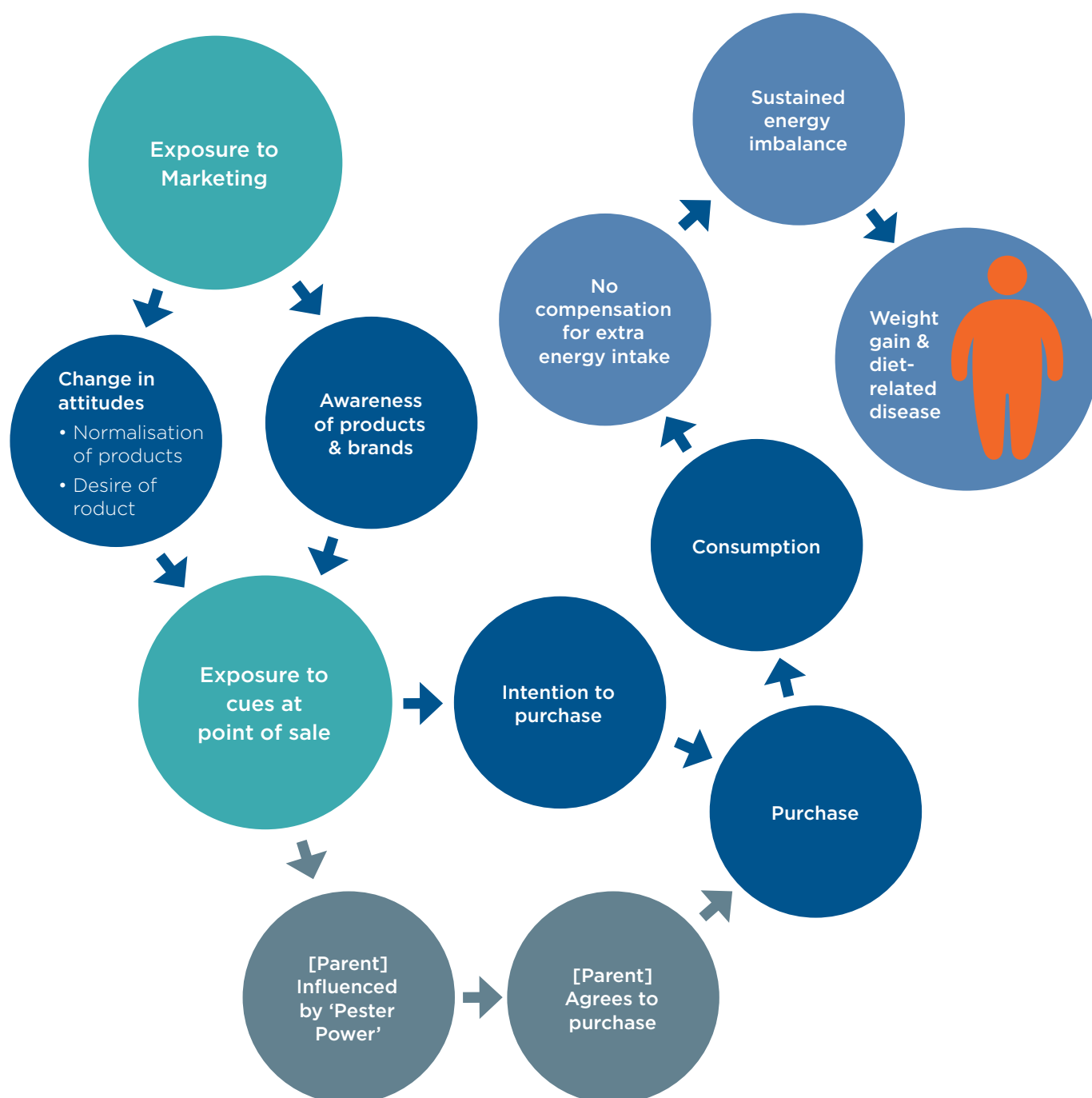
The pathway linking exposure to HFSS food marketing to children's body weight and associated health outcomes is likely to be complex and to involve a number of impacts that operate not sequentially but in tandem, with repeated exposures having cumulative impacts over time.²⁶ In support of this, there is ever-increasing evidence of marketing effects on a number of different behavioural outcomes, demonstrating that HFSS food marketing is associated with:

- more positive attitudes to unhealthy foods;²⁷
- increased taste preferences towards advertised products;^{28, 29}
- increased preference for HFSS foods overall;³⁰

- greater pestering of parents to purchase HFSS foods;³¹
- increased intake in the short term;^{32, 33}
- intake that is not compensated for at later eating occasions;³⁴
- greater consumption of unhealthy foods and lower consumption of healthy foods overall in the diet;^{35, 36} and
- greater body weight.^{37, 38}

While a majority of studies have focused on advertising through traditional broadcast media (i.e. primarily television), there is increasing evidence of similar, if not more substantial, effects resulting from children's exposure to digital food marketing.^{39, 40, 41, 42} The evidence for effects on younger children is unequivocal. Fewer studies have focused on adolescents, but where they have, similar effects of marketing on behaviour have been observed.^{43, 44} In sum, the strength and composition of the evidence are such that the direct implication of HFSS food marketing exposure in childhood obesity calls for effective implementation of the Set of Recommendations.⁴⁵

CASCADE OF EFFECTS TO FOOD PROMOTIONS



Source: Kelly et al.²⁶

Recap of the WHO Set of Recommendations

Based on this evidence, in May 2010 WHO Member States endorsed Resolution WHA63.14, calling for limits on the marketing of food and non-alcoholic beverage products to children.⁴⁶ Subsequent to the Resolution, WHO released the Set of Recommendations, the main purpose of which is to guide efforts by Member States in designing new policies on food marketing and/or strengthening existing ones.¹¹

As stated in the Set of Recommendations, the policy aim is to reduce the harmful impact on children of marketing of HFSS foods. Given that the effectiveness of marketing in influencing behavioural outcomes (such as food preferences, purchase requests and consumption patterns) is a function of both exposure and power, the overall policy objective is both to limit the exposure of children to HFSS food marketing and to reduce the power of such marketing. *Exposure* refers to the volume of marketing children see, as determined by the frequency and reach of marketing messages (i.e. which media do children use?); *power* refers to the creative content, design and execution of the message that enhance its persuasive appeal (i.e. what techniques are particularly effective in persuading children?).

Governments are considered the key stakeholders in the development of policy and crucial in providing leadership. To achieve the policy aim and objective, the Set of Recommendations encourages Member States to set clear definitions for the key components of the policy, thereby allowing for its uniform implementation.

“Marketing” is defined in the Set of Recommendations as:

any form of commercial communication or message that is designed to, or has the effect of, increasing the recognition, appeal and/or consumption of particular products and services. It comprises anything that acts to

advertise or otherwise promote a product or service.

The coverage of this definition is broad and focuses on both the effect of a commercial communication and its intention. In addition, advertising is only one form of marketing among many considered within the scope of the Recommendations. Other forms of commercial communication that would be considered marketing under the WHO definition include sponsorship, product placement, point-of-purchase displays and packaging. The Recommendations do not refer explicitly to the promotion of brands (as distinct from products and services); however, such promotion is considered part of the marketing mix. As certain brands and organizations are clearly associated with products or services whose marketing would fall within the scope of the Recommendations, efforts to restrict HFSS marketing also need to consider how brands associated with HFSS products are marketed. Finally, the Recommendations urge governments to ensure that settings where children gather, including schools, remain free from all forms of marketing for HFSS products.

In light of this definition, when designing policies to reduce the harmful impact of marketing, countries are advised to consider which communication channels are covered by restrictions and what persuasive techniques are prohibited. It is also necessary to specify the age of children covered, as well as to define the scope of restrictions in such a way as to address marketing that children are exposed to, regardless of the intended audience. Member States also need to determine which HFSS foods are subject to the restrictions; they can choose to distinguish food types in several ways – for example, by using national dietary guidelines, definitions set by scientific bodies or specific food categories – or they can base their restrictions on a nutrient profile model. Nutrient profile models are increasingly used by government bodies worldwide

to define foods to which restrictions apply.ⁱ The WHO Regional Office for Europe nutrient profile model provides a template which Member States can adjust as necessary to define which foods are permitted or not permitted to be advertised to children in that country.⁴⁷

The Set of Recommendations states that Member States can consider different approaches, i.e. a stepwise or comprehensive approach. However, it also underlines that a comprehensive approach has the highest potential to achieve the desired impact. Evidence from countries indicates that the definitions adopted

in the policy are critical and will ultimately influence its scope and impact, as discussed in the next section.

In addition, the policy framework should specify monitoring and enforcement mechanisms and establish systems for their implementation. The WHO Set of Recommendations therefore calls for a full policy cycle approach. Member States should also cooperate to put in place the means necessary to reduce the impact of cross-border marketing (inflowing and outflowing) – something that is particularly relevant for the WHO European Region, despite limited successes to date in restricting marketing of a cross-border nature.

i Nutrient profile models typically generate a binary outcome, classifying foods as permitted or not permitted to be marketed to children. They achieve this through different mechanisms, including scoring or category-specific thresholds, and include different nutrients and food components. The WHO Regional Office for Europe published a nutrient profile model in 2015, which has since been used by Member States in developing and evaluating their policies. Comparisons of nutrient-profiling approaches show wide variation. A comparison of the WHO Regional Office for Europe nutrient profile model with the EU Pledge model showed that, overall, the WHO model is stricter, in that it would permit fewer products to be advertised to children. Despite rapid proliferation of example models for countries to use and adapt, only six countries report using a nutrient profile model to define the foods and beverages to which marketing restrictions apply.

Status of policy implementation in countries

Policy monitoring by the WHO Regional Office for Europe has demonstrated that a growing number of countries recognize marketing to children as a problem that requires intervention. Of the 53 countries in the WHO European Region, 54% report that they have taken steps to limit marketing of HFSS foods to children.⁴⁸ However, too many countries still report no action, and the impact of existing policies on reducing children's exposure to marketing could be substantially increased by expanding the scope and criteria that apply. For example, most action focuses on broadcast advertising only, despite clear evidence that children are exposed to marketing through many other communication channels and mechanisms, most notably in the digital sphere. Children are active and enjoy being online, so policies must address this issue in order to have an impact on overall exposure.⁴⁹ Of countries that report steps to limit marketing, 43% specified that the measures apply to television, with only 28% specifying measures that apply to the internet. In addition, the overwhelming preference remains for self-regulation involving voluntary commitments by the food and advertising industries – an approach that is often found wanting by independent review and consistently criticized by civil society organizations.^{22,50}

Some countries in the European Region do have legally binding policies in place that restrict the marketing of HFSS products to children. Such policies include both specific regulations targeting HFSS foods and more general regulations that prohibit or aim to reduce exposure to, and/or the power of, all marketing to children in certain media, at certain times. These regulations typically limit their scope to child-oriented programming and focus primarily on advertising. More recently, some countries have attempted to use regulations and/or voluntary codes to address other forms of marketing, such as digital marketing on social media platforms. In addition, many countries

report measures to prohibit marketing in schools. Forms of marketing that remain almost entirely neglected include sponsorship, in-store promotions and packaging.ⁱⁱ

Marketing restrictions in traditional broadcast media

Legally binding restrictions on marketing in broadcast media have been adopted in some countries. However, they vary significantly in their approach and scope. Most notably, they differ with respect to whether they address HFSS foods specifically or comprise rules that relate to marketing to children more generally.

In 2007, the **United Kingdom** became the first country in the European Region to introduce legally binding regulations that specifically targeted HFSS food marketing to children, with the stated aim of “limiting the exposure of children to HFSS advertising on television, as a means of reducing opportunities to persuade children to demand and consume HFSS products”.⁵¹ The regulations were seen as pioneering at the time and, for their purposes, consider children to be those under the age of 16.⁵² HFSS food advertising (determined by a nutrient profile model that allocates a score to foods and beverages) is banned not only on dedicated children's channels but also in and around broadcast programmes “of particular appeal” to children under 16 years of age (as determined by the proportion of children in the viewing audience). In addition, there are “content rules” prohibiting, for example, the use of some promotional characters and product placement. These rules do not apply to “brand equity characters” – i.e. characters originally designed for marketing purposes.

In **Ireland**, the Broadcasting Authority of Ireland's 2013 Children's Commercial Communications Regulatory Code prohibited advertising, sponsorship,

ii See the tables in Appendix 1 for highlights of country policies and a summary of the definitions/scope they have adopted.

teleshopping and product placement of HFSS food, as defined by a nutrient-profiling model, during “children’s programmes” (TV and radio programmes that are “commonly referred to as such” or where over 50% of the audience is under 18 years old). “Children’s commercial communications” are those that promote products of particular interest to children and/or are broadcast during children’s programmes.⁵³ Celebrities or sports stars may not promote food or drink products in children’s commercial communications to under 15s unless part of a public health campaign, and children’s commercial communications to children under 13 must not include nutrient or health claims or include licensed characters. However, as in the United Kingdom, brand equity characters may continue to be used in children’s commercial communications for HFSS products. In addition, the General Communications Code (2017) establishes overall limits on advertising of HFSS food: no more than one in four advertisements and no more than 25% of sold advertising time “across the broadcast day”.⁵³

In **Portugal**, amendments to the advertising code under consideration by the Portuguese parliament would prohibit

advertising of foods and beverages with a high content of sugar, fat or sodium on television and in on-demand audiovisual media within 30 minutes before and after children’s programmes and television programmes which have a minimum of 20% audience under 12 years of age, as well as the insertion of advertising in their interruptions.⁵⁴

In the meantime, existing self-regulatory initiatives remain in place.⁵⁵

In **Turkey**, regulations on advertising of foods to children in broadcast media (radio and television) have been in place since 2011. There is a specific prohibition on the marketing of foods and beverages containing ingredients that are “not recommended for excessive consumption in general diets, such as trans fats, salt or sodium and sugar, before, during and after children’s programming”.⁵⁶ It is further specified (following amendment to the law in April 2016) that, if commercial communications about such foods and beverages are included during programmes other than children’s programmes, easily readable health

promotion messages encouraging physical activity and a healthy diet should be shown in a banner on the lower part of the screen. The broadcast authority has indicated that it both actively monitors such marketing and responds to complaints. In 2018, the regulations were updated to reflect new criteria for defining HFSS foods (i.e. a nutrient profile model) based on the WHO Regional Office for Europe model.⁵⁷ Foods on the list prepared by the Ministry of Health that are not allowed to be advertised during children’s programming include chocolate and confectionery, wafers, energy bars, sweet sauces and desserts, cakes, sweet biscuits and cookies, potato chips, fruit juices, energy drinks and edible ices.

Sweden and **Norway**, meanwhile, have historically prohibited *all* television advertising of any product before, during and after children’s programmes, dating back to the 1990s.^{58, 59, 60} In Norway, advertisement on television may not specifically target children, meaning minors under 18 years. The regulation also states that advertising for products or services of special interest to children and young people is prohibited: (i) if it uses personalities who in the preceding 12 months have featured regularly, or over a long period of time, as important elements in programmes for children on channels received in Norway; (ii) if children feature in the commercial; or (iii) if it uses characters or content that particularly appeal to children. Nevertheless, children may still be exposed to marketing via programming for mixed audiences that is not considered to be for children or to particularly appeal to them, and thus both governments recognize that there is potential for strengthening current policies and legislation. In 2014, a self-regulatory scheme was introduced in Norway that aimed to expand the range of marketing techniques covered through voluntary restrictions on marketing aimed at under 13s.⁶¹ This followed a draft regulation proposed by the Norwegian government that originally proposed comprehensive restrictions on marketing aimed at children under 18. A second proposal reduced the age limit to under 16s. It was this second proposal that formed the basis of the Norwegian self-regulation, even though the age limit was lowered further to 13.

Latvia⁶² and **Lithuania**⁶³ have restrictions that are narrower and apply specifically to energy drinks. Among a range of provisions relating to their marketing (including sale, sponsorship and availability),

advertising of these products on TV before, during and after programmes for under 18s is prohibited.

In **Slovenia**, the national Act on Audiovisual Media Services,⁶⁴ transposing the EU Audiovisual Media Services Directive (AVMSD),⁶⁵ requires that media service providers announce and make publicly available codes of conduct regarding inappropriate audiovisual commercial communications, accompanying or included in children's programmes, of foods and beverages containing nutrients and substances with a nutritional or physiological effect, in accordance with government guidance. Subsequently, the Slovenian government adopted a nutrient profile model to serve as government guidance for implementation. The Slovenian model is based on the WHO Regional Office for Europe model, with minor adaptation. The age limit is 15, aligned to existing legislation of the Ministry of Culture.

Other countries report that they do not have specific legally binding regulations that explicitly restrict food marketing in television broadcasting; rather, they rely on general marketing and advertising regulations. For example, **Denmark** has in place a Marketing Act and an Executive Order on Radio and Television Broadcasting, neither of which specifically aims to reduce the impact of HFSS marketing on children. The Executive Order relating to broadcasting does state that "advertisements for food such as chocolate, sweets, soft drinks, snacks and similar products should not suggest that they may replace regular meals".⁶⁶ Further, Danish law requires marketing directed at children under 18 to have regard to "natural credulity and lack of experience and critical awareness, as a result of which they are readily influenced and easy to impress". However, in light of the limited protections the law provides, national policy discussions relating to the specific issue of HFSS food marketing resulted in the adoption of a self-regulatory Code of Responsible Food Marketing to Children, which is underpinned by a nutrient profile model.⁶⁷ The Code only applies to marketing directed at children under 13.

The remaining countries that report action on broadcast advertising of HFSS foods to children primarily rely on co-regulatory or self-regulatory codes of conduct. In **Spain**, for example, the Ministry of Health, along with the food and media industries and the Spanish self-regulatory organization (Autocontrol), adopted a

code of co-regulation of food advertising directed at children under the age of 12 years – the PAOS Code. The code is voluntary in nature and applies to food advertising messages disseminated via audiovisual and printed media. It contains content-related standards but sets no nutritional criteria for what food products are permitted.⁶⁸

Despite several legislative proposals, **France** has not specifically restricted the marketing of HFSS foods to children by law: it only mandates the insertion of health messages in all advertisements promoting HFSS foods.⁶⁹ Since 2009, this measure has been complemented by a voluntary charter on nutrition and physical activity, whereby members of the food and advertising industries have undertaken, with the support of various government ministries and public agencies, to "strengthen responsible food marketing practices" on television and in other audiovisual media services.⁷⁰ The first version of the charter was replaced with a second version in 2013 (both running for five-year periods).⁷¹

Nevertheless, even though the charter's primary objective is to promote a healthy diet, it has not explicitly called for restrictions on HFSS food marketing to children in line with the WHO Set of Recommendations. Rather, the charter refers to the codes of conduct of the French Advertising Self-Regulatory Association, which are very general (recalling the importance of a healthy diet, the need to avoid excessive consumption and snacking, etc.).⁷² It is clear that the charter is not intended to reduce the exposure of children to HFSS food marketing or the power that such marketing has on them.

In December 2016, France adopted an Act of Parliament requiring, in particular, that programmes on public television produced primarily for children under 12 years of age should not contain commercial advertisements.⁷³ The ban targets both television advertising and advertising in programmes available on the public channels' websites. Despite its limited scope, this text is significant. By legislating in this area, it allows for a partial implementation of the Set of Recommendations, in that the advertising ban it imposes applies to all goods and services, including HFSS foods. Nevertheless, the proposed ban concerns only advertising during children's programming on public channels. If we consider the ranking of channels

in terms of audience share of children aged between 4 and 10 years, the first public channel is only in fifth position, the first four being private channels.⁷⁴ Furthermore, 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 HFSS food marketing has on them. And, finally, other media are left unregulated. An increasing number of actors have argued for further restrictions.⁷⁵

In many other countries, self-regulation is designed and implemented by food and advertising industries themselves acting independently of government. Under the **EU Pledge**, signatory companies have committed not to advertise food on mass media where children under 12 make up 35% of the audience unless their products comply with category-based thresholds on sodium, saturated fat and total sugar.⁷⁶ Many countries have adapted the provisions of the EU Pledge, the **International Chamber of Commerce Framework for Responsible Food and Beverage Marketing Communications**,⁷⁷ or the **International Food and Beverage Alliance Global Policy**.⁷⁸ Countries with national self-regulatory codes similar to or largely based on these international models include Austria, Belgium, Bulgaria, Cyprus, Czechia, Germany, Greece, Hungary, Italy, Luxembourg, Netherlands, Poland, Romania, Russian Federation, Slovakia and Switzerland. For example, in December 2012, the Hungarian Advertising Self-Regulatory Board (ÖRT) and the Hungarian Brand Association initiated a self-regulatory pledge based on the same criteria as the EU Pledge, together with eight companies (Coca-Cola, Danone, Ferrero, Intersnack, Mondelez, Mars, Nestlé and Unilever). As in the EU Pledge, the signatories of the Hungarian pledge committed to refrain from advertising in programmes where 35% or more of the media audience are under 12 years, unless the products meet nutrition criteria. The scope of the commitment covers advertising foods and beverages on company-owned websites and third-party online advertising.⁷⁹ (For brevity, further examples are not given here.)

Marketing restrictions in digital and non-broadcast media

Some countries have introduced rules that also seek to cover marketing in digital and other non-broadcast

media. This reflects a partial shift in media use, where traditional broadcast media are supplemented by online streaming services, gaming and social media, resulting in additional or even dual (i.e. simultaneous) screen time.⁸⁰ While television remains a substantial part of children's media consumption and is core to marketing strategies, other channels are becoming increasingly more important alongside television as part of an integrated marketing communication approach that data show increases campaign effectiveness and brand sales.⁸¹

In 2017, the UK Committee of Advertising Practice introduced self-regulatory rules aimed at restricting advertising of HFSS products to children in traditional and online non-broadcast media, from magazines and cinema billboards near schools, to social media platforms, apps and “advergames”.⁸² Ireland also launched a voluntary code in early 2018, with similar scope.⁸³ The **United Kingdom** approach aims to harmonize non-broadcast media regulation with the previously adopted legally binding rules on children's broadcast media and thus brings rules closer towards media neutrality; the new rules will also apply the same Department of Health nutrient-profiling model to differentiate HFSS products and the same age threshold (media “targeted at < 16 years”). According to the new rules:

- Advertising that directly or indirectly promotes an HFSS product cannot appear in “children's media” (for example, on a website aimed at children or in a children's magazine).
- Advertising of HFSS products cannot appear in other media for which children under 16 years make up over 25% of the audience (for example, advertorial content with an influencer that might have broad appeal but also a significant child audience).
- Advertising of HFSS products that are targeted directly at pre-school or primary school children through their content will not be allowed to include promotions, licensed characters or celebrities popular with children, although advertisers may now use those techniques to better promote healthier options. However, brand equity characters are exempt.

- Brand marketing, when there is a “significant” likelihood that an HFSS product is being promoted, may be assessed on a case-by-case basis by the Advertising Standards Authority (ASA), but should allow for the possibility of range diversification and product reformulation. Brand advertising in which products are not featured directly is prohibited if it has the effect of promoting a specific unhealthy food product.

In light of recognized concerns that audience data are not available in all instances, the ASA relies on other factors to assess whether media are “children’s media”, such as media content, including themes and imagery, and the context in which they appear. If marketers use data to create an audience – a mailing list for direct or email marketing, for example, or account data held by a social networking platform – they need to ensure that they have taken all reasonable steps to exclude under 16s from the list or targeting criteria. For some online platforms, data held by the media owner may be used to infer ages based on factors such as interests or interactions with other users.

In July 2018, the ASA issued its first decisions interpreting these rules. It identified two examples of non-compliance for marketing found in non-broadcast media. The first ruling related to an advergame app featuring a game in which players matched pairs of branded sweets by flicking them towards each other, at increasing levels of difficulty. The ASA considered that the selection of media alone was insufficient to determine whether this marketing was directed at children under 16; in other words, they asserted that an advergame app is not, by its nature, directed at children under 16. However, the ASA considered that the advergame app in question had considerable appeal to children under 16, particularly as a result of the use of bright colours and cartoon-style imagery to animate the sweets, some of which wore sunglasses or bows. Moreover, in view of the media in which consumers were directed to the game (it was featured on food packaging) and the likelihood that the age gates would not deter those under 16 from downloading and playing it, it was considered likely that a significant percentage of its audience was under 16. In that context, the ASA decided that it was incumbent on the advertiser to demonstrate that children under 16 did not comprise more than 25% of the audience. In the absence of any audience data demonstrating that the app had been

appropriately targeted, the ASA concluded that in this instance the marketing was in breach of the Code.⁸⁴

The second ruling related to a website for a joint promotion (including downloadable content) between a well-established confectionery manufacturer and the National Trust for Scotland. The website for the joint promotion featured the heading “Enjoy Easter Fun” and an image of a rabbit holding a chocolate Easter egg. The egg packaging referred by name to the manufacturer and used both the colour it is associated with and its logo. Text underneath stated: “Looking for a way to make Easter magical? You’ve found it! Read on for tips, treats and fun things to make and do.” Further down the page, website visitors could download a storybook, titled “The Tale of the Great Easter Bunny” (where the bunny was also in the colour associated with the food manufacturer’s brand), and an activity pack titled “Eggciting activities” and featuring images of a rabbit holding a branded egg. The ASA considered that it was unlikely that over 25% of the website’s visitors were under the age of 16 and ruled that the advertisement had not infringed the Code. However, it noted that both the storybook and the activity pack were specifically created as content for children under 16 and would be given to children to use. It ruled that these materials were HFSS food adverts that were directed at children and therefore breached the Code.⁸⁵

Other complaints were dismissed in their entirety. In particular, the ASA ruled that advertisements promoting HFSS food (chocolate and hazelnut spread in this case) that were posted by two prominent vloggers (video bloggers) on YouTube, Instagram and Twitter were not directed at children under 16 for the purposes of the Code. Although the ASA acknowledged that these advertisements would be of appeal to children under 16, it considered that they would not be of greater appeal to them than to those aged 16 or over. “In general the content did not focus on themes likely to be of particular appeal to under 16s and did not feature under 16s.” With regard to the YouTube video, the ASA stated that it did not have a basis on which to believe that there would be a significant difference between the demographic profile of users viewing the relevant vlogger’s videos while not logged in and his logged-in or subscribed viewers. Regarding the Instagram post, it noted that “less than 25% of both vloggers’ followers worldwide were registered as under 18, which

was also in line with the age profile of their YouTube audiences”. As regards the two tweets, it highlighted that “Twitter’s overall demographic data showed that between 81% and 91% of UK Twitter users were aged 18 and over”. On the basis of these figures put forward by the manufacturer of the HFSS food in question, the ASA concluded that it had taken reasonable steps to target the advertisements appropriately and therefore did not breach the Code.⁸⁶

Yet it should be noted that the two vloggers concerned, Alfie Deyes and Zoella Sugg, have very strong appeal to teenagers. Sugg has recently won, and Deyes been nominated for, a number of major children’s and teens’ media awards.⁸⁷ Both vloggers have extensive followings on Instagram and YouTube – on Instagram, for example, Sugg has 10.7 million followers and Deyes 4.5 million (data from July 2018), while Sugg has over 12 million YouTube subscribers. Any marketing content they post is, therefore, bound to reach very large numbers of children, even if they do not form over 25% of total audiences. Thus, the ASA rulings underline, once again, the limited effects of regulation that focuses on children as a proportion of a total audience and/or on marketing “targeted at” children.ⁱⁱⁱ

In *Childhood obesity: a plan for action*, chapter 2, published in June 2018, the UK government announced that “to make more progress to reduce the marketing and promotion of unhealthy food and drink”, it would consult on introducing a 21:00 watershed on TV advertising of HFSS foods and similar protection for children viewing advertisements online. The stated aim is to limit children’s exposure to HFSS advertising and drive further reformulation. In particular, through these consultations the government will consider whether self-regulation of online advertising “continues to be the right approach” for protecting children from HFSS food advertising or whether legislation is necessary.⁸⁸

Packaging, in-shop marketing, sponsorship and in-school promotions are not covered by the rules, as they fall outside the remit of the Committee of Advertising Practice. Further, the Code exempts brand equity characters, even though they are popular with children and have been demonstrated to influence their food preferences and choices.²⁹ Critically, the new rules are

reactive and, as such, rely on the ASA being notified of violations so that it can then investigate and take appropriate action, rather than a pre-screening process whereby marketing is checked against the rules before it is permitted to go ahead (as is the case with the broadcast rules).

In **Ireland**, the 2017 Non-broadcast Media Advertising and Marketing of Food and Non-alcoholic Beverages Code of Practice applies to non-broadcast media (digital, out-of-home, print, cinema).⁸³ Harmonized with the Irish broadcast regulations, it applies the same nutrient profile criteria used by the Broadcast Authority of Ireland, an amendment of the UK Department of Health nutrient profile criteria used in the United Kingdom. Although the Irish code considers a child to be under 18 years of age, “children’s media” are media that are created specifically to be used and enjoyed by those under the age of 15 and/or media whose audience or user profile consists of 50% or more of this age group. Pertinent rules relating to non-broadcast media set out in the code include:

- Marketing communications for HFSS foods should not be “booked on children’s media” as defined above.
- Marketing communications carried outside children’s media which are targeted at children shall not include:
 - » licensed characters and celebrities popular with children in any communication for HFSS foods;
 - » communications for HFSS foods that utilize either promotions or competitions.
- Marketing communications for HFSS foods “by means of social media shall not target children under the age of 15”.
- Where marketing communications for HFSS foods are permissible, they shall not exceed a maximum of 25% of total advertising space.
- The websites of food businesses should not carry content that is designed to engage children under

iii Similarly, the ASA dismissed the complaint that a crisps manufacturer had infringed the Code by promoting alcohol and HFSS food to children under 18 and 16 respectively on the basis that the manufacturer had taken sufficient care to ensure that the advertisements in question were not targeted at an underage audience.

the age of 15 with HFSS food brands (e.g. children's areas, videos, "webisodes", branded education and interactive features).

The code will be monitored for compliance and effectiveness by a body designated by the Minister for Health; guidance will be developed by the monitoring body, which will decide its operational methods.^{iv}

In **Denmark**, the government-endorsed self-regulatory scheme now covers advertising on webpages targeting children, including those with games and chat rooms. In **Norway**, the self-regulatory scheme goes further, to cover all forms of marketing specifically aimed at children under 13, including social media (e.g. chat services, blogging tools and internet communities), games and play sites, and webpages that market products specifically aimed at children. Examples of media that will normally be regarded as having particular appeal to children under the Norwegian scheme are social media such as chat services, blogging tools and internet communities which are *specifically aimed* at children; games, play sites and entertainment sites *specifically aimed* at children; and internet sites which market products *specifically aimed* at children. In 2018 the self-regulatory body responsible for overseeing the scheme published a guide on marketing and social media, which takes into account the provisions of the self-regulatory scheme as well as other aspects of Norwegian legislation (e.g. from the Consumer Ombudsman and Norwegian Media Authority). Types of media covered by this guide include YouTube, Facebook and Instagram, as well as vloggers. It reminds advertisers that, despite the age limits for using social media (typically under 13), they should not automatically assume that an advertisement would not be considered to be targeted at children under 13. Further guidance is provided to ensure that marketing content is clearly labelled as such.⁸⁹

In **Spain**, the co-regulatory code was updated in 2012 to cover marketing directed at children under 15 on the internet; there are rules on content, while marketing to this age group is defined by the type of product, design and attributes of the marketing communication, venue of dissemination, and whether a website or section

has an audience of more than 50% children under 15. However, as in broadcast media, no nutritional criteria are applied. The new rules under consideration in **Portugal** would apply equally to websites or pages with content directed "at minors".⁵⁴

The **EU Pledge** has expanded its original focus on TV advertising to include (since January 2012) all company, brand and third-party websites; and (since December 2016) product placement, interactive games, mobile and SMS marketing. However, it still contains a range of significant loopholes; in particular, it does not restrict use of equity brand characters, apply to in-store promotions and packaging, or cover brand marketing.^{20, 21}

Restrictions on marketing in schools

In many countries, schools are considered a protected setting. Most countries, therefore, have at least *some* rules in place regarding marketing in educational facilities (at least primary schools), including marketing of foods. However, implementation in the European Region is understudied. According to a mapping produced by the European Commission's Joint Research Centre, food marketing limitations apply in 76% of available school food policies, with four countries specifically restricting marketing of HFSS foods, 17 countries specifying generic marketing restrictions (i.e. bans on marketing in schools for all products), and five countries reporting both generic and specific marketing restrictions.⁹⁰

For example, in **Hungary**, according to the Act on Commercial Advertising Activities, all advertising directed at children under 18 in child welfare and child protection institutions, kindergartens, elementary schools and, where applicable, their dormitories is prohibited.⁹¹ In **Poland**, the 2006 Act on Food and Nutrition Safety was amended to include rules on the sale, advertising and promotion of food in pre-schools, primary and secondary schools. The amended act, which came into effect on 1 September 2015, prohibits advertising and promotion of food in schools that does not meet certain nutrition standards.⁹² In 2011, the **Spanish** parliament approved the Law on Nutrition and Food Safety, which states that kindergartens and schools

iv For provisions under this code regarding forms of marketing other than non-broadcast media, see the section "Restrictions on other forms of marketing".

should be free from advertising.⁹³ The government subsequently introduced voluntary guidelines for schools, which state that “no advertising of any commercial brand shall be carried out, nor shall any products, incentives or gifts be distributed containing brands, logotypes or publicity references, during any activity or as part of the material, in the context of the educational programmes carried out in the school setting”.⁹⁴

Under current **Norwegian** legislation, children are widely protected from marketing activities in school settings by the Education Act and the Independent Schools Act.⁹⁵ The rules proposed in **Portugal** would prohibit marketing of HFSS foods in pre-schools, primary and secondary schools, as well as in children’s parks. The rules would also apply to a 100-metre radius around these establishments, as well as to publications, programmes and activities for minors.

In addition, **EU Pledge** members commit that they will not engage in food or beverage product marketing to children in primary schools “*except where specifically requested by, or agreed with, the school administration for educational purposes*”. The exemptions to this commitment are also extensive: “menus or displays for food and beverage products offered for sale, charitable donations or fundraising activities, public service messages, government subsidised/endorsed schemes ... and items provided to school administrators for education purposes ... are not covered.”⁷⁶

Restrictions on other forms of marketing

Policy action in Europe to address forms of marketing beyond broadcast media, digital media and school settings is generally very limited. Marketing avenues and techniques that are covered by the Set of Recommendations, but rarely covered by government policies, include sponsorship, product packaging, in-store promotions (e.g. at checkout, in the aisles), street billboards and prizes/giveaways or multi-buy promotions. Also included in the Set of Recommendations are settings where children gather, apart from schools, such as recreation facilities and leisure centres. Recent policy monitoring suggests that

less than 20% of countries in the European Region cover one or more of these avenues/techniques.

In **Ireland**, the code of practice for non-broadcast media applies also to out-of-home marketing, commercial sponsorship and retail product placement.⁸³ The code does not apply to corporate social responsibility initiatives, donations or patronage, packages, wrappers, labels, tickets, timetables and menus, unless they advertise another product or a sales promotion or are recognizable in a marketing communication. The code covers communications delivered via formats such as billboards or hoardings, public transport stops or shelters, interiors and exteriors of buses or trains, and building banners. The provisions are as follows:

- Limitations are set for marketing of HFSS food categories, such that a maximum of 33% of the available marketing space, by time period and by format, will be used for their promotion.
- Displays of HFSS foods will be excluded from an area extending 100 metres from the school gate for large roadside billboard formats, and special attention will be given to HFSS foods that particularly appeal to children.
- Marketing communications for HFSS foods are not allowed on building banners.
- Marketing communications utilizing wraparounds or takeovers for HFSS foods will account for less than 5% of the total available advertising space (that is, if a wraparound typically covers 100% of the advertising space, for example on a bus, only 5% of that advertising space can advertise HFSS foods).^v

With specific regard to sponsorship, under the Irish code no sponsorship involving HFSS foods will be permitted in settings dedicated to use by children of primary school age, or for events of particular appeal to children of primary school age. Existing sponsorship contracts and agreements which would otherwise be in breach of the code are permitted to continue until they expire, but companies are encouraged to move

v “Wraparounds” are defined as marketing where 100% of the available advertising space of a public transport vehicle is given over to advertising for a single product; “takeovers” are defined as marketing where 100% of the available advertising space in any given location is given over to advertising for a single product.

to non-HFSS sponsorship arrangements wherever possible and to make their sponsorship codes available upon request. In the case of retail settings, the code encourages, where practical, an “HFSS food free” checkout option to customers. In retail environments with four or more checkout aisles/lines, a minimum of one in four aisles/lines should be free of HFSS foods. Other outlets with less than four checkouts are encouraged to provide one non-HFSS checkout.

In **Norway**, the self-regulatory code of practice adopted to extend and complement the existing legislative framework takes a wide definition of marketing. It encompasses “all types of initiatives for promoting sales”.⁶¹ Examples of marketing techniques always covered in the scope of the code include advertising in cinemas in connection with films that are specifically aimed at children under 13 years and that start before 18:30; marketing in interactive games specifically aimed at children and where a product’s trademark, or other elements of the marketing of the product, form an integral part; and all forms of competitions with an age limit of under 13 years. However, in the overall assessment, it should be assumed that the more child-focused a product is, the more stringent the application of the rules and requirements in relation to the media and methods permitted for use in marketing promotion. Types of promotion that are not regarded as marketing in the context of this code include:

- *The actual product, including packaging*
This means that product design, packaging, wrappers, etc., are not in themselves regarded as marketing. However, even though the packaging is exempted from the definition of marketing under the Norwegian code, it is important to stress that the intentions of the code also apply to the packaging. The packaging may not, for example, have a character such that the product itself is almost secondary. In 2016, the Norwegian Food and Drink Industry Professional Practices Committee – the body responsible for handling complaints in relation to the code – concluded that the design of an M&Ms package which served as a dispenser, with the chocolate confectionary next to or inside the dispenser, did constitute marketing that was especially aimed at children under the age of 13 and was thus considered to be in violation of the code.⁹⁶

- *Ordinary display of products at the point of sale*
Ordinary display includes shelf placement and rental of floor space for display of goods. The question of what is permitted as “ordinary display” is subject to a concrete assessment that considers whether, beyond the actual display, there is any use of figures, posters, images, etc., of particular appeal to children. For example, if various advertising elements with a particular appeal to children are linked to the display – for example, by having a figure of appeal to children standing next to the packs – this will not be an ordinary display and will be a marketing activity covered by the code.
- Sponsorship which includes only use of the sponsor’s name, the sponsor’s trademark or the product trademark, including distribution of samples with the consent of parents and other responsible persons.

In **Denmark**, news, print media and sponsorship are included within the scope of the self-regulatory code, but there are exemptions for local sports clubs.⁶⁷ The Forum of Responsible Food Marketing Communication, which is responsible for formulating and implementing the code, encourages food producers, together with the recipients of the sponsorship, to carefully consider the message about eating habits and lifestyle that their sponsorship sends to children. In **Lithuania**, however, the government prohibits companies producing/manufacturing energy drinks from organizing or sponsoring sporting and other events at venues (such as schools, cinemas and theatres) frequented by persons under 18. This is an example of a product-specific approach to restricting sponsorship.⁶³

In the **United Kingdom**, the government has announced its intention to limit in-store promotions. First, it proposes to legislate to ban price promotions, such as multi-buy offers and unlimited refills of HFSS food in the retail and out-of-home sector. Second, it proposes to legislate to ban the promotion of HFSS food by location (at checkouts, end of aisles and store entrances) in the retail and out-of-home sector. It will consult on these two proposals before the end of 2018.⁸⁸

Outside Europe, there are some examples of countries that have taken a broader approach to restricting marketing. **Quebec**’s Consumer Protection Act, originally adopted in 1971, bans any commercial

advertising, including for foods, directed at children under 13 on TV, radio, print, internet, mobile phones and public signage, as well as through use of promotional items.⁹⁷ Exemptions exist for advertising in children's magazines, at children's entertainment events, in store windows and in on-pack advertisement, provided that the advertisement meets certain criteria (for instance, it does not exaggerate the product or directly entice a child to purchase it). To determine whether or not an advertisement is directed at persons under 13 years of age, account must be taken of the context of its presentation, and in particular of:

- the nature and intended purpose of the goods advertised;
- the manner of presenting the advertisement; and
- the time and place it is shown.

The fact that such an advertisement may be contained in media intended for persons of 13 years of age and over or for mixed audiences “does not create a presumption that it is not directed at persons under thirteen years of age”.

More recently, in 2012, **Chile** adopted a law on nutritional composition of food and its advertising, which introduced, among other measures, rules relating to the use of “stop signs” for HFSS foods.⁹⁸ By extension, according to the law, products bearing one or more stop signs must also adhere to the following provisions:

- The product shall not be sold, marketed, promoted or advertised within establishments of pre-school, primary or secondary education.
- The product shall not be advertised in and around media or means of communication that target children under 14 years of age, such as posters, printed materials, point of sale, television, radio, internet and magazines. For the purposes of the law, marketing is understood as any form of promotion, communication, recommendation, information or activity intended to promote the consumption of a specific product.
- The product shall not be given freely to children under 14 years of age, nor can commercial ploys targeting that public, such as toys, accessories, stickers or other similar incentives, be used.

Most notably, implementation of these rules has meant that brand equity characters – characters created for the sole purpose of promoting a product or brand and thus having no context or identity beyond their association with that product or brand – are considered to be commercial promotion and are thus being removed from food packaging of products that do not meet the nutritional criteria (i.e. have one or more stop signs). Such characters may continue to be present on foods that comply with the nutritional criteria or are not intended for/of appeal to children.

Brand marketing

Marketing communication may promote *products* or *brands*. Traditionally, many legally binding regulations and self-regulatory schemes have focused on product advertising and excluded brand marketing from restrictions. Companies whose HFSS products would be subject to advertising restrictions can therefore avoid them by engaging in forms of marketing that may be less restricted (such as sponsorship) or may continue to advertise but only feature the brand logo alone or selected products from their range such as low-calorie drinks and healthier meal bundles. This is possible in spite of evidence that exposure to “healthy” meal bundles, or to brand advertising where a brand is typically associated with less healthy items, promotes not healthier choices in children but a liking for fast food.⁹⁹

For example, the **EU Pledge** defines marketing communications as “paid advertising or commercial sales messages for food and beverage *products*, including marketing communications that use licensed characters, celebrities and movie tie-ins”.⁷⁶ Similarly, company-owned, brand equity characters – characters created by advertisers to promote their products in media, including many that are designed specifically to appeal to children – are typically not covered by policies, despite evidence that they promote unhealthy food choices in children.²⁹

Many countries struggle with the issue of how to include brand marketing in the scope of their regulations, given that it is notoriously challenging to identify “unhealthy” brands. Nevertheless, the new rules relating to non-broadcast media that have been introduced by the Committee of Advertising Practice in the **United Kingdom** prohibit brand advertising (including branding such as company logos or characters) that “has the effect of promoting specific HFSS products,

even if they are not featured directly”; they also give examples of specific advertising scenarios in order to differentiate advertisement of a specific HFSS product from advertisement of a specific brand.⁸² Examples of when brand marketing would be considered to promote HFSS products include the follow situations:

- An advertisement refers to or features a brand name that is synonymous with a specific HFSS product; that name could be featured on other products or product variants but is inextricably linked to a specific HFSS product.
- An advertisement for a brand refers to or features, for example, a strapline, celebrity, licensed character, brand-generated character or branding synonymous with a specific HFSS product.

These UK restrictions apply to marketing directed at, or likely to appeal particularly to, audiences below the age of 16, and such marketing cannot appear in non-broadcast children’s media or in media where more than 25% of the audience is made up of under 16s. This welcome example demonstrates that regulation of brand marketing is possible, albeit challenging.

Cross-border marketing

Many European countries, including those with food marketing restrictions in place, receive marketing in their country from beyond their borders, and they may find it difficult to restrict media content originating from a neighbouring country. This concern is exacerbated when countries have close cultural ties and share a common language. The Set of Recommendations therefore recognizes the importance of tackling cross-border marketing to ensure that the effectiveness of national policies is not undermined and urges States to collaborate in their implementation of the Recommendations.¹⁰⁰ The need for international cooperation in this policy area has become even more pressing than it was in 2010 in light of the development of digital marketing, which is inherently cross-border and consequently more difficult to regulate at national level by States acting on their own.¹ The EU provides a unique case study of the opportunities that cross-border marketing can offer, and the difficulties that such cooperation can raise for countries seeking to regulate marketing.

The EU legal order rests on a high level of integration between its Member States, including the establishment

of a Single Market, i.e. “an area without internal frontiers in which the free movement of, among others, goods (*including food products*) and services (*including advertising services*) is ensured in accordance with the provisions of the EU Treaties”.¹⁰¹ For example, the European Commission has moved to create a digital single market, which is essentially about removing national barriers to transactions that take place online and minimizing fragmentation and barriers that do not exist in the physical Single Market. The Commission has estimated that bringing down these barriers within the EU could contribute an additional €415 billion to the EU’s GDP.¹⁰²

However, despite this push to minimize barriers to cross-border trade within the Single Market, both online and offline, the only provision of EU law dealing specifically with the marketing of HFSS foods to children is Article 9 (2) of the AVMSD:

Member States and the Commission shall encourage media service providers to develop codes of conduct regarding inappropriate audiovisual commercial communications, accompanying or included in children’s programmes, of foods and beverages containing nutrients and substances with a nutritional or physiological effect, in particular those such as fat, trans-fatty acids, salt/sodium and sugars, excessive intakes of which in the overall diet are not recommended.⁶⁵

Article 9 (2) falls short of implementing the Set of Recommendations in so far as its scope is too limited to promote the comprehensive approach that the Recommendations call for. The narrow definitions (and indeed absence of key definitions, such as a “child”) mean that it does not facilitate effective marketing restrictions. It is true that, under Article 4 of the AVMSD, Member States are “free to require media service providers under their jurisdiction to comply with more detailed or stricter rules”. In other words, the AVMSD is a measure of minimum harmonization which allows Member States to regulate HFSS food marketing to children more strictly than Article 9 (2) does. Several Member States have used this possibility, including the United Kingdom and Ireland, as discussed above. Nevertheless, the freedom which they derive from Article 4 is significantly constrained by Article 3 (1) of the AVMSD, which mandates:

Member States shall ensure freedom of reception and shall not restrict retransmissions on their territory of audiovisual media services from other Member States for reasons which fall within the fields coordinated by this Directive.

Under this provision, which lays down what is often referred to as the “State of Establishment” or “country of origin” principle, Member States may only impose standards exceeding the minimum level of protection laid down in the AVMSD on audiovisual media service providers established in their own jurisdiction.¹⁰³ They cannot do so on providers established in other Member States, as these providers only need to comply with the law of the State in which they are established, not the law(s) of the other State(s) in which they transmit.^{vi} The rationale underpinning the State of Establishment principle is that a balance must be struck between the free movement imperative of the Single Market and other imperatives of public interest, such as consumer and public health protection.^{vii} However, difficulties are likely to arise when audiovisual media services are retransmitted from one Member State to another Member State that has a higher level of protection. It is not surprising, therefore, that the Set of Recommendations stresses the need to adopt *effective* cross-border standards.

The complaint that Sweden initiated in 2011 in relation to the broadcasting into Sweden of alcohol advertising by two broadcasters established in the United Kingdom illustrates the difficulties. While Sweden restricts the marketing and advertising of alcohol, the United Kingdom does not do so to the same extent. The Swedish authorities notified the European Commission outlining that they wanted to take measures against the broadcasting companies in question. However, on 31 January 2018, the Commission responded that Sweden could not derogate from the State of Establishment principle.¹⁰⁴ In particular, the Commission rejected the argument put forward by Sweden that the broadcasters had established themselves in the United Kingdom in order to circumvent the stricter Swedish alcohol advertising rules.

The limitations of existing EU provisions to restrict HFSS food marketing to children have been described in many previous publications¹⁰⁵ and will be briefly summarized in the next section of this report. The EU undertook to review the AVMSD in 2012.¹⁰⁶ Member States subsequently adopted the EU Action Plan on Childhood Obesity 2014–2020, which acknowledged the “strong link between TV and screen exposure and adiposity in children and young people” and called on the food industry to review and strengthen its commitments.¹⁰⁷ In particular, it noted that “these efforts to restrict marketing and advertising to children and young people should include not only TV but all marketing elements, including in-store environments, promotional actions, internet presence and social media activities”.

The Commission published a proposal for the revision of the AVMSD on 25 May 2016.¹⁰⁸ Referring specifically to the WHO Regional Office for Europe’s nutrient profile model, the Commission noted that “Member States should be encouraged to ensure that self- and co-regulatory codes of conduct are used to effectively reduce the exposure of children and minors to audiovisual commercial communications regarding [HFSS foods]” (Preamble 10 of the proposal). It therefore called for an extension of the scope of Article 9 (2) to HFSS food marketing “accompanying or included in programmes with a significant children’s audience”. This proposal has given rise to very polarized responses. On the one hand, civil society has voiced its concerns that the proposal – as a result of its narrow scope and reliance on the EU Pledge – will not effectively protect children from the negative impact of HFSS food marketing on their health. On the other hand, in its report to the European Parliament of 10 May 2017, the Committee on Culture and Education proposed to remove any reference to the WHO Regional Office for Europe’s nutrient profile model and to “programmes with a significant children’s audience” from the proposal, and instead to maintain the existing wording of Article 9 (2) of the AVMSD: “accompanying or included in children’s programmes”. This view is based on the fact that such a notion is “neither clear nor legally sound, because

vi Article 2 (1) provides that “each Member State shall ensure that all audiovisual media services transmitted by media service providers under its jurisdiction comply with the rules of the system of law applicable to audiovisual media services intended for the public in that Member State”. The Directive also lays down criteria to determine where a provider of audiovisual media services is established.

vii This was clearly confirmed by the Court of Justice of the European Union in its *De Agostini* ruling, where it assessed the compatibility of the Swedish ban on advertising to children and therefore had to interpret the relationship between the provision of minimum harmonization and the State of Establishment principle (Case C-34/95 *De Agostini* [1997] E.C.R. I-3875).

programmes not initially targeting children, such as sport events or TV singing contests, may fall within this category”. After much discussion, the European Parliament, the Council and the Commission confirmed on 6 June 2018 the preliminary political agreement reached on 26 April 2018.¹⁰⁹ The revised AVMSD is expected to be published later in 2018. We understand that the agreed text states that “measures should be put in place to effectively reduce children’s exposure to publicity on unhealthy food or beverages”.¹¹⁰ This is an improvement: the revised AVMSD recognizes that a narrow focus on “children’s programming” cannot reduce the exposure of children to HFSS food marketing.

However, the EU will not supplement the EU Pledge with any EU-wide legally binding provisions, despite the fact, as mentioned above, that the EU Pledge has many loopholes. Perhaps the most notable gaps are that the threshold for a “child audience” established in the EU Pledge (that at least 35% are less than 12 years old) leaves unprotected the many children, in absolute numbers, who watch mixed-audience programmes; and that the age threshold of 12 means protections do not extend to older children. The revised AVMSD should put some pressure on the food industry to align the EU Pledge with existing evidence, but there is no guarantee that it will. No other EU legislation

compensates for this shortcoming. Even the recent General Data Protection Regulation (GDPR) is unlikely to play a significant role in protecting children from exposure to HFSS food marketing.¹¹¹

The EU alone cannot (and therefore must not) regulate all forms of HFSS food marketing to children. It can, however, restrict cross-border HFSS food marketing. What constitutes cross-border marketing is not a straightforward question, but it can be defined based on previous experience and existing regulations: labelling and packaging rules, clearly; television, radio and internet marketing, clearly too. By contrast, some forms of advertising – referred to as “static advertising”, which lacks cross-border trade implications – fall outside the purview of EU law: cinema advertising, for instance, and billboard advertising. It is clear, though, that cross-border communications falling within the scope of the AVMSD, including advertising, sponsorship, product placement and teleshopping, could be regulated at EU level.

The next section will explore in more detail some of the limitations of the existing approaches to restricting marketing of HFSS foods to children outlined above; the section after that will then provide some insights into how countries might overcome these challenges.

Published work on the impact of implemented policies in reducing exposure and power

The formal evaluation of the **United Kingdom's** legally binding broadcast regulations conducted by Ofcom (the regulatory authority for broadcasting) reported that children saw around 37% fewer adverts for HFSS foods following the introduction of the restrictions.¹¹² The reported effects were greater for younger children (52% fewer HFSS food adverts seen) than for adolescents (22% fewer). The evaluation reported that exposure to HFSS food advertising was eliminated during children's airtime (including both children's channels and children's slots on other channels) and that children's exposure to HFSS food advertising fell in all parts of the day before 21:00 and by 25% between the peak hours of 18:00–21:00. It was also reported that the regulations resulted in a sharp drop in HFSS food advertising featuring techniques considered attractive to children, such as popular cartoon characters. While the use of celebrities increased, both in children's and adult airtime, it was argued that most of these were likely to appeal principally to adults; further, the evaluation concluded that there was a significant shift in the balance of food and drink advertising on television towards non-HFSS products, which accounted for an estimated 41.1% of all food and drink child impacts in 2009, as against 19.3% in 2005. However, the reductions observed were driven mainly by the decline in exposure during children's airtime. In fact, children saw 46% more HFSS food advertising on commercial non-public service broadcast channels during adult airtime, and there was an overall increase in the volume of HFSS advertising aired throughout the day.

Academic evaluations reflect this latter finding – that actual changes in children's exposure were limited and confined to reductions during dedicated children's programming. They found that there had been no reduction in children's exposure to HFSS food marketing; rather, an increase had been observed after

marketing simply migrated to those programmes not subject to the restrictions. Adams et al. argued that this primarily resulted from increases in exposure during programming for mixed audiences that is not subject to the regulations but holds large appeal to children (i.e. programming with the highest absolute viewing numbers for children under 16): this is the so-called “squeezed balloon effect”, where the problem does not disappear, but instead moves into another area. Using viewing panel data covering two periods (one before the restrictions came into force and one six months after full implementation), the authors of this study found that exposure of all viewers aged 4 years and older to HFSS food advertising, as a proportion of both all advertising and all food advertising, increased.¹¹³ Other trends were also noted – for example, that advertising by fast food companies continued during children's dedicated programming, but the adverts increasingly promoted healthier meal bundles.^{99, 114} These effects occurred despite evidence that the scheduling restrictions were widely adhered to.

While the scheduling restrictions were largely effective in excluding HFSS food advertising from the broadcast slots to which they applied, arguably they did not achieve the stated aim “to reduce significantly the exposure of children under 16 to HFSS advertising”, and therefore did not achieve the aim of the WHO Set of Recommendations. This is an important lesson for other countries considering regulation: if objectives and policy criteria are too narrowly defined, the overall impact of the policy may be limited – indeed, the effect may be different to, or even opposite to, the one intended.

There is thus scope to strengthen the UK rules regarding the advertising of HFSS foods around television programming popular with children and adults alike, where current regulations do not apply. As mentioned

above, the UK government has announced its intention to consult on extending restrictions up to a “watershed” of 21:00, whereby no HFSS food advertising would be permitted in any programming before this time.^{88, 115, 116} Furthermore, it has been argued that the UK regulations do not effectively prevent companies from marketing “healthier” products that meet the nutrition criteria as a means of continuing to market their brand to children.¹¹⁴

As in the United Kingdom, children in **Ireland** view extensive amounts of non-children’s television programming. Analysis of advertising shown in children’s actual peak viewing times (as opposed to children’s programming) indicated that a high proportion of advertising was for HFSS products. Using viewing panel data to identify time slots with most young children viewing, Tatlow-Golden et al. found that, although programming complied with the legally binding regulations, more than half of food advertisements in these time slots featured HFSS food items as defined by the nutrient profile model applied (rising to 72% when the WHO Regional Office for Europe nutrient profile model was applied), and that young children saw over 1000 HFSS food adverts annually. The authors recommended applying food advertising restrictions to times when higher proportions of young children watch television – not just to child-directed programming – as well as to digital media; they also recommended that a stricter nutrient-profiling method be applied. As in the United Kingdom, these findings suggest that the impact of legally binding rules can be undermined if their definition of “marketing to children” is too narrow to capture a large proportion of the marketing to which children are actually exposed.¹¹⁷ In **Portugal**, for example, proposed thresholds for defining child programming have considered a 20% child audience threshold. While the restrictions will only apply to under 12s, the 20% threshold would be lower when compared to thresholds established in other countries; applying tighter audience indexing approaches could be one way to close – partially at least – some of the gaps.

Evaluations of **self-regulatory codes of broadcast advertising** often report good compliance with agreed criteria,¹¹⁸ although there are clear differences in the results obtained from studies funded by industry and those funded by national research funders, government and civil society organizations.^{119, 120} Independent

assessments consistently show that self-regulatory or voluntary schemes are typically narrow in scope, with weak criteria and limited government oversight. A 2012 study from **Germany** found widespread evidence that children in the country were continuing to be exposed to large numbers of food commercials for non-core products using techniques attractive to children, despite the announcement of the EU Pledge in December 2007.¹²¹ A later paper from Germany, published in 2016, did find that HFSS food advertising had declined (according to the EU Pledge nutrition criteria), primarily through reductions in children’s programming. However, when the Ofcom nutrient profile model criteria were applied and the analysis was extended to programming popular with children, less than 20% of advertised products complied.¹²²

In **Spain**, the most recent monitoring report from the PAOS Code was published in 2017.¹²³ This evaluation found that 20% of TV advertising spots were for food and beverage products; 15% of these advertisements were found to be targeted at children aged between 4 and 12. Of this advertising aimed at minors, the evaluation found that 94% was from food and drinks companies that adhere to the PAOS Code; therefore, these advertisements would have had to meet the standards of the PAOS Code. A 2013 study evaluated the impact of the PAOS Code and found that 61.5% of the advertised products were less healthy according to the Ofcom nutrient profile model. 100% of the breakfast cereals and 80% of the non-alcoholic drinks and soft drinks were less healthy. 59.7% of sampled advertisements were for less healthy products, a percentage that rose to 71.2% during children’s viewing time.¹²⁴ Another study from Spain identified issues of non-compliance with the PAOS Code, in particular in relation to the content of advertisements (i.e. persuasive appeals such as use of characters).¹²⁵

Finally, two forthcoming publications – one from the Russian Federation, the other from Turkey – both illustrate continuing high prevalence of HFSS food marketing to children on TV despite self-regulatory pledges by companies and, in the case of Turkey, the existence of some regulatory measures. In the **Russian Federation**, the authors found that 20% of all TV advertisements were for food and beverages, of which 62% were not permitted by the WHO Regional Office for Europe nutrient profile model.¹²⁶ In **Turkey**,

food and drinks were the most heavily advertised product category on TV (36% of total advertisements). Again, the majority (78.8%) of food advertisements were for energy-dense HFSS food and beverages that do not comply with the WHO nutrient profile model.¹²⁷

Limitations of self-regulatory approaches to restricting broadcast advertising that are frequently discussed in the literature include the use of narrow definitions of “child-directed advertising”, typically based on audience indexing metrics that limit the number of programmes defined as “children’s programming”. For example, the still widespread practice of establishing an audience threshold of 35–50% under 12s for it to be considered child programming has been criticized, as it demonstrably results in fewer programmes being considered child-oriented and almost always excludes the programmes that are most popular with this age group, as these programmes also have large adult audiences.¹²⁸ Furthermore, a focus on the concept of “child-directed” or “child-oriented” programming and communications means that use of qualitative targeting that appeals to children (e.g. through use of celebrities) is underscrutinized in programming for mixed audiences, despite evidence that children engage with and are affected by such components.

It is possibly too early to evaluate the impact of voluntary codes of practice on non-broadcast media developed in the United Kingdom, Ireland and Norway. However, the UK code has been in place since 2017 and a preliminary evaluation may soon be feasible, despite methodological challenges. These voluntary codes represent an advance in that they provide greater clarity and definition as to what rules apply to non-broadcast media. They also go a long way to closing many of the loopholes that previously existed for these media. However, it remains to be seen how the codes will be implemented, monitored and enforced.

For example, it is well reported that there is uncertainty about the accuracy of data on age when it comes to social media usage, as many children lie about their age so that they can sign up to certain platforms. This could make it challenging to determine websites/platforms that are particularly popular with children. Further, the most popular social media platforms among children (in absolute terms) are clearly for mixed audiences. There is currently no common industry-wide standard to assess whether a platform or website is popular among

children or routine, publicly available data on audience share. When the *content* appeals to children and is directed at them, but the *context* is not targeted solely at children, it is not immediately clear which will take precedence. Furthermore, social media platforms rarely permit research by external assessors and do not share data externally about the extent and nature of their marketing audience reach. That said, some provisions show particular potential, especially when considered in the context of targeted behavioural advertising online. Provision 7.2.3 of the Irish code states that “marketing communications for HFSS food by means of social media shall not target children under the age of 15”; if applied, this provision could be effective given the use of micro-targeting in social media, where demographic and behavioural characteristics are used to identify advertising audiences. Furthermore, in social media, advertisers frequently urge users to share marketing posts or “tag” friends; given known peer effects with regard to HFSS food consumption,⁴⁴ such incitements to peer-to-peer promotion are likely to enhance the reach of such messages and potentially to increase their power. This practice of encouraging user-generated promotion could also come under the purview of this provision.

A report from **Norway**, published in 2016, surveyed advertising of HFSS foods to children on television and the internet. The authors found few television advertisements for HFSS products in and around children’s programming; and the advertisements they did identify were judged to have relatively little appeal for younger children, with respect to both form and content. Advertisements for HFSS foods found in and around programmes for youth and adults were also considered to have relatively little appeal to the youngest viewers, again in both form and content. On social media, however, the authors judged the form and content of the advertising to be designed for children with respect to aspects such as language, activities portrayed and contests. This was particularly the case for Facebook and YouTube. Study participants aged 12–17 were asked to take screenshots of all the advertisements they noticed on the websites and social media they used most frequently. Each child delivered between 60 and 100 screenshots.¹²⁹ The study thus gives a mixed picture, with social media presenting the major challenge. It is also important to note, however, that in focusing on marketing that appeals to younger children (less than 13 years old), the report does not

quantify the amount of marketing that appeals to adolescents. Any marketing that is ostensibly aimed at older children and/or features in media for more mixed audiences, including adolescents, will not only affect that age group (i.e. 13+) but is also highly likely to be seen by and appeal to younger children who admire and follow the trends of their older peers.¹³⁰

In **Denmark**, the most recent status review of the Forum of Responsible Food Marketing Communication dates from 2014.¹³¹ It reported that the code of practice had high compliance, with no TV advertisements for HFSS products covered by the code appearing during

children's programming on commercial channels. A similar situation was reported for print media. Instances of violations of the code were found on the internet, where HFSS products featured in online games. However, the methods used to identify personalized social media advertising that may target under 13s were not well developed. It is thus highly likely that the survey methods selected by the Forum underestimate children's exposure, both by not considering marketing seen by older children and by underestimating marketing exposure during viewing of content for mixed audiences and via social media.

Challenges facing Member States in the implementation of the WHO Set of Recommendations

The above overview of policy actions and existing evidence of impact paints a mixed picture of success in implementing the WHO Set of Recommendations in the European Region. There has been some notable progress, but clear gaps and limitations also emerge: countries have struggled to adopt policies that are broad enough to effectively reduce the total volume and power of HFSS food marketing that children are exposed to.

Based on these insights into the impact and limitations of existing policies, this section aims to explore some of the common challenges and loopholes in greater depth, identifying key questions that need to be addressed and providing concrete guidance to help countries frame their policies more effectively.

Who should be protected? Age of child

The evidence supports extending protections to all children, including adolescents. There is a growing body of research showing that teenagers are also negatively influenced by HFSS food marketing,^{44, 132} and they typically have independent spending money that is often spent on unhealthy snacks, with particular brands chosen as markers of social identity.^{133, 134, 135, 136} However, the absence to date of an EU-wide definition of the notion of a “child” in this context has contributed to the EU Pledge and many other codes and policies defining a child as less than 12 years of age. Setting the threshold here is based on the notion that older children and adolescents do not require similar protections to younger children. This view, in turn, reflects dated cognitive models of marketing persuasion that suppose that “advertising literacy” is achieved in early adolescence. This leads to an assumption that, as many children of this age and beyond are capable of understanding persuasive intent,

they will apply cognitive defences against the effects of marketing exposure.¹³⁷

This assumption is problematic from a number of perspectives. First, these models do not take into account that marketing, particularly digital marketing, has emotional, implicit (unconscious) and social effects that can also influence beliefs and behaviour.¹³⁷ Emotional advertising, for example, has been shown to be the most impactful,¹³⁸ and as such exposures are not processed centrally, cognitive defence is subverted and therefore is no defence at all. Second, to effectively counter food marketing persuasion, individuals need to possess not only the *ability* to resist, but also the *motivation* to do so.^{139, 140} Teenagers are known to be highly sensitive to reward,¹⁴¹ and this has been linked to the development of maladaptive health behaviours.¹⁴² Adolescents are also impulsive and more strongly influenced by peers in undertaking risky behaviours.^{143, 144} Thus, despite having more developed cognitive ability than younger children, adolescents possess neurological, hormonal and social developmental factors that may actually make them *particularly* susceptible to HFSS food advertising.¹⁴³ It is inappropriate, therefore, to put the onus on this demographic group to make rational decisions based on considerations of long-term mental and physical health, in preference to choosing more immediate rewards. Instead, their vulnerability and need for protection should be reflected in the policies enacted to restrict HFSS food marketing exposure.

Key considerations for Member States

- Many existing regulations and policies apply only to younger children (under 12 years of age). This is

despite the fact that marketing targeted at older children and/or adults often reaches younger children. Thus, a narrowly defined age range may not adequately protect younger children, if that is the intention of the policy.

- The widespread practice of establishing younger age cut-offs is most likely based on dated, cognitive-focused developmental models of marketing persuasion that concluded that “advertising literacy” is achieved in early adolescence. Such models have several limitations, notably that awareness of the commercial intent does not negate the persuasive effect on the individual. Of particular concern in this regard are adolescents, who have been largely excluded from discussions and continue to be the target of intensive marketing.¹³⁰
- The Convention on the Rights of the Child (CRC) defines a child as every human being below the age of 18 years unless, under the law applicable to the child, majority is attained earlier. WHO defines adolescents as those between 10 and 19 years of age. Most adolescents are, therefore, included in the age-based definition of “child”, adopted by the CRC, as a person under the age of 18 years.

Which marketing targets children? Redefining “child-directed marketing”

Existing regulations, whether legally binding or voluntary, broadcast or non-broadcast, are designed to limit HFSS food marketing that is “targeted at”, “directed at” or “appealing to” children, is “child-directed”, or is on “children’s programming” or “children’s media”. However, this focus means that existing regulations are not very successful at limiting children’s *actual* exposure to HFSS marketing, as children are exposed to a substantial amount of media elsewhere.

As children watch more family shows than children’s programmes, most of the television that children watch is not in fact considered to be children’s programming. Thus, the threshold established in many policies (e.g. the EU Pledge, stating that at least 35% of the total audience is under 12 years) leaves unprotected the many children (in absolute numbers rather than as a proportion of the total audience) who watch mixed-audience programmes. The research that the EU commissioned on the exposure of children to alcohol marketing unequivocally supports this assessment:

for children aged 4–14, the part of the day with the highest average hourly viewing rates was 17:00–20:59 in all nine selected Member States except Italy and Spain, where it was 21:00–23:59.¹⁴⁵ UK population data for 2015 estimate that 18.8% of the total UK population is under 16. Because the current index established in the UK restrictions is 120, a show with HFSS food commercials could be watched with an audience of 22.6% children (18.8 * 1.2) without restriction. This is equivalent to 1 808 000 children watching.¹⁴⁶

Similarly, data relating to children’s app preferences, such as the EU Kids Online *Net Children Go Mobile* report, demonstrate that children’s greatest use is of, and highest preference is for, general-use platforms such as YouTube, Instagram, Snapchat and Facebook.¹⁴⁷ Despite their popularity with children, these platforms cannot be considered “children’s media”, as adults substantially outnumber children as overall users and therefore children’s use does not meet the percentage thresholds set by various codes. As a result, a substantial proportion of children’s exposure to HFSS food marketing in digital media is unlikely to be covered by existing regulations.

In light of this – and in light of evaluations of children’s continued exposure to HFSS food marketing on television, even in countries with legally binding regulations that are complied with – the actual impact of many regulations appears to be smaller than it could be if alternative approaches were taken. If policies are to actually reduce children’s exposure to HFSS food marketing, they will need to address the media locations and times where children are most active and most engaged.

First and foremost, policies should address children’s exposure to HFSS food marketing, irrespective of timing, venue or intended audience. Timings, venues and channels/platforms where children are viewing or present in high absolute numbers can be identified and considered “children’s media”, irrespective of whether adults are also in the audience. Furthermore, it should be noted that in digital media (and increasingly on television, where digital delivery means that advertising is also becoming micro-targeted to specific audiences), the mechanisms with which companies deliver demographically and behaviourally targeted marketing are the very mechanisms by which children,

including adolescents, could be identified and excluded from receiving digital marketing.

Key considerations for Member States

- In traditional media, marketing restrictions have often been limited to “children’s programming”. Definitions include the proportion of children watching, the proportion relative to the adult audience, the total number of children watching, and the television rating of the programme or channel. Such approaches are workable but would be improved by applying them to programming that is viewed by large numbers of children, rather than to programming targeted at children, even if that means applying restrictions to programming for mixed audiences.
- For example, instead of defining child-directed advertising (such as “advertising during children’s programming”), a focus on programming/media that children actually view and/or engage with would ensure that a given policy would more effectively address exposure to HFSS food marketing. The policy would then cover programmes popular with children but not made especially for them, such as sporting events or music/talent-show competitions. To address this, some countries have considered introducing “watershed” policies that prohibit all HFSS marketing before a specific time.
- Particular challenges arise in defining marketing to children online, as the internet locations most visited by children are often not those “directed at” or “targeting” them but those providing access to a wide range of content (e.g. Google, Facebook, Instagram, YouTube). Again, it is important that regulations are designed to capture the HFSS food marketing to which children are actually exposed, not just the marketing that is aimed directly at them. In this case, it may be important that regulation of digital HFSS food marketing also addresses marketing for mixed audiences, to capture all the marketing that children are exposed to, including marketing on sites, platforms, apps and other digital locations that are likely to be of interest to children, even if they are not the primary target audience.

Which forms of marketing should be restricted? Addressing all forms of marketing

As discussed above, the WHO Set of Recommendations defines marketing broadly and recognizes that Member States will be more successful at protecting children from HFSS food marketing if they adopt a comprehensive approach to such marketing. In effect, it is only if they address all forms of marketing that they can effectively limit the risk of investment shifts from regulated to unregulated programmes, media, marketing techniques or settings where children gather.

For example, as discussed above, brand equity characters rarely fall within the scope of HFSS food marketing restrictions, even though they influence children’s food preferences. In 2010, Ofcom found that this omission led to a 58% increase in spots using brand equity characters after the UK regulations came into force.

More generally, the EU regulatory framework does not regulate use of marketing techniques that are particularly powerful at influencing children. In particular, no mention is made in the AVMSD of the use of celebrities, the use of licensed or brand equity characters, or offers of free toys to promote HFSS foods. Furthermore, Regulation 1924/2006 on nutrition and health claims made on foods only requires pre-authorization of claims (i.e. that they first be substantiated with evidence), and currently no nutrient profile model has been adopted to define which foods can or cannot bear a claim and no specific provisions apply to products popular with children.¹⁴⁸ This is at odds with the WHO Set of Recommendations, which emphasizes the importance of reducing both the exposure of children to HFSS food marketing and the power of specific marketing techniques used to promote unhealthy food, if the impact of HFSS food marketing is to be effectively reduced.

Packaging

Food packaging is a “product level” form of marketing that can influence children’s food choices.¹⁴⁹ It can be defined as the manner in which foods and beverages are wrapped, boxed and presented to consumers in retail stores.¹⁵⁰ Simple visual cues on packaging (such as characters) are a popular technique for marketing to children because they aid children’s identification and recall of advertised products more effectively

than textual information that relies on the child's reading ability and confidence.^{151, 152} A majority of food purchasing decisions are made in less than 10 seconds at the point of sale, with packaging appeal and its influence over product requests from children playing a key role in these decisions.^{153, 154, 155} As a result, the use of packaging as a marketing vehicle has become increasingly popular.^{150, 156, 157} Cross-promotions targeted at children on packaging are on the rise, and most of this marketing is for HFSS foods.¹⁵⁷

An Australian study exploring marketing to children via food packaging in supermarkets found that there were at least 16 different marketing techniques used to attract children; these included bright colours, child-oriented text, kid-size/lunchbox packs, links to food company websites, promotional characters, references to play/education, references to flavour, captions that exaggerated the attributes of the food (e.g. "dangerously cheesy"), novel packaging shapes, cross-promotions, movie tie-ins, images of children, celebrities and games. The study revealed that over three quarters of products featuring one or more of these techniques were promoting unhealthy foods.¹⁵⁸

Experimental studies have demonstrated that these packaging techniques can be effective in influencing children's behaviour. For example, the presence of a character on food packaging can significantly influence eating-related outcomes in children (children's taste and snack preferences for the character-packaged product increase, and they make more frequent requests to eat and purchase the product), with effects demonstrated for unfamiliar spokescharacters,^{159, 160} licensed characters,^{159, 160, 161, 162, 163} and brand equity characters.²⁹ The size of the food portion depicted on cereal packaging has also been shown to influence children's serving and consumptive behaviour: when a large portion of cereal was depicted on the front of the box, children poured themselves and consumed significantly more cereal than when the portion on the front of the box was smaller.¹⁶⁴

Some concrete examples of countries that are attempting to tackle the marketing of foods to children via packaging are starting to emerge. A relatively simple provision to include, which may go some way to reducing the use of packaging to appeal to children, is to consider packaging within the scope of regulations if it is of such a character that the product itself is almost

secondary – the Norwegian case of M&Ms packaging described above is illustrative here.⁹⁶ Also, it seems feasible to have restrictions on the use of licensed and brand equity characters on packaging for HFSS foods, as the Chilean measures demonstrate.⁹⁸

Brand marketing

Food marketing creates demand for both highly palatable foods and, notably, highly appealing brands. Branding is a critical aspect of marketing, particularly for children and young people; and child-oriented food marketing often takes a branding approach.¹⁵¹ Advertising is thought to be very effective at building strong brands,¹⁶⁵ and food is one of the most highly branded items, with over 80% of US grocery items being branded.¹⁶⁶ This extensive branding drives major advertising campaigns as food manufacturers seek to build brand awareness and brand loyalty in a competitive marketplace. Brand preference, developed through fostering associations between the brand and the consumer,¹⁶⁷ is believed to precede and contribute to purchase behaviour, which then facilitates and promotes consumption.^{26, 166}

The power of brand marketing to influence children's eating behaviour has been demonstrated in a number of empirical studies. Borzekowski & Robinson showed that even brief exposures to commercial brand promotion were sufficient to affect brand preference in young children.¹⁶⁸ Robinson et al. later found that children reported preferring the taste of items if they were in branded packaging that displayed fast food logos (relative to the same items in matched but non-branded packaging).²⁸ More recently, another type of brand imagery (brand equity characters) was shown to be effective in influencing children's taste preferences and snack choices towards the branded products.²⁹ In a pilot experimental study in the US, overweight children ate more of the branded foods than the non-branded foods.¹⁶⁹ Neuroimaging studies support this notion of the power of brand advertising by demonstrating that food logos activate brain regions in children that are associated with motivation.¹⁷⁰ Similarly, the Coca-Cola logo has been shown to be a highly salient conditioned cue in adolescents.¹⁷¹ Children's knowledge of HFSS food brands is also a predictor of child BMI.¹⁷²

Current provisions relating to brand marketing in policies adopted by European Member States are a step forward but remain somewhat equivocal. Companies

that have a range of products on offer, with different nutritional profiles (e.g. using less sugar and/or sweeteners), are likely to be able to argue that marketing for products that meet nutritional criteria does not constitute brand marketing – especially if they can make the argument that the product is well known/established in its own right and not linked inextricably to an HFSS product. The concern is that such cross-promotion effects will continue, e.g. through use of common taglines, design elements or themes, and so enable indirect promotion of top-selling products.

Key considerations for Member States

- Multiple communication channels and integrated strategies are often used in a single promotional campaign. Thus, limiting marketing restrictions to a narrow range of channels or techniques alone will still leave children exposed, and may lead to an increase in marketing via other channels and techniques (the so-called “squeezed balloon” effect). WHO has repeatedly articulated that restrictions should cover multiple communication channels and techniques in order to comply with the spirit of the Set of Recommendations.²¹ Important forms of marketing that are often excluded from policies but increasingly relevant include brand marketing, sponsorship, in-store promotion and food packaging. These are loopholes that need to be closed if policies are to be effective.

Which foods and beverages should be restricted? Use of nutrient profile models

Nutrient profile models, where applied, identify which foods may or may not be marketed to children. Absence of a nutrient profile model is clearly a detriment to a policy as it makes implementation impractical and/or permits HFSS foods to be marketed. The Spanish case is illustrative here, where commendable efforts to reduce the persuasive appeal of HFSS food marketing, via restrictions on marketing techniques, are greatly undermined by the absence of a nutrient profile model. In its failure to identify foods whose marketing should be restricted, the impact of the policy is unavoidably limited; this has been demonstrated in independent studies showing that much marketing for HFSS foods is still found on media popular with children in Spain.¹²⁴

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The evidence also demonstrates that the choice of a nutrient profile model used can have a material effect on the amount of HFSS food advertising seen by children, even where legally binding regulations apply. A comparison of the WHO Regional Office for Europe model with the EU Pledge model reveals that, overall, the WHO model is stricter.¹⁷³ Scarborough et al. also highlighted differences between models when they compared eight international nutrient profiling systems in use to restrict marketing to children; they found considerable discrepancies, with the UK nutrient profile model, which is also applied in an amended form in Ireland, identifying fewer foods as “less healthy” than other major profiling systems.¹⁷⁴ In one set of regulation-compliant advertisements in Ireland shown during times when 4–6-year-old children watch most television, 50% more adverts were categorized as HFSS by the nutrient profile model developed by the WHO Regional Office for Europe than by the existing Irish adaptation of the UK model.¹¹⁷ In 2018, the UK government launched a consultation on an updated nutrient profile model.¹⁷⁵

Key considerations for Member States

- The foods most frequently marketed to children are consistently shown to be “non-core” (or “eat less”) foods, such as sugary breakfast cereals, sugar-sweetened beverages, confectionery and savoury snack foods, which are not part of a healthy diet and are discouraged in food-based dietary guidelines. Such HFSS foods are clear targets for restrictions; however, without explicitly defined nutritional criteria or thresholds, implementing restrictions becomes practically impossible – a challenge that has been one of the biggest obstacles to policy development.
- One tool for addressing this challenge is a nutrient profile model. Depending on how the nutrient profile model is constructed (e.g. which nutrients are included; the level at which thresholds are set), they will vary in strictness and classify foods differently. The WHO Regional Office for Europe nutrient profile model has been adopted into legislation in two countries (Slovenia and Turkey) and shown to be stricter than existing industry models.

How can cross-border marketing be addressed? Leveraging opportunities for cross-border controls

How could the EU facilitate the task of Member States in their implementation of the Set of Recommendations? At the very least, the EU could revise the AVMSD in line with the Recommendations to ensure that it effectively regulates cross-border audiovisual commercial communications for HFSS foods and ensures that Member States are not impeded from implementing them effectively by the State of Establishment principle. For example, the Directive currently bans all forms of audiovisual commercial communications for tobacco products or for medicinal products or medical treatments available only on prescription.¹⁷⁶ This covers all communications falling within the scope of the AVMSD, including advertising, sponsorship, product placement and teleshopping.¹⁷⁷ Similar provisions could be adopted for HFSS foods with a view to replacing Article 9 (2), and the Preamble of the Directive could refer specifically to the Set of Recommendations. This would ensure that the existing loopholes identified above are closed.

Nevertheless, the AVMSD only covers a limited number of commercial communications and cannot on its own regulate all forms of cross-border marketing. Its role in implementing the Set of Recommendations is therefore necessarily limited. This is particularly so as the Recommendations define the notion of “marketing” broadly, covering many techniques and media which are outside the scope of the AVMSD. As regards these techniques and media affecting cross-border food marketing, the EU should consider adding to its legislative arsenal, as it has done in relation to the marketing of tobacco products. The analogy with tobacco demonstrates how far the tobacco control policies of Member States can be supported by the adoption of EU legislative rules intended to harmonize the laws of Member States. The Tobacco Advertising Directive prohibits all forms of cross-border advertising and sponsorship of tobacco products which are not covered by the AVMSD.¹⁷⁸ Moreover, the Tobacco Products Directive also regulates the marketing of electronic cigarettes and imposes significant restrictions on the use of tobacco packaging as a marketing tool.¹⁷⁹ The constitutional legitimacy of both directives has been upheld by the Court of Justice

of the European Union (CJEU),¹⁸⁰ confirming that the EU has the necessary powers to adopt EU-wide marketing standards, provided that these standards are genuinely intended to improve the functioning of the internal market.¹⁸¹ The same reasoning would apply if the EU decided to regulate the cross-border marketing of HFSS foods, particularly to children.

Furthermore, the EU is mandated by the EU Treaties to ensure a high level of public health protection in the development and implementation of all its policies, including its internal market policy,¹⁸² and its action should be guided by its overarching objective of promoting the well-being of its people.¹⁸³ If the EU has, to date, failed to adopt evidence-based policies intended to restrict the impact of HFSS food marketing on children, this is primarily for lack of political will; it is not a consequence of constitutional obstacles that would prevent the adoption of EU-wide cross-border marketing standards.

Key considerations for Member States

- EU Member States should acknowledge that all forms of cross-border HFSS food marketing are likely to be more effectively regulated at EU level than by Member States individually.
- In particular, Member States should encourage the EU to revise Article 9 (2) of the AVMSD in line with the WHO Set of Recommendations and ensure that the EU upholds its obligation to adopt a high level of public health protection in the development and implementation of all its policies, including its internal market policy.
- If Member States cannot agree collectively to revise Article 9 (2), they could ensure that Member States which would like to restrict HFSS food marketing to protect children from the harm it causes are not prevented from doing so by the State of Establishment principle.
- Member States may also reflect on other forms of HFSS food marketing which are not regulated by the AVMSD and see how the EU could best regulate them.

Towards a children's rights approach to implementation of the WHO Recommendations

Even though the WHO Recommendations themselves do not refer to children's rights, their comprehensive implementation nonetheless supports a children's rights approach to childhood obesity prevention in that they flesh out the provisions of relevant international human rights instruments, and in particular Article 24 of the United Nations Convention on the Rights of the Child (CRC), which mandates States Parties to respect, protect and fulfil the child's right to the highest attainable standard of health.

In September 2011, the United Nations General Assembly, in its Political Declaration on NCDs, reaffirmed "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health" and recognized "the urgent need for greater measures at the global, regional and national levels ... in order to contribute to the full realization of the right of everyone to the highest attainable standard of physical and mental health".¹⁸⁴ More recently, the WHO Commission on Ending Childhood Obesity reaffirmed the essential relevance of the child's right to the highest attainable standard of health:

Government and society have a moral responsibility to act on behalf of the child to reduce the risk of obesity. Tackling childhood obesity resonates with the universal acceptance of the rights of the child to a healthy life as well as the obligations assumed by State Parties to the Convention of the Rights of the Child.¹

A children's rights approach works towards strengthening the capacities of right-holders (children) to understand and realize their rights, and of duty-bearers (States) to meet their legal obligations under the CRC and other legally binding international human rights instruments. By imposing legal obligations on States, a children's rights approach guarantees a degree

of State accountability, making effective remedies more likely where rights are violated. A children's rights approach supports the monitoring of State commitments and has the potential to translate the commitments and obligations enshrined in the CRC into operable, durable and realizable entitlements. Furthermore, as children's rights are inalienable and universal, the language of human rights can ensure that a given issue is afforded special consideration in public policy.¹⁸⁵

The duty of States to effectively protect children from HFSS food marketing

HFSS food marketing negatively affects a broad range of rights protected under the CRC, not least the right to the enjoyment of the highest attainable standard of health, the right to adequate food and the right to privacy.¹⁸⁶

The right to the enjoyment of the highest attainable standard of health (often referred to as the right to health) is a universal human right. In particular, Article 24 of the CRC requires that "States Parties recognise the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health" and, more specifically, that they "take appropriate measures to diminish infant and child mortality [and] to combat disease and malnutrition, through, inter alia, the provision of adequate nutritious foods".

The Committee on the Rights of the Child has issued a General Comment on Article 24 and interprets the child's right to health broadly as

an inclusive right, extending not only to timely and appropriate prevention, health promotion, curative, rehabilitative and palliative services,

but also to a right to grow and develop to their full potential and live in conditions that enable them to attain the highest standard of health through the implementation of programmes that address the underlying determinants of health.¹⁸⁷

As such, the right to health has an important role to play in disease prevention, including childhood obesity and related diseases.^{viii} Even though obesity is not explicitly mentioned in the text of Article 24 itself, States must interpret the CRC in a dynamic manner and address health concerns affecting children at a given point in time, and not at the time the CRC was adopted, when obesity may not have been considered a major global public health issue: “Children’s health is affected by a variety of factors, many of which have changed during the past 20 years and are likely to continue to evolve in the future.”¹⁸⁸

States must fulfil the child’s right to health to the maximum extent of their available resources and, where needed, within the framework of international cooperation.¹⁸⁹ The notion of the “highest attainable standard of health” takes into account both the child’s biological, social, cultural and economic conditions and the resources available to the State, supplemented by resources made available by other sources, including nongovernmental organizations and the international community. Even though the right to health is not a right to be healthy as such, it nonetheless amounts to a right to the conditions and services that ensure the enjoyment of the best health standards attainable under existing circumstances. Consequently, it mandates States to provide the opportunity for every child to enjoy the highest attainable standard of health (as opposed to any standard of health).

In light of the unequivocal evidence linking HFSS food marketing to childhood obesity, it is argued that States should, as part of their duty to respect, protect and fulfil the right to health and related rights, implement the WHO Set of Recommendations and restrict such marketing with a view to reducing its negative impact on children and the enjoyment of their rights. One notes the increasing number of statements from various UN agencies and special rapporteurs to this effect. In particular, the Committee on the

Rights of the Child has noted that the food industry spends billions of dollars on persistent and pervasive marketing strategies promoting HFSS food to children; that children’s exposure to “fast-foods” should be limited; and that their marketing, “especially when it is focused on children”, should be regulated and their availability in schools and other places controlled.¹⁹⁰ As Anand Grover, then UN Special Rapporteur on the Right to Health, stated in 2014:

Owing to the inherent problems associated with self-regulation and public-private partnerships, there is a need for States to adopt laws that prevent companies from using insidious marketing strategies. The responsibility to protect the enjoyment of the right to health warrants state intervention in situations when third parties, such as food companies, use their position to influence dietary habits by directly or indirectly encouraging unhealthy diets, which negatively affect people’s health. Therefore, States have a positive duty to regulate unhealthy food advertising and the promotion strategies of food companies. Under the right to health, States are especially required to protect vulnerable groups such as children from violations of their right to health.¹⁹¹

In a number of recent country reports, the Committee on the Rights of the Child has also called on States with high obesity rates to regulate HFSS food marketing to ensure that they comply with their obligations under the CRC, thus emphasizing that childhood obesity should be considered as a children’s rights concern.¹⁹²

The Set of Recommendations, which is evidence-based, helps to flesh out the measures that States should adopt to comply with their obligations under the CRC to respect, protect and fulfil the child’s rights to health, food and privacy, and other related rights. It guides the actions that States should consider – individually and collectively as EU Member States – to end childhood obesity. It therefore supports a children’s rights approach, even though it does not itself specifically refer to children’s rights. In particular, a children’s rights approach to food marketing regulation requires that the outstanding challenges and loopholes identified above are both recognized and effectively addressed at

viii This was clearly emphasized in the final report of the WHO Commission on Ending Childhood Obesity (ECHO Commission).¹

national and EU levels. It is also important that the key notions underpinning the implementation of the Set of Recommendations should be defined broadly and independently of vested interests to ensure the effective protection of children from the harmful impact that HFSS food marketing has on them; and that the risk of investment shift should be considerably limited.¹⁹³

Comprehensive approaches are more likely to ensure that marketing does not “migrate”:

- from regulated to unregulated programmes (e.g. from children’s programme to programmes with a high children’s audience in absolute numbers);
- from regulated to unregulated media (e.g. from broadcast media to digital media, packaging or sponsorship);
- from regulated to unregulated marketing techniques (e.g. from licensed to equity brand characters); and
- from regulated to unregulated settings (e.g. from schools to other settings where children gather).

Furthermore, a children’s rights approach reinforces the need for States to protect all children, including adolescents. While the CRC may recognize that children’s vulnerabilities vary from one stage of childhood to another, it applies to all children (it defines a “child” as every human being under 18 years old) and does not exempt States from their obligations to protect them from harm, including the harm that HFSS food marketing causes.

Finally, a children’s rights approach also embraces international cooperation to ensure that the effectiveness of national measures intended to protect children from unhealthy food marketing is not limited as a result of cross-border marketing, which States will find difficult to regulate unilaterally.

Such an approach does not lead to the marginalization of the role of parents, who are primarily responsible for the upbringing of their children. Rather, it empowers

them by modifying the environments that encourage obesity,^{ix} thereby helping them to better care for their children and hence to discharge the parental responsibilities that rest on them and are recognized by the CRC.¹⁹⁴ Ultimately, children should be able to participate in both online and offline environments and benefit from the opportunities that may stem from such participation without being harmed by HFSS food marketing. Indeed, the need to protect children from all behavioural targeting is now becoming recognized. It is underlined by the Council of Europe’s *Guidelines to Member States to respect, protect and fulfil the rights of the child in the digital environment*, which recommend that States outlaw behavioural targeting in digital media: “Profiling of children, which is any form of automated processing of personal data which consists of applying a ‘profile’ to a child, particularly in order to take decisions concerning the child or to analyse or predict his or her personal preferences, behaviour and attitudes, should be prohibited by law.”¹⁹⁵ In Ireland, Section 30 of the 2018 Data Protection Act had already done so.¹⁹⁶ A child’s right to participation must be reconciled with his or her need for protection.²¹

Upholding the best interests of the child as a primary consideration at all stages of the policy cycle

The previous sections of this paper have argued that the more comprehensive marketing restrictions are, the more likely they are to be effective in reducing the impact of HFSS food marketing on children and ensuring that the rights they derive from the CRC are duly upheld. However, the more comprehensive and effective marketing restrictions are, the more likely it is that business actors will challenge their validity on the grounds that measures regulating the content, presentation (including packaging and labelling), advertising or other forms of promotion of their products infringe several of their commercial rights and/or interests and are unduly restrictive of trade. In particular, it is common for business actors whose products and/or commercial practices have been regulated to invoke infringements of their freedom of (commercial) expression and information; their right to (intellectual) property; and their freedom to choose an occupation and to conduct a business.

ix Article 18 of the CRC explicitly emphasizes that parents are not solely responsible for the environment in which their children live and must be supported by the state to discharge their parental responsibilities; this is particularly true in relation to obesity, many of the causes of which are environmental.

Although the rights of business are protected in many countries, they are not absolute. They can be, and often are, restricted on grounds of public health protection, among others. The claims put forward by business actors that their commercial rights would be violated by the imposition of legally binding restrictions on HFSS food marketing should always be placed in a broader context. Importantly, under both EU and international trade law, States have a broad margin of discretion to restrict trade (and therefore commercial rights) to protect the health of their citizens, not least children. They must, however, ensure that the measures they introduce to protect health, and in particular implement the WHO Set of Recommendations, are non-discriminatory and necessary to achieve their intended objective. There is a growing body of case law on the relationship between international trade and public health protection. This is why the public health community, assisted by competent lawyers, must thoroughly engage with existing trade rules as interpreted by relevant courts, tribunals and dispute settlement bodies. This requires that public health experts work closely with trade experts to ensure that they understand these rules and their rationale and can develop an effective strategy from the moment they start to envisage the design of regulatory measures such as restrictions on HFSS food marketing. The more Member States understand the constraints that are derived from international trade law, the more they can maximize the opportunities that the law offers to effectively prevent NCDs, and specifically childhood obesity.¹⁹⁷

The key question for States is to determine how they can reconcile potentially conflicting rights and interests. States must ensure that their legislative response is tailored to the objective they pursue and no more restrictive of these competing interests than is necessary; in other words, this legislative response must be *proportionate*. Thus, if a measure is intended to protect children from the harmful consequences of HFSS food marketing, a State should not ban all food marketing; it should limit itself to banning HFSS food marketing. Hence the importance of adopting an evidence-based nutrient profiling scheme to determine which foods should fall within the scope of the marketing restrictions and which should not.

However, once a State has explained the objective(s) it pursues, it has a broad margin of discretion to

determine how best it can achieve the objective(s) in question. The suggestion that a comprehensive implementation of the Set of Recommendations would violate international and European trade law is unlikely to succeed. By contrast, it is argued that a children's rights approach to obesity prevention mandates such an approach. However, when designing their policies, States must be cognizant of international and European trade rules and ensure that they provide the evidence required to justify their measures and show that they are not unnecessarily restrictive of trade.

This will require, first, that States highlight that childhood obesity is a problem within their borders or is about to become one; and that children are exposed to HFSS food marketing. Once this is established, they do not need to "reinvent the wheel": they can draw on the ample evidence establishing a link between HFSS food marketing and childhood obesity to justify the need for HFSS food marketing restrictions.

The next step is to reflect on whether States could have adopted alternative, less trade-restrictive measures. Two remarks should be made here. First, the notion of "alternative measure" is understood as referring to measures of equal effectiveness. Therefore, the argument that food labelling or education campaigns should be preferred to HFSS food marketing restrictions is not grounded in international or European trade law: food labelling rules and education campaigns should be part of a comprehensive, coordinated obesity prevention strategy alongside, and not instead of, HFSS food marketing restrictions. It is only then that States will end childhood obesity and uphold their international commitments to this effect. Second, it is not because restrictions are wide in scope that they are necessarily unduly restrictive of trade. One has to consider the objective(s) pursued and compare the ability of the different options envisaged to achieve the objective(s) in question. Therefore, as it is established that stepwise approaches to HFSS food marketing restrictions are unlikely to significantly reduce the impact of HFSS food marketing on children, States must adopt restrictions that are broader in scope. International and European trade law and human rights law can be reconciled: States have the possibility to develop effective public health and obesity strategies, on the condition that they base these strategies on the best available evidence; and such evidence clearly supports, as discussed above, the comprehensive implementation of the Set

of Recommendations, including a broad definition of marketing to children and higher age thresholds to protect not only young children but also adolescents.

Granting a broad margin of discretion to States in developing effective public health strategies is all the more warranted as Article 3 (1) of the CRC mandates States to ensure that the best interests of the child are upheld as a primary consideration in all their actions. This is particularly important when the implementation of the Set of Recommendations is at stake: preventing obesity and other related NCDs requires a multisectoral approach and the coordinated involvement of all sectors of government.¹⁹²

It seems paradoxical that businesses challenge potentially effective HFSS food marketing restrictions while simultaneously claiming that they have undertaken to market food to children responsibly.²⁰ Business actors themselves have a responsibility under the United Nations Guiding Principles on Business and Human Rights to ensure that they do not violate

human rights.¹⁹⁸ The food industry should therefore ensure that its marketing practices respect the rights enshrined in the CRC and refrain from marketing unhealthy food to children, including adolescents. The EU Pledge and similar voluntary initiatives still contain significant loopholes – though their number has been reduced following revisions of the EU Pledge in 2012 and 2014, as highlighted above. The WHO Set of Recommendations provides the yardstick to evaluate compliance of businesses with their responsibility to uphold the child's right to health, and any commitment falling short of the Recommendations should not be considered sufficient from a children's rights perspective. Where business actors fail to fulfil this responsibility, this report argues that States must take all necessary measures to facilitate children's enjoyment of their human rights. This includes the positive duty to regulate unhealthy food marketing, as incumbent in the obligation to protect and fulfil the child's right to the enjoyment of the highest attainable standard of health and other related rights.¹⁹²

Conclusion

The Committee on the Rights of the Child has noted that “most mortality, morbidity and disabilities among children could be prevented if there were political commitment and sufficient allocation of resources directed towards the application of available knowledge and technologies for prevention, treatment and care”.¹⁸⁷ This remark resonates when reflecting on the relatively slow progress so far made towards the effective implementation of the WHO Set of Recommendations in the European Region and beyond. There is a growing body of knowledge concerning both the impact of HFSS food marketing on children

and the limited effectiveness of the measures some States have taken. However, this has not yet led to the adoption of the comprehensive approaches that the WHO Recommendations advocate. More is required from States to implement the Recommendations and to comply with their obligations under the CRC to respect, protect and fulfil the rights of all children. This paper provides concrete guidance to support States in taking these important steps to reduce the impact of HFSS food marketing on children and moving towards a healthier food environment across the WHO European Region.

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The WHO Regional Office for Europe

The World Health Organization (WHO) is a specialized agency of the United Nations created in 1948 with the primary responsibility for international health matters and public health. The WHO Regional Office for Europe is one of six regional offices throughout the world, each with its own programme geared to the particular health conditions of the countries it serves.

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