

MARKETING OF HFSS FOOD TO CHILDREN

Over the past fifteen years, evidence has increasingly shown that the marketing of food high in saturated fats, trans-fatty acids, free sugars, or salt (HFSS food) influences children's preferences, purchase requests and consumption patterns. Despite growing childhood overweight and obesity rates and the extensive marketing to children of HFSS food, the European Union (EU) has – so far – only encouraged self-regulatory approaches to the restriction of HFSS food marketing to children. This current hands-off policy is not working.



Growing childhood overweight and obesity trends

Around 1 in 3 children in the EU aged 6-9 years old was overweight or obese in 2010. This represents an increase on 2008, when estimates were 1 in 4.¹ If the EU and its Member States fail to act on overweight and obesity in children and young people, this issue threatens to have a highly negative impact on health and quality of life and may overwhelm national healthcare systems in the near future.²

The influence of HFSS food marketing on children's diets

There is strong evidence from independent systematic reviews that HFSS food marketing contributes to childhood overweight and obesity. Research on the extent, nature and effects of food marketing to children shows that food marketing is extensive and that most of this marketing is for HFSS food. It also establishes that marketing influences children's food preferences, purchase requests and consumption patterns, independently of other factors such as snacking or physical inactivity.³

The use of integrated marketing strategies

Food marketing to children is now a global phenomenon and tends to be pluralistic and integrated, using multiple messages across multiple media. Traditional advertising, via television, but also billboards, packaging, in-store promotions and sponsorship arrangements, is gradually being complemented by a multifaceted mix of marketing communications which focuses on branding and building relationships with consumers via digital media, not least the internet and smartphones.

Member States' international commitments

In Resolution WHA63.14 of May 2010, the 63rd World Health Assembly – including all EU Member States – approved a set of WHO recommendations on the marketing of food to children calling for policies that aim to reduce the impact on children of marketing of HFSS food.⁴ This call has been frequently reiterated since 2010 both at global and at regional levels, and the restriction of such marketing is now seen as an integral component of obesity prevention policies.⁵

The AVMS Directive and its loopholes

The EU Audiovisual Media Services Directive (often referred to as the AVMS Directive) does recognise the importance of limiting the exposure of children to HFSS food marketing. Nevertheless, it only calls on the Member States and the Commission to 'encourage media service providers to develop codes of conduct regarding inappropriate audiovisual commercial communication, accompanying or included in children's programmes, of [HFSS food]'.⁶

This provision is not in line with existing evidence and best practice for a range of reasons, raising serious doubts as to its effectiveness:⁷

- The AVMS Directive only requires Member States and the Commission to 'encourage' media service providers to develop codes of conduct on the marketing of HFSS food to children. There is no duty to ensure either that such codes are, indeed, adopted or that they are sufficiently effective.
- Evidence strongly supports the view that self-regulation is not a suitable regulatory mechanism to protect children effectively from the harmful consequences that the marketing of HFSS food has on their health.⁸ The conflicts of interest inherent in this mechanism prevent industry from ensuring that the public interest (as opposed to their private economic interests) is the primary consideration.
- The AVMS Directive only requires that media service providers limit 'inappropriate' HFSS food marketing 'accompanying or included in children's programming' without defining what constitutes 'children's programming'. Consequently, the EU Pledge, the main self-regulatory initiative which has been adopted in Europe in relation to HFSS food marketing, only applies when at least 35% of the audience is made up of children under 12.⁹ This percentage leaves many programmes popular with children outside the scope of industry commitments to abstain from marketing HFSS food during children's programmes.¹⁰
- Other key notions are left undefined in the AVMS Directive, not least 'HFSS food'.
- All forms of HFSS food marketing to children are 'inappropriate', contrary to what Article 9(2) as currently drafted may suggest.

A call for effective EU regulatory intervention

The EU should use the current review of the AVMS Directive to align its approach to the marketing of HFSS food to children with existing evidence and with the international commitments of its Member States. In particular, it should use its regulatory powers to limit the exposure of children to HFSS food marketing, rather than relying on voluntary, non-enforceable codes of conduct written by industry operators for industry operators. This would be a significant improvement from several viewpoints:

- It would help change the obesogenic environment in which children grow, and therefore facilitate the educational role of parents and society more generally.
- It would also help the EU uphold its 'mainstreaming obligations' by ensuring a high level of consumer and public health protection in all its policies, as well as ensuring that its approach complies with the rights of the child, and in particular that it takes the best interest of the child as a primary consideration – as the EU Treaties and the EU Charter require.
- Increasing the standards of protection laid down in the AVMS Directive would also contribute to the proper functioning of the internal market by limiting market fragmentation.¹¹

As Anand Grover, who was UN Special Rapporteur on the right to the highest attainable standard of health from 2008 to 2014, vividly stated:

*'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.'*¹²

We therefore call on the EU to implement a comprehensive prohibition on all forms of HFSS food marketing to children which fall within the scope of its conferred powers. In particular, we call for a revision of the AVMS Directive to ensure that it restricts effectively the exposure of children to audiovisual commercial communications for HFSS food throughout the EU, including a complete prohibition of all audiovisual commercial communications for HFSS food on television between 6am and 9pm.

Notes

- [1] T Wijnhoven, J van Raaij and J Breda, WHO European Childhood Obesity Surveillance Initiative WHO: Implementation of round 1 (2007/2008) and round 2 (2009/2010) (WHO Regional Office for Europe 2014).
- [2] EU Action Plan on Childhood Obesity 2014-2020 (European Commission 2014).
- [3] See in particular G Cairns, K Angus and G Hastings, The extent, nature and effects of food promotion to children: a review of the evidence to December 2008 (WHO 2009).
- [4] See Set of recommendations on the marketing of foods and non-alcoholic beverages to children (WHO 2010); and the Framework for implementing the set of recommendations on the marketing of foods and non-alcoholic beverages to children (WHO 2012) interpreting their provisions.
- [5] See, in particular, the WHO global action plan for the prevention and control of non-communicable diseases for 2013-2020 which explicitly calls on Member States and the international community to work towards the implementation of the Recommendations as a major component of effective childhood obesity prevention strategies. See also the Vienna Declaration on Nutrition and NCDs in the context of Health 2020 (4-5 July 2013) and the Conclusions of the Council of the European Union on nutrition and physical activity (20 June 2014) which invite the Commission and Member States to 'promote action to reduce the exposure of children, to advertising, marketing and promotion of foods high in saturated fats, trans fatty acids, added sugars or salt'.

- [6] Article 9(2), Directive 2010/13/EU on audiovisual media services [2010] OJ L95/1.
- [7] A Garde, *EU Law and Obesity Prevention* (Kluwer Law International 2010), ch 5.
- [8] S Galbraith-Emami and T Lobstein, 'The impact of initiatives to limit the advertising of food and beverage products to children: a systematic review' (2013) 14(12) *Obesity Reviews*; O Bartlett and A Garde, 'The EU Platform and the EU Forum: New Modes of Governance or a Smokescreen for the Promotion of Conflicts of Interest?', in A Alemanno and A Garde (eds), *The Emergence of an EU Lifestyle Policy: The Case of Alcohol, Tobacco and Unhealthy Diets* (CUP 2015).
- [9] www.eu-pledge.eu.
- [10] HFSS advertising restrictions: Final Review (Ofcom 2010); Children and Parents: Media Use and Attitudes Report (Ofcom 2014).
- [11] O Bartlett and A Garde, 'Time to seize the (red) bull by the horns: The EU's Failure to Protect Children from Alcohol and Unhealthy Food Marketing' (2013) 38(4) *European Law Review* 498.
- [12] Report on unhealthy foods, non-communicable diseases and the right to health, 26th session of the Human Rights Council, June 2014, Document A/HRC/26/31. For a discussion on the relevance of fundamental rights see A Alemanno and A Garde, Regulating Lifestyles in Europe: How to prevent and control non-communicable diseases associated with tobacco, alcohol and unhealthy diets? (Swedish Institute for European Policy Studies 2013).
- [13] http://www.who.int/nmh/publications/best_buys_summary.pdf?ua=1; S Merkur, F Sassi and D McDaid, *Promoting health, preventing disease: is there an economic case?* (WHO Regional Office for Europe), p 9.

Addressing some of the recurring arguments of industry operators against the regulation of HFSS food marketing to children

‘Food marketing does not make children fat’

This argument is no longer sustainable in light of existing evidence. As discussed above, marketing influences children’s food preferences, purchase requests and consumption patterns, independently of other factors such as snacking or physical inactivity. If it is true that marketing restrictions alone will not prevent multifactorial conditions such as obesity (there is no ‘magic bullet’), such restrictions are nonetheless part of the regulatory mix that should be considered as part of comprehensive, effective obesity prevention strategies.

We are not proposing to exclude other options or suggest that such restrictions alone will resolve the ‘obesity epidemic’. Rather, we are stating – in line with existing evidence – that marketing is part of the problem and that restrictions are part of the solution.

‘Advertising only plays a minor part in the problem, whereas advertising revenue plays a significant role in promoting European good quality programmes’

We accept that advertising can make a contribution to programme financing. However, such advertising does not have to be for HFSS food. It could be for non-HFSS food, or for non-food products.

Moreover, any cost-benefit analysis must look at the broad picture, taking the health and wider societal impacts into consideration. WHO views marketing restrictions as highly cost-effective.¹³ The introduction of legally binding rules intended to restrict the marketing of HFSS food is a proportionate response to the challenges posed by growing rates of overweight and obesity, particularly in children.

‘It is for parents to take responsibility for what their children watch’

Parents do have a responsibility to ensure that what their children watch is not detrimental to their development. However, their responsibility is exceedingly difficult to exercise bearing in mind that children are constantly exposed to HFSS food marketing. There is a societal responsibility to ensure that children are brought up in a healthy environment.

‘There is no need for statutory regulation; the industry can self-regulate and is doing so effectively’

As discussed above, self-regulation is voluntary: it is neither legally binding nor legally enforceable. The EU Pledge does not apply to all operators and it contains significant gaps (in relation to the children protected; the media, the programmes and the marketing techniques covered; and the categorisation of food in HFSS and non-HFSS food), which necessarily prevents it from eliminating the exposure of children to HFSS food marketing.

In any event, relying on food and advertising industries to regulate themselves is fraught with difficulties, in light of the inherent conflicts of interest involved in this process. As the WHO Recommendations on the marketing of HFSS food to children explicitly acknowledge, governments are best placed to protect the public interest and avoid conflicts of interest.