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Time to Seize the (Red) Bull by the Horns: The EU's Failure to Protect Children from Alcohol and Unhealthy Food Marketing

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Abstract

Following the publication of the Commission's first application report on the Audiovisual Media Services Directive, this article provides an analysis of the provisions regulating the marketing of food and alcoholic beverages to children. After examining evidence on the impact of food and alcohol marketing to children, it assesses the weaknesses of the Directive's provisions regulating such practices, placing them within the broader context of the Directive and existing EU consumer protection and fundamental rights agenda. It concludes that the growing health burden of non-communicable diseases in Europe places an onus on the EU to do far more to prevent children from being targeted by the alcohol and food industries.

Introduction

In May 2012, the European Commission published the first report on the application of Directive 2010/13, which is intended to promote the free movement of audiovisual media services (the AVMS Directive or the Directive).² One of the key issues discussed in the report relates to the effectiveness of the provisions of the Directive on the marketing of food and alcoholic beverages to children.³

During the negotiations that led to the adoption of the AVMS Directive, public health and consumer organisations strongly criticised the fact that the Television Without

¹ This work was supported by the Economic and Social Research Council [grant number ES/J020761/1].

² Directive 2010/13 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) [2010] OJ L95/1.

³ European Commission, *Audiovisual Media Services and Connected Devices: Past and Future Perspectives* COM(2012) 203 final.

Frontiers Directive⁴ – the predecessor to the AVMS Directive – did not contain any significant restrictions on the marketing of alcoholic beverages, whilst being completely silent on the marketing of foods and beverages high in fat, trans-fatty acids, salt/sodium or sugars, whose excessive intake is not recommended as part of a balanced diet (HFSS food). This relative paucity of provisions could perhaps have been explained in 1989, when the Television Without Frontiers Directive was first adopted, as rather little attention had yet been drawn to childhood obesity concerns and the rising incidence of non-communicable diseases (NCDs). This is clearly no longer the case: NCDs currently account for nearly 86% of deaths and 77% of the disease burden in Europe, leading to soaring health, social and economic costs.⁵ This is all the more striking as the World Health Organisation (WHO) estimate that up to 80% of NCDs worldwide could be prevented by eliminating common risk factors including unhealthy diets and the abuse of alcohol.⁶ Furthermore, evidence has accumulated in the last ten years that marketing for alcoholic beverages and HFSS food is associated with unhealthy lifestyles and is regarded as one factor in the growing burden of NCDs in Europe. Thus, even if the EU legislature eventually decided against banning the marketing of alcoholic beverages and HFSS food to children,⁷ it has nonetheless recognised that the excessive consumption of such products, fuelled in part by highly effective marketing campaigns, is a cause for concern and has therefore introduced both quantitative and qualitative restrictions on

⁴ Directive 89/552 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities [1989] OJ L298/23.

⁵ WHO Regional Office for Europe, *Action Plan for implementation of the European Strategy for the Prevention and Control of Noncommunicable Diseases 2012–2016*, http://www.euro.who.int/_data/assets/pdf_file/0019/170155/e96638.pdf, p.1 [All Internet links mentioned in this paper were last accessed on February 6, 2013].

⁶ See WHO, *2008-2013 Action Plan for the Global Strategy for the Prevention and Control of Non Communicable Diseases* (2008) <http://www.who.int/nmh/publications/9789241597418/en/>, p. 5.

⁷ By contrast, commercial communications for tobacco and medicinal products and treatments available only on prescription are strictly prohibited: see Article 9(1) (d) and (f) respectively.

their marketing as part of the EU strategies on obesity prevention⁸ and alcohol-related harm.⁹

This article assesses the effectiveness of these restrictions. After reviewing the evidence base supporting a limitation of the marketing of HFSS food and alcoholic beverages to children (1), it discusses the provisions of the AVMS Directive dealing specifically with alcohol and food marketing (2), replacing them within the broader context of the Directive (3) and current EU strategies on consumer protection and fundamental rights (4). It concludes that the existing EU regulatory framework is not sufficiently robust to protect children from the harmful effects of HFSS food and alcohol marketing and makes tentative suggestions on what the EU should consider doing to strengthen the protection of children's health from such marketing.

The relationship between marketing, consumption and health

Advertising restrictions have always given rise to vivid controversies reflecting the strongly polarised views of different stakeholders on the role which the marketing of certain goods has played on their consumption and, in turn, on diets and health. In light of their particular vulnerability to marketing, attention has tended to focus on children. For years, consumer and public health associations have highlighted that the exposure of children to the marketing of unhealthy products such as alcoholic beverages or HFSS food has had a negative impact on their health and have therefore called for its strict regulation. By contrast, the opponents of regulation have argued that restrictions on marketing violate the fundamental right of commercial operators to promote their goods, services and brands. Thus, any restrictions on marketing need to be preceded by a proportionality assessment based on evidence in order to reconcile these divergent points of view.

It is true that commercial expression is viewed as a form of expression and, as such, benefits from the protection granted by Article 10 of the European Convention on Human Rights, which provides in its first paragraph that “everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and

⁸ European Commission, *A Strategy for Europe on Nutrition, Overweight and Obesity Related Health Issues* COM(2007) 279 final. For more information on the EU Nutrition and Physical Activity Strategy, see: http://ec.europa.eu/health/nutrition_physical_activity/policy/index_en.htm. For an extensive commentary, see A. Garde, *EU Law and Obesity Prevention* (Alphen aan den Rijn: Kluwer Law International, 2010).

⁹ European Commission, *An EU Strategy to Support Member States in Reducing Alcohol Related Harm* COM(2006) 625 final. For more information on the EU Alcohol Strategy, see: http://ec.europa.eu/health/alcohol/policy/index_en.htm

regardless of frontiers”. Drawing on the case law of the US Supreme Court,¹⁰ the European Court of Human Rights has interpreted this provision broadly to the effect that it protects all forms of expression, including commercial expression consisting of the provision of information, expression of ideas or communication of images as part of the promotion of a commercial activity and the concomitant right to receive such communications.¹¹ Nevertheless, the right to free expression is not absolute: public authorities may restrict commercial speech for reasons of overriding public interest, including the protection of public health. To do so, however, they must establish that the restriction is proportionate, i.e. that it is both legitimate and no more restrictive than necessary to address specific public health concerns.¹² The Court of Justice of the European Union explicitly relied on this case law in its two *Tobacco Advertising* judgments¹³ and in its *Karner* ruling.¹⁴ The Court’s recent *Deutsches Weintor*¹⁵ and

¹⁰ In *Virginia Pharmacy Board v Virginia Consumer Council* (1976) 425 US 748, the Supreme Court stated: “the free dissemination of commercial information allows businesses to promote their goods and services, while offering the possibility to consumers of being informed about the goods and services in question, which may in turn lead to increased competition between manufacturers and service providers. The underlying assumption is that if a product or a service is lawfully available on the market, consumers should be able to know about it so that they can decide which one to choose among competing products and services.” For a discussion of this case law, see A. Garde, “Freedom of Commercial Expression and the Protection of Public Health in Europe” (2010) 12 Cambridge Yearbook of European Legal Studies 225.

¹¹ See in particular *Markt Intern v Germany* Series A no 165 (1990) 12 E.H.R.R. 161; *Groppera v Switzerland* Series A no 173 (1990) 12 E.H.R.R. 321; and *Casado Coca v Spain* Series A no 285 (1994) 18 E.H.R.R. 1; *Krone Verlag v Austria* (2006) 42 E.H.R.R. 28.

¹² Article 10(2) of the European Convention on Human Rights explicitly states that the right of commercial operators to promote their goods and services may be limited: “The exercise of [the freedoms to hold opinions and to receive and impart information and ideas], since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary”.

¹³ Case C-376/98 *Germany v Council and the European Parliament* [2000] E.C.R. I-8419 and Case C-380/03 *Germany v Council and the European Parliament* [2006] E.C.R. I-11573.

¹⁴ Case C-71/02 *Karner* [2004] E.C.R. I-3025.

¹⁵ Case C-544/10 *Deutsches Weintor* [2012] E.C.R. I-xxx, 6 September 2012, not yet reported.

*Sky Österreich*¹⁶ judgments, discussed below, have confirmed that the EU legislature is entitled to give priority, in the necessary balancing of the rights and interests at issue, to overriding requirements of public interests over private economic interests.

Evidence linking food advertising to increased HFSS food consumption

Up to a few years ago, the food industry tended to argue that food marketing restrictions were not legitimate because marketing did not, as such, contribute to childhood obesity. If children were overweight, it was because they were not sufficiently active and because they snacked whilst watching television or surfing the Internet. Therefore the first question that arises when envisaging restrictions on food marketing to children is whether exposure to HFSS food marketing does contribute to childhood obesity.

As one of the EU Member States with the highest levels of childhood overweight and obesity, the UK has been at the forefront of obesity research. In particular, several public authorities have commissioned independent research to determine the influence that food marketing has on children's choices, preferences, consumption and behaviour. In 2003, the Food Standards Agency commissioned a report which concluded that television advertising led to an increase in consumption not only of the product of a given brand, but also of all the products of the category in question.¹⁷ In other words, not only will children prefer Coca-Cola to Pepsi if they see an advertisement for the former, but they will also increase their consumption of fizzy sugary drinks to the detriment of other categories of drinks such as water, milk or fruit juices.¹⁸

Similarly, the independent regulator for the UK communication industries, Ofcom, commissioned research into the role played by television advertising in influencing children's consumption of unhealthy food. The report concluded that advertising had a modest, direct effect on children's food choices and a larger but unquantifiable indirect effect on children's food preferences, consumption and behaviour.¹⁹ On this

¹⁶ Case C-283/11 *Sky Österreich* [2013] E.C.R. I-xxx, 22 January 2013, not yet reported.

¹⁷ G. Hastings et al., "Review of Research on the Effects of Food Promotion to Children" (University of Strathclyde, 2003)
<http://www.food.gov.uk/multimedia/pdfs/foodpromotiontochildren1.pdf>.

¹⁸ This review has been regularly updated. The latest update was commissioned by the World Health Organisation: G. Hastings et al., *The Extent, Nature and Effects of Food Promotion to Children: A Review of the Evidence to December 2008* (WHO, 2009)
http://www.who.int/dietphysicalactivity/Evidence_Update_2009.pdf.

¹⁹ Sonia Livingstone produced three reports for Ofcom on the effects of food advertising (February 2004, May 2004 and January 2006). They are all available at

basis, while noting the multiple factors accounting for childhood obesity, Ofcom acknowledged that there was a case for proportionate and targeted action in relation to television advertising to address this public health issue. This research constituted the basis for the imposition of a ban on all HFSS food marketing in and around children's television programmes in the UK.

The relationship between food marketing and children's diets has more recently been recognised at global level. In particular, in Resolution WHA63.14 of May 2010, the Sixty-third World Health Assembly approved a set of WHO recommendations on the marketing of food to children calling for a ban on all HFSS food marketing to children.²⁰

Evidence of a relationship between the marketing of alcoholic beverages and their excessive consumption

Similarly, the WHO Global strategy to reduce the harmful effects of alcohol, also endorsed by the Sixty-third World Health Assembly in May 2010, has recognised the growing evidence linking the marketing of alcoholic beverages with their excessive consumption and the increased probability of developing an NCD.²¹

Studies have shown, with reference to children and young people, that there is indeed a positive relationship between exposure to alcohol advertising and the likelihood of consuming alcohol frequently and heavily. The Science Group²² of the European Alcohol and Health Forum²³ conducted a wide ranging review of a variety of these

<http://www.ofcom.org.uk>. Her findings are summarised in S. Livingstone, "Does TV Advertising Make Children Fat: What the Evidence Tells Us?" (2006) 13 Public Policy Research 54.

²⁰ The Recommendations, the Framework Implementation Report interpreting their provisions (2012) and all other WHO documents on food marketing to children are available at <http://www.who.int/dietphysicalactivity/marketing-food-to-children/en/index.html>.

²¹ Resolution WHA 63.13 notes that "reducing the impact of marketing, particularly on young people and adolescents, is an important consideration in reducing harmful use of alcohol": WHO, *Global strategy to reduce the harmful use of alcohol* (2010) http://www.who.int/substance_abuse/alcstratenglishfinal.pdf.

²² An advisory group composed of independent experts on alcohol policy. The list of members is available at http://ec.europa.eu/health/alcohol/docs/science_list_2010_en.pdf.

²³ The Forum is a body set up pursuant to the EU Alcohol Strategy and is, according to its founding Charter (http://ec.europa.eu/health/ph_determinants/life_style/alcohol/documents/Alcohol_ch

studies and delivered an Opinion in 2009 which concluded that there was “consistent evidence to demonstrate an impact of alcohol advertising on the uptake of drinking among non-drinking young people”.²⁴ Other systematic reviews of studies have found similar results. According to Smith and Foxcroft, “the effect was consistent across studies ... a dose response between amount of exposure and frequency of drinking was clearly demonstrated”.²⁵ Meier also concluded that “regardless of their explicit intention there is evidence for an effect of alcohol advertisements on underage drinkers”.²⁶ Thus the evidence base for the effect of marketing on youth drinking supports the existence of a positive relationship between marketing and consumption.²⁷

Research findings that marketing for alcoholic beverages and HFSS food negatively influences children’s choices, preferences, consumption and behaviour therefore prevent industry operators from arguing that marketing practices have had no role to play in growing NCD burdens. Thus, the question is not whether a regulatory intervention is legitimate, but how it should be tailored to protect children effectively from harmful media influences on their health whilst allowing the industry to promote goods and services which they have lawfully placed on the market.

Complicating factors

The difficulties facing public authorities entrusted with carrying out the necessary proportionality assessment are compounded by the fact that the impact of marketing on children’s health is extremely difficult to quantify. This problem results from at least two factors. Firstly, regulating marketing is only part of the overall equation to reduce the burden of NCDs. Developing evidence-based NCD prevention strategies is

arter2007.pdf) intended to provide “a common platform for all interested stakeholders at EU level that pledge to step up actions relevant to reducing alcohol-related harm”.

²⁴ Science Group of the European Alcohol and Health Forum, “Does marketing communication impact on the volume and patterns of consumption of alcoholic beverages, especially by young people? – a review of longitudinal studies” (2009) http://ec.europa.eu/health/ph_determinants/life_style/alcohol/Forum/docs/science_o01_en.pdf.

²⁵ L. Smith and D. Foxcroft, “The effect of alcohol advertising, marketing and portrayal on drinking behaviour in young people: systematic review of prospective cohort studies” (2009) 9 B.M.C. Public Health 51.

²⁶ P. Meier, “Independent review of the effects of Alcohol pricing and promotion: Part A: Systematic Reviews” (2008) http://www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/documents/digitalasset/dh_091383.pdf, section 2.7.

²⁷ Further studies subsequent to the Opinion of the Science Group which provide corroborating evidence include for instance M. Morgenstern et al., “Exposure to alcohol advertising and teen drinking” (2011) 52 Preventative Medicine 146, 149.

a complex task for policy makers, as nutrition and alcohol policies can only be effective if they adopt a comprehensive multi-sectoral approach reflecting the multiplicity of the root causes of NCDs. As the UN General Assembly noted in its Declaration on NCDs of September 2011:

“[T]he conditions in which people live, poverty, uneven distribution of wealth, lack of education, social, gender, political, behavioural and environmental determinants of health are all contributory factors to the prevalence of NCDs.”²⁸

Tackling them requires the integration of policies across the policy spectrum. There is no magic bullet, and although regulating marketing to children must be seen as part of the solution, it is still only one part of the solution.

Secondly, most of the research carried out to date has tended to focus on the influence of television advertising, whilst children have become exposed to a growing number and range of commercial messages which extend far beyond traditional media advertising and which involve activities such as online marketing, sponsorship and peer-to-peer marketing.²⁹ The problem is made more acute by the fact that certain marketing techniques, including the use of cartoon or licensed characters, have been specifically developed to seduce young audiences,³⁰ and that companies tend to use “integrated marketing communications”, in which promotional activities range across different media platforms, often blurring the distinction between promotional and other content.³¹ A Recent report from RAND Europe on young people’s exposure to

²⁸ See the Political Declaration of the High Level Meeting on the Prevention and Control of NCDs (A/66/L.1) which the UN General Assembly adopted unanimously on 19-20 September 2011:

http://www.un.org/ga/search/view_doc.asp?symbol=A/66/L.1.

²⁹ D. Buckingham, “The Impact of the Commercial World on Children’s Wellbeing” (Department for Children, Schools and Families and Department for Culture, Media and Sport, 2009),

<https://www.education.gov.uk/publications/standard/publicationDetail/Page1/DCSF-00669-2009>.

³⁰ See in particular J. McGinnis, J. Gootman and V. Kraak, *Food Marketing to Children and Youth: Threat or Opportunity?* (Washington: Institute of Medicine 2006) and J. Harris, M. Schwartz and K. Brownell, “Marketing Foods to Children and Adolescents: Licensed Characters and other Promotions on Packaged Foods in the Supermarket” (2009), 13 *Public Health Nutrition* 409.

³¹ Buckingham, “The Impact of the Commercial World on Children’s Wellbeing” <https://www.education.gov.uk/publications/standard/publicationDetail/Page1/DCSF-00669-2009>. For a recent analysis of the development of integrated marketing communication strategies in the food sector, see the US Institute of Medicine,

alcohol marketing highlighted the realities of this problem by revealing that through their high use of social media, which often relies on alternative content such as competitions and games to draw viewers in, young people are exposed to quite a high proportion of alcohol advertising, interacting with both marketer- and user-generated content on the same website.³² In light of this increasingly complex media environment, it is worth bearing in mind the distinction which the WHO Recommendations on food marketing to children have drawn between the exposure of children to marketing (how much marketing to children?) and the power of marketing (what type of techniques work specifically well with children?). As the effectiveness of marketing is determined by these two components,³³ a comprehensive approach tackling both exposure and power has the highest potential to achieve the desired impact.³⁴

The provisions of the AVMS Directive and their loopholes

As a result of the accumulated evidence on the negative effect that marketing for alcoholic beverages and HFSS food has on children's consumption patterns and health, the EU has recognised that the marketing of such products should be regulated. However, the provisions it has adopted to date are disappointing, to say the least.³⁵

Commercial communications for alcoholic beverages

“Challenges and opportunities for change in food marketing to children and youth: Workshop summary” (National Academies Press, 2013).

³² E Winpenny et al., “Assessment of young people's exposure to alcohol marketing in audiovisual and online media” (RAND Europe, 2012), http://ec.europa.eu/health/alcohol/docs/alcohol_rand_youth_exposure_marketing_en.pdf.

³³ Recommendation 2: “Given that the effectiveness of marketing is a function of exposure and power, the overall policy objective should be to reduce both the exposure of children to, and power of, marketing of foods high in saturated fats, *trans*-fatty acids, free sugars, or salt”.

³⁴ Explanatory Paragraph 17 accompanying Recommendation 3 on Policy Development.

³⁵ This article does not discuss more general provisions focusing on advertising to children and advertising detrimental to health, and it does not discuss the quantitative restrictions which the AVMS Directive has imposed on audiovisual communications. On these provisions, see O. Castendyk, E. Dommering and A. Scheuer *European Media Law* (Alphen aan den Rijn: Kluwer Law International, 2008) and J. Harrison and L. Woods *European Broadcasting Law and Policy* (Cambridge: Cambridge University Press, 2007).

Despite the good intentions expressed in the EU Alcohol Strategy “to consider further actions to curb under-age drinking and harmful drinking patterns among youth”,³⁶ it is clear that the two provisions of the AVMS Directive applying directly to alcohol marketing – Article 9(1) (e) and Article 22 – are neither specific nor strong enough to protect children from the harmful influence of alcohol marketing on their health.

Article 9(1) (e) applies to all forms of commercial communications for alcoholic beverages, stating that such communications “shall not be aimed specifically at minors and shall not encourage immoderate consumption of such beverages”. This wording suggests that despite the mounting evidence on the relationship between alcohol marketing and children’s drinking habits, Article 9(1) (e) does not prohibit audiovisual media commercial communications for alcoholic beverages from being shown to children.³⁷ The requirement is that they must not *specifically* be aimed at them. Thus, “advertisements for such products could be broadcast right before, after or during children’s programmes without being considered as specifically aimed at minors”, notwithstanding the fact that they would reach a high number of children.³⁸ The consequences of this state of affairs are reflected in sobering research findings which show that in some Member States children are just as likely if not more likely to be exposed to alcohol advertising than adults.³⁹ Furthermore, although it is a key term used in the both Article 9(1) (e) and Article 22, there is no definition of “immoderate consumption” anywhere in the Directive, not even a qualitative one. Immoderate consumption is supposedly the very thing that the rules are trying to prevent, especially with regard to children who are targeted by the alcohol industry as potential future heavy drinkers and reliable customers, however there are no common guidelines as to the level of consumption that an advertisement must suggest or portray before it is considered immoderate. The interpretation of the term is left to the Member States. Due to different cultural approaches to alcohol in each Member State

³⁶European Commission, *An EU Strategy to Support Member States in Reducing Alcohol Related Harm* COM(2006) 625 final, p. 7.

³⁷ We have referred to “children” throughout, even though the AVMS Directive refers to “minors” in relation to alcohol marketing and “children” in relation to food marketing. Neither of these terms is defined in the Directive itself and the age of majority varies between Member States.

³⁸ Castendyk, Dommering and Scheuer, *European Media Law*, 2008, 600.

³⁹ Winpenny et al., “Assessment of young people’s exposure to alcohol marketing” http://ec.europa.eu/health/alcohol/docs/alcohol_rand_youth_exposure_marketing_en.pdf. The WHO Framework for alcohol policy states that “all children and adolescents have the right to grow up in an environment protected from the negative consequences of alcohol consumption and, to the extent possible, from the promotion of alcoholic beverages” (WHO, *Framework for alcohol policy in the WHO European Region 2006*, p. 23). Declining to expressly prohibit the marketing of alcohol to children, whether direct or indirect, is arguably a retreat from the commitment to this principle.

the “level of socially accepted moderacy”⁴⁰ varies greatly. For example, some states may consider it acceptable for an advertisement to show a large numbers of empty bottles the day after a party while other states would not,⁴¹ thus opening the door to differing standards of protection against irresponsible alcohol marketing campaigns that attempt to instil positive attitudes towards heavy drinking at an early age.

Whereas Article 9(1) (e) applies to all forms of audiovisual media communications, Article 22 applies to television advertising only. Contrary to the claim made in the first report on the application of the AVMS Directive, which describes Article 22 as containing “detailed requirements”,⁴² the wording contained in Article 22 is generalised and constitutes no more than what could be regarded as common sense. It is therefore unsurprising that most Member States have exceeded the level of protection offered in the Directive, as discussed below.⁴³ Even when a comparison is made to self-imposed industry regulatory codes, the generality of Article 22 is revealed. For example, the Portman Group Code of Conduct is a UK self-regulatory code devised by the industry for ensuring that its members promote alcohol in a socially responsible manner. Its purpose is therefore similar to that of Article 22. However, it consists of eleven provisions, compared to six in Article 22, and its requirements are broader and go further than those in the Directive. For instance, Rule 3 (2) (g) requires that promotions for alcoholic beverages must not “urge the consumer to drink rapidly or to ‘down’ a product in one”⁴⁴ – this finds no equal in the Directive. Moreover, Rule 3(2) (d) states that a drink, its packaging and any promotional material must not directly or indirectly “suggest any association with sexual success”, whereas the AVMS Directive uses the less strongly worded phrase “shall not create the impression that the consumption of alcohol contributes towards ... sexual success”. One could therefore argue that the provisions of Article 22 are basic even compared to what the industry concedes to be necessary.

The root of the problem when it comes to marketing to children is that neither Article 9(1) (e) nor Article 22 make an attempt to address the creative techniques that make communications for alcoholic beverages appealing to children. There is no mention of

⁴⁰ Castendyk, Dommering and Scheuer, *European Media Law*, 2008, 596.

⁴¹ *Ibid.*

⁴² European Commission, *First Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the application of Directive 2010/13/EU “Audiovisual Media Services Directive”* COM(2012) 203 final, p. 7.

⁴³ See the European Commission’s *First Report on the Application of the Audiovisual Media Services Directive*, which indicates that 22 Member States of 27 have implemented more detailed provisions, p. 7.

⁴⁴ At p. 7. The Portman Code is available at

<http://www.portmangroup.org.uk/assets/documents/Code%20of%20practice%204th%20Edition.pdf>.

youth culture, humour, cartoons, or childish behaviour, all of which have been shown to make alcohol advertising appealing to a youth audience.⁴⁵ The aspects that are mentioned are however easily circumvented. For example, one study points out that:

“[W]hile many codes restrict the use of young people in advertisements, having them present is not necessary for an advertisement to be appealing to under-age drinkers.”⁴⁶

Thus, alcohol companies are still able to produce commercial communications that appeal strongly to children without infringing the rules in the AVMS Directive – although the Directive may prohibit the use of certain elements and concepts, the subtlety of modern marketing methods means that when direct exhortations are prohibited the same message can be just as effectively communicated through association, suggestion and appealing to core aspects of youth culture.

The Commission itself has indirectly acknowledged this problem in its first application report on the AVMS Directive:

“[V]ery few cases of clear infringements have been found. However, a significant proportion, more than 50% of the advertising spots, contained elements which might be linked to some of the characteristics banned by the AVMS Directive, although in view of the detailed requirements of the AVMS Directive they fell short of constituting a clear cut infringement.”⁴⁷

Commercial communications for HFSS food

The EU’s commitment to protect children from HFSS food marketing is even weaker than it is for alcoholic beverages. Article 9(2) of the AVMS Directive was specifically adopted to respond to childhood obesity concerns and provides that:

⁴⁵ A. de Bruijn et al., “Commercial promotion of drinking in Europe: Key findings of independent monitoring of alcohol marketing in five European countries” (STAP, 2012), www.eucam.info/content/bestanden/ammie-eu-rapport_final.pdf, pp. 31-33.

⁴⁶ P. Anderson and B. Baumberg, *Alcohol in Europe, a public health perspective: A report for the European Commission* (Institute of Alcohol Studies: London, 2006), p. 285. Another study showed that even if communications did not portray the physical act of drinking, students who saw them nonetheless perceived the characters in the communications to be heavy episodic drinkers: D Proctor et al., “Effects of cautionary messages and vulnerability factors on viewers perceptions of alcohol advertisements” (2005) 66(5) *J. Stud. Alcohol and Drugs* 648.

⁴⁷ At p. 7.

“Member States and the Commission shall encourage media service providers to develop codes of conduct regarding inappropriate audiovisual commercial communication, accompanying or included in children’s programmes, of [HFSS food].”

Although it is welcome that Article 9(2) recognises the negative influence of HFSS food marketing on children’s dietary choices, its scope is nevertheless strictly circumscribed and this raises serious doubts as to the provision’s effectiveness. First, the wording of Article 9(2) is unclear. In particular, the phrase “inappropriate audiovisual commercial communication” seems to leave the food industry with an important margin of discretion. One could argue that all forms of commercial communication for HFSS food directed at children are inappropriate.⁴⁸ Nevertheless, this is not what a literal interpretation of Article 9(2) suggests. Rather, it implies that there are appropriate and inappropriate HFSS food adverts, thus putting the onus on the industry to tackle only the latter in its codes of conduct. One could imagine that using celebrities or cartoon characters would be viewed as inappropriate, as these techniques are particularly effective in diverting a child’s attention away from the actual product, whereas adverts that do not rely on these or similar techniques would not be regarded as “inappropriate”. Such an approach, apart from being ineffective, would be extremely cynical, as it would leave the industry with a broad margin of discretion in relation to the content of its codes of conduct. It would be comforting to believe that this provision was drafted somewhat inadvertently.

Secondly, this provision only requires Member States and the Commission to “encourage” media service providers to develop codes of conduct on the advertising of unhealthy food to children and to monitor the fulfilment of this commitment. There is no duty to ensure either that such codes are indeed adopted or that they are sufficiently effective.⁴⁹

Thirdly, Article 9(2) only requires that media service providers limit inappropriate unhealthy food marketing “accompanying or included in children’s programming”. As stated above, however, the AVMS Directive does not define what is meant by

⁴⁸ This is clearly the stance taken by the World Health Organisation Recommendations on food marketing to children.

⁴⁹ As the Commission has stated, however, “the co-regulatory and self-regulatory schemes have to be broadly accepted by main stakeholders in the Member States concerned and provide for effective enforcement. How these concepts of acceptability and effectiveness are interpreted can be decided at national level”; similarly for the interpretation of the terms “encourage” and “monitor”: see para. 8 of the minutes of the meeting of the EU Platform held on 19 November 2008, http://ec.europa.eu/health/ph_determinants/life_style/nutrition/platform/docs/ev_2001_119_ag_en.pdf.

“children's programming”. Consequently, the EU Pledge, the main self-regulatory initiative which has been adopted to comply with Article 9(2), only applies when at least 35% of the audience is made of children of less than 12.⁵⁰ This percentage, which has been lowered from 50%, remains extremely high and will leave a range of popular programmes with children outside the scope of the food industry's commitment to abstain from advertising during children's programmes. Alternatively, the EU could define a “watershed” – i.e. a time when the child audience is likely to be small and before which it is not allowed to promote HFSS food. This option would have the advantage of being potentially far more effective and easier to administer across the EU. The group of children to be protected by Article 9(2) is also left undefined. The EU Pledge applies a threshold of 12 years old. If it is generally accepted that children cannot fully grasp the commercial intent of advertising until the age of 11 or 12 and that children below 12 years of age must be protected, this does not mean that children who are more than 12 years old are unaffected by HFSS food marketing. Older children also respond to the persuasive intent of advertising.⁵¹ A decision thus needs to be taken on whether this is sufficient to protect them, as in the case of tobacco products or medicines and medicinal treatments available only on prescription. As the Commission has noted in its first application report on the AVMS Directive, “it does appear that advertising techniques geared towards minors are frequently used in television advertising”⁵² and that consequently more needs to be done. In particular, the Commission has stated that it will “support the development of stricter age and audience thresholds for advertising and marketing and more consistent nutritional benchmarks across companies”.⁵³ If this statement does not resolve the issue,⁵⁴ it goes some way towards acknowledging that the approach adopted to date has not been sufficiently protective of children.

⁵⁰ <http://www.eu-pledge.eu/>.

⁵¹ WHO, *A Framework for Implementing the Set of Recommendations on the Marketing of Foods and Non-Alcoholic Beverages to Children* (2012) http://www.who.int/dietphysicalactivity/framework_marketing_food_to_children/en/, p. 21.

⁵² At p. 8.

⁵³ At p. 9. The EU Pledge does not lay down uniform nutritional criteria, allowing food operators to promote certain items that should arguably fall within the category of HFSS food. However, a consultation on this issue has been launched:

http://www.eu-pledge.eu/sites/eu-pledge.eu/files/releases/EU_Pledge_Nutrition_White_Paper_Nov_2012.pdf.

⁵⁴ Determining the age is absolutely key to the debate; however this question remains unresolved to date. It is argued that it can only be addressed effectively on the basis of a careful proportionality analysis which stakeholders have to date largely failed to engage with.

The scope of the definition of an “audiovisual commercial communication”

Not only do the provisions in Articles 9(1) (e), 9(2) and 22 lack specificity, but they also fail to cover many promotional tools frequently used by industry operators to reach children. In particular, a range of potentially harmful promotions for alcoholic beverages and HFSS food may be excluded from the scope of the AVMS Directive because they do not constitute an “audiovisual commercial communication”, defined in the Directive as:

“[I]mages with or without sound which are designed to promote, directly or indirectly, the goods, services, or images of a natural or legal entity pursuing an economic activity. Such images accompany or are included in a programme in return for payment or for similar consideration or for self-promotional purposes. Forms of audiovisual commercial communication include, inter alia, television advertising, sponsorship, teleshopping and product placement.”⁵⁵

If a communication is not offered in return for remuneration or self-promotional purposes, and does not accompany a programme, then it falls outside the scope of the AVMS Directive. For example, how would the website of a company selling alcoholic beverages fare under this definition?⁵⁶ Although websites have been found to be powerful promotional tools for targeting children directly,⁵⁷ it is unlikely that they will fall within the definition of an audiovisual commercial communication: even if they fulfil the condition of having a self-promotional purpose, it is difficult to argue that they “accompany or are included in a programme”.⁵⁸

Other examples of promotional content that is likely to fall outside the definition of an audiovisual commercial communication include viral emails that are designed to “gain credibility by making [them] seem as if the message is from a trustworthy friend”,⁵⁹ as well as Facebook “seeding” tactics of alcohol and food industry

⁵⁵ Article 1 (h).

⁵⁶ For HFSS food, the EU Pledge was extended in January 2012 to cover company-owned websites: <http://www.eu-pledge.eu/>.

⁵⁷ S. Calvert, “Children as Consumers: Advertising and Marketing” (2008) 18(1) *The Future of Children* 205, 213.

⁵⁸ This conclusion is strongly supported by Recital 22 to the AVMS Directive, which indicates that “websites that contain audiovisual elements only in an ancillary manner, such as animated graphical elements, short advertising spots or information related to a product or non-audiovisual service” will be outside the scope of the Directive.

⁵⁹ G. Hastings, ““They’ll drink bucket loads of the stuff”: An analysis of internal alcohol industry advertising documents” (2009) *The Alcohol Education and Research Council*, p. 4.

operators.⁶⁰ Both of these marketing strategies have the ability to reach large numbers of children.⁶¹ It is therefore of concern that many new forms of marketing fall outside the scope of the AVMS Directive, whilst not being adequately regulated by any other harmonising provisions of EU law, as discussed in section 4 below.

The limits of self-regulation as an alternative to legally binding regulation

The Commission has been very vocal in promoting the use of self-regulation at EU level by industry operators as an alternative to the adoption of legally binding rules to support healthier lifestyles.⁶² Its rationale for believing that self-regulatory schemes can supplement the AVMS Directive or even act as an alternative to tighter legal controls is that these schemes would have the potential to deliver more rapid responses to infringements, be more flexible so as to adapt to rapidly changing media environments and be more effective in view of the cooperation that would be established with public authorities to achieve better health outcomes for all, rather than alienate industry operators by imposing binding rules on them that they do not approve of.

Such a belief is regrettably not founded on evidence. A range of independent experts from the EU and beyond widely support the opposite view that self-regulation is not a suitable regulatory mechanism to protect children effectively from the harmful consequences that the marketing of HFSS food and alcoholic beverages has on their health.⁶³ This should not come as a surprise. Self-regulation has inherent and arguably

⁶⁰ ‘Seeding’ tactics involve posting promotional material on pages external to the company, and then relying on the link being shared between private individuals along a long chain until it no longer appears that the link has originated from or been posted by the company itself.

⁶¹ For instance, “an evaluation of Smirnoff’s Facebook presence showed that almost three quarters of its contacts are in significant danger of breaching the Diageo Marketing Code (i.e. are underage)”: Hastings, “‘They’ll drink bucket loads of the stuff’”, 2009, p. 4.

⁶² See, for example, the speech delivered on 28 March 2012 by John Dalli, then Commissioner for Health and Consumer Protection, on the regulatory challenges and solutions for responsible advertising at the Conference “Advertising We Care”, available at http://www.aereurope.org/content/view/1039/68/lang,en_GB/.

⁶³ For a criticism of the use of self-regulation to limit the marketing of HFSS food and alcoholic beverages to children, see in particular: C. Hawkes, “Self-regulation of food advertising: What it can, could and cannot do to discourage unhealthy eating habits among children” (2005) British Nutrition Foundation, Nutrition Bulletin 374; D. Ludwig and M. Nestle, “Can the food industry play a constructive role in the obesity epidemic?” (2008) 15 JAMA 300; K Brownell and K Warner, “The perils of ignoring

insurmountable weaknesses that mean that it will rarely act as an effective replacement for legislation. Clearly, “to defend the right to market alcohol [and HFSS foods] is essential business activity for the vested interests involved”,⁶⁴ and consequently any self-regulatory commitments will always be compromised. An inherent conflict of interest does arise when commercial operators are asked to voluntarily stop marketing to children whilst they have a primary responsibility towards their shareholders to increase their profits. Marketing is one of the most effective tools available to them to reach this objective and thus for both the food and the alcoholic beverages industries it has been an established commercial objective to actively target children as key marketing audiences.⁶⁵ Consequently, asking the industries to self-regulate would amount to “putting Dracula in charge of a blood bank”.⁶⁶

If we review the commitments that HFSS food and alcoholic beverages industry operators have made – all of which are supposed to share the common objective of reducing the exposure of children to alcohol and HFSS food marketing – one cannot but conclude that they have failed to respond effectively to concerns related to growing obesity rates and harmful drinking patterns among children. This can be observed firstly in the fact that the majority of self-regulatory norms relating to the marketing of alcoholic beverages have focused on content-based regulation, which is far easier for industry operators to manipulate than volume-based regulation, thus ensuring that advertising elements likely to entice children that are not caught by the AVMS Directive are also not caught by the relevant codes. A report produced by the

history: Big Tobacco played dirty and million died. How similar is Big Food?” (2009) 87(1) *The Milbank Quarterly* 259; T Babor, “Alcohol research and the alcoholic beverage industry: issues, concerns and conflicts of interest” (2009) 104 *Addiction* 34; L. Sharma, S. Teret and K. Brownell, “The food industry and self-regulation: Standards to promote success and to avoid public health failures” (2010) 100 *American Journal of Public Health* 240; A Gilmore, “Public health, corporations and the New Responsibility Deal: Promoting partnerships with vectors of disease?” (2011) 33(1) *Journal of Public Health* 2; L. Dorfman, et al., “Soda and tobacco industry corporate social responsibility campaigns: How do they compare?” (2012) 9 *PLoS Med* 1241; R Moodie et al., “Profits and pandemics: prevention of harmful effects of tobacco, alcohol, and ultra-processed food and drink industries” (2013) 381 *The Lancet* 670.

⁶⁴ S. Casswell, “Current status of alcohol marketing policy – an urgent challenge for global governance” (2012) 107 *Addiction* 478, 481.

⁶⁵ G. Hastings, ““They’ll drink bucket loads of the stuff””, 2009.

⁶⁶ This image was used by Simon Capewell when he criticised the degree to which the food industry had been consulted by the Department of Health in England on the future obesity policy: reported in Jacques Peretti, “Why our food is making us fat” (June 11, 2012), *Guardian.co.uk*,

<http://www.guardian.co.uk/business/2012/jun/11/why-our-food-is-making-us-fat>.

AMMIE project examining the alcohol advertising codes of several Member states observes:

“Elements included in alcohol advertising campaigns that are, according to our youth panels, part of the youth culture, were not identified as such by Advertising Code Committee. Moreover, humour is an attractive style element to young people and yet is not addressed in the self-regulatory codes”.⁶⁷

The report even explicitly accuses the industry of manipulating the code, emphasising that these commitments are “clever and precisely formulated thus resulting in easily rejected complaints”,⁶⁸ however in truth, many of the self-regulatory codes do no more than simply implement the insufficiently protective provisions already contained in the AVMS Directive, a convenient way for the industry to inconspicuously avoid tighter commitments.

The pledges given by the industry as part of the EU Alcohol and Health Forum are even more cynically constructed. Of the 66 commitments on commercial communications, 53 have been made by alcohol producers. An examination of the content of these pledges reveals that at least 20 relate mainly to educational and informational aims rather than any concrete improvement on limiting the exposure of children to alcohol marketing. However, there is overall little evidence that educational programmes are at all effective in reducing the level of alcohol related harm.⁶⁹ The remainder of the pledges are often disguised attempts to perpetuate the promotion of alcohol to minors. For instance, the EU Alcohol and Health Forum pledge made by the World Federation of Advertisers and a number of alcohol producers is to “promote the integration of the 70/30 rule into national self-regulatory codes and systems”.⁷⁰ This pledge, while seeming constructive on its face, actually

⁶⁷ A. de Bruijn et al., “Commercial promotion of drinking in Europe”
www.eucam.info/content/bestanden/ammie-eu-rapport_final.pdf, p. 33.

⁶⁸ *Ibid.*

⁶⁹ For example, see the conclusions reached in: W. Mistral, “Effectiveness of national policies and initiatives to reduce alcohol-related harm among young people”, Young People and Alcohol Project 2009; L. Jones et al., “A Review of the Effectiveness and Cost-Effectiveness of Interventions Delivered in Primary and Secondary Schools to Prevent and/or Reduce Alcohol Use by Young People under 18 Years Old” (2007) <http://www.nice.org.uk/nicemedia/pdf/AlcoholSchoolsConsReview.pdf>; R. Gordon and P. Anderson, “Science and alcohol policy: a case study of the EU strategy on Alcohol” (2011) 106 *Addiction* 55.

⁷⁰ The 70/30 rule states that alcohol cannot be advertised to an audience if it is composed of more than 30% minors. An overview of this commitment can be found at
<http://ec.europa.eu/eahf/index.jsp?pageNumber=&clear=&comparatorSubmitBeforeAfter=%3C%3D&comparatorSubmitBeforeAfter=%3C%3D&submitDate=&compar>

works against the protection of minors, since as a Forum Task Force Mapping Exercise Document⁷¹ points out, if any percentage of an audience are minors this will fall short of achieving the aims of the EU Strategy, and as the AMMIE report points out,⁷² 30 per cent of a given audience actually allows very high absolute numbers of children to be legitimately exposed to alcohol advertising which could encourage them to develop harmful drinking habits. A similar remark has been made above in relation to the EU Pledge on HFSS food marketing to children, which retains a 35/65 threshold. The European Commission needs to recognise that if regulatory standards in the field of alcohol and HFSS food advertising are to be effective, the key policy parameters should be set by the competent regulatory authorities, in this instance the EU legislature, rather than industry operators, and they must be set in such a way as to avoid conflicts of interest.⁷³

Overall one can only conclude that the major loopholes contained in the provisions of the AVMS Directive have been exacerbated by the EU's misplaced and dogmatic belief in the potential of self-regulation to supplement the existing legal regime in improving public health.

The food and alcoholic beverages industries as two Goliaths of the EU's economy

An important explanation for the EU's continued reluctance to regulate the marketing of HFSS food and alcoholic beverages rests on the power and influence that the food and alcohol industries possess and the tactics that they have employed to deflect any criticism of self-regulation as an effective regulatory mechanism. Food and drink operators comprise the second largest manufacturing industry in Europe, with 14.5% of total manufacturing turnover (EUR 917 billion for the EU-27), while employment

[atorBeforeAfter=%3C%3D&comparatorBeforeAfter=%3C%3D&finalDate=&commitmentTitle=&commitmentSummary=&objective=&baseline=&activities=1&countries=0&forumMembers=49&priorityAreas=All&targetGroups=All&onGoingOrFinal=all&includeArchive=on.](#)

⁷¹ EU Alcohol and Health Forum. Taskforce on Marketing Communication, *Targeting/Not Targeting Youth*, 2009, http://ec.europa.eu/health/archive/ph_determinants/life_style/alcohol/forum/docs/youth_en.pdf.

⁷² A. de Bruijn et al., "Commercial promotion of drinking in Europe" www.eucam.info/content/bestanden/ammie-eu-rapport_final.pdf, p. 33.

⁷³ This is precisely what Recommendations 4 and 6 of the WHO Recommendations on food marketing to children urge the 193 States that approved them (including the 27 EU Member States) to recognise.

in this sector represents about 14% of the total manufacturing sector (about 310,000 companies providing 4.8 million jobs).⁷⁴

The economic significance of the food and drink industries gives them a strong bargaining position and a powerful influence over political processes.⁷⁵ To sustain these advantages there is a large amount of complicity between policy-makers and industry operators alike,⁷⁶ leading to the “rise of the ‘unelected’ in policy making”,⁷⁷ and an infiltration of the political process that has given the industry an unquantifiable but certainly significant level of power. Both industries have been very well rewarded by the European Commission, the EU Alcohol and Health Forum and the EU Platform on Diet, Physical Activity and Health being largely “dominated by corporate interests”.⁷⁸

The food and alcohol industries have also recognised the importance, in order to protect their vested interest in “maintain[ing] the survival and advancement of their organisation”,⁷⁹ of presenting an organised front. Within industries as large as alcohol and food there will evidently be divisions,⁸⁰ however as a collective both industries realise that they must “form around a shared view of the preferred policy outcome and coordinate their advocacy activities”.⁸¹ To this end, there is evidence of an “industry playbook” that is promulgated by players, containing “at the heart of this strategy ... a script built on values of personal responsibility”.⁸² The food and alcohol industries have promoted the rhetoric within media channels that the development of poor health

⁷⁴ For information on the EU’s food and drink industry, see

http://ec.europa.eu/enterprise/sectors/food/eu-market/index_en.htm

⁷⁵ P Field and R Gauld, “How do vested interests maintain outdated policy? The case of food marketing to New Zealand children” (2011) 4 *The Open Health Service and Policy Journal* 30, 34.

⁷⁶ D Miller and C Harkins, “Corporate strategy, corporate capture: Food and alcohol industry lobbying and public health” (2010) 30 *Critical Social Policy* 568, 568. Similarly, key programmes within Member States such as the Drinkaware Trust and Change4Life in the UK are heavily controlled by the food and drink industries.

⁷⁷ Miller and Harkins, “Corporate strategy, corporate capture” (2010) 30 *Critical Social Policy* 568, 568.

⁷⁸ Miller and Harkins, “Corporate strategy, corporate capture” (2010) 30 *Critical Social Policy* 568, 578.

⁷⁹ Field and Gauld, “How do vested interests maintain outdated policy?” (2011) 4 *The Open Health Service and Policy Journal* 30, 35.

⁸⁰ On the divisions within the alcohol industry, see C Holden et al., “Cleavages and co-operation in the UK alcohol industry: A qualitative study” (2012) 12 *BMC Public Health* 483

⁸¹ Field and Gauld, “How do vested interests maintain outdated policy?” (2011) 4 *The Open Health Service and Policy Journal* 30, 34.

⁸² Brownell and Warner, “The perils of ignoring history” (2009) 87(1) *The Milbank Quarterly* 259, 266.

is a matter of individual choice, and that responsibility for the excessive consumption of alcoholic beverages and HFSS food lies not with them but with individuals who *choose* to consume their products. This tactic of blaming individuals is not in line with independent evidence explaining the rise of NCDs worldwide, and policy-makers must be particularly vigilant against the orchestrated, constant attempts of industry operators to undermine the development of effective NCD prevention strategies.

Furthermore, the food and alcohol industries have systematically used their power, their influence and the level of organisation they have acquired in pursuit of their preferred policy outcomes. One strategy that they have consistently used to this effect is to undermine scientific research on the harm that alcoholic beverages and HFSS foods can cause. A cynical view might be that “at worst, the industry’s scientific activities confuse public discussion of health issues and policy options”.⁸³ However, evidence suggests that this is exactly what the food and alcohol industries aim to achieve, particularly when it comes to advertising, where for instance “the alcohol industry have used selected econometric findings to bolster their, entrenched, position that advertising does not influence demand for alcohol”.⁸⁴ Public policy makers must react accordingly and treat industry engagement with the evidence base as inherently suspicious.

As a result of their activities in attempting to evade regulation and restriction, the food and alcohol industries have encountered heavy criticism among the scientific and public health community. Nevertheless, the EU legislature has yet to take this criticism on board.

Perhaps the biggest accusation levied at the industry is that they have become a “disease vector”.⁸⁵ Unfortunately, the “broader lessons from tobacco have been implicitly rejected”,⁸⁶ leaving the vector concept under researched and thus side lined in policy considerations relating to alcoholic beverages and HFSS food. The invitation given to the alcohol and food industries to sit at the policy table, and the incessant pursuit of self-regulatory solutions seem to ignore both the criticism of the food and alcohol industries as vectors of disease and the criticism already mentioned above that the fiduciary responsibilities of all corporations to maximize profits regardless of health consequences constitute an inherent limit to the compatibility of

⁸³ Babor, “Alcohol research and the alcoholic beverage industry” (2009) 104 *Addiction* 34, 44.

⁸⁴ R Gordon et al., “Alcohol marketing and young people’s drinking: what the evidence base suggests for policy” (2010) 10 *J. Public Affairs* 88, 90.

⁸⁵ R Jahiel and T Babor, “Industrial epidemics, public health advocacy and the alcohol industry: lessons from other fields” (2007) 102 *Addiction* 1335, 1335.

⁸⁶ Gilmore, “Public health, corporations and the New Responsibility Deal” (2011) 33(1) *Journal of Public Health* 2, 2.

industry interests with public health.⁸⁷ Some have been forthright in arguing that the engagement of industry with public health initiatives is nothing more than a “smokescreen”⁸⁸ to cover up further brand promotion, whilst others have gone as far as suggesting that “moral jeopardy”⁸⁹ is generated when public health agencies are directly exposed to the industry. It is therefore all the more regrettable, in light of these criticisms, that the food and alcohol industries continue to be courted by policy-makers, not least the European Commission.

Combining a clause of minimum harmonisation with the state of establishment principle

The AVMS Directive sets up an interesting regulatory mechanism combining a clause of minimum harmonisation with the State of Establishment principle.

The clause of minimum harmonisation

Under Article 4 of the AVMS Directive, Member States are “free to require media service providers under their jurisdiction to comply with more detailed or stricter rules”. In light of the failure of the EU to act on existing evidence concerning the relationship between HFSS food and alcohol marketing and children’s health, several Member States have relied on this provision to exceed the minimum level of protection that the AVMS Directive provides. Some Member States have decided to ban advertising to children entirely for all goods and services, as Sweden has done since 1991.⁹⁰ Of the other Member States, a broad spectrum of approaches can be observed, focusing either on exposure or on power, or on both components of marketing.

⁸⁷ Gilmore, “Public health, corporations and the New Responsibility Deal” (2011) 33(1) *Journal of Public Health* 2, 2.

⁸⁸ G Rayner and T Lang, “Is nudge an effective public health strategy to tackle obesity?” (2011) 342 *BMJ* d2177.

⁸⁹ P Adams et al., “Poisonous partnerships: health sector buy-in to arrangements with government and addictive consumption industries” (2010) 105 *Addiction* 585, 587.

⁹⁰ Section 7 of the Radio and Television Act states that commercial advertising in television broadcasts, teletext and on-demand television may not be designed to attract the attention of children of less than 12 years of age. The Act is available in English at:

<http://www.radioochtv.se/Documents/Styrdokument/Radio%20and%20Television%20Act.pdf?epslanguage=sv>.

A multitude of national laws has been adopted on the protection of children from alcohol advertising.⁹¹ For example, France has opted to ban all alcohol advertising on television and in cinemas, and has also prohibited the sponsorship of cultural and sporting events by alcohol producers. Where advertising is allowed in other media forms such as the adult press, radio and billboards, it is subject to strict controls – communications must only refer to objective qualities of the products and must carry a health message.⁹² Other Member States have taken a less restrictive approach while still offering more protection than the AVMS Directive. For instance in Ireland, the statutory scheme in place not only mirrors Article 22 of the AVMS Directive but also bans both commercial communications for beverages of 25% alcohol by volume and those for ready-to-drink products such as alcopops.⁹³ These statutory provisions are supported by a self-regulatory code on alcohol advertising that contains restrictions on the use of youth culture, ‘treatments’ likely to appeal to children and characters that would have particular appeal to children.⁹⁴

One can also observe significant discrepancies from one Member State to another concerning the regulation of HFSS food marketing.⁹⁵ For example, Ofcom in the UK has introduced a ban on the scheduling of HFSS food advertising in or around programmes aimed at children (including pre-school children), or in or around programmes likely to be of particular appeal to children aged 4 to 15.⁹⁶ The UK has also banned the product placement for HFSS food and alcoholic beverages in all television programmes.⁹⁷ Moreover, alongside these scheduling restrictions (relating

⁹¹ Contact Committee document attached to minutes of 35th meeting of the Contact Committee established by Article 29 of the AVMS Directive, http://ec.europa.eu/avpolicy/docs/reg/tvwf/contact_comm/35_table_1.pdf.

⁹² The original text of the Loi Evin as part of the Public Health Code can be accessed at <http://www.legifrance.gouv.fr>.

⁹³ At sections 8.6.1 and 8.1.10 respectively. The statutory provisions can be accessed at http://www.bci.ie/documents/BCI_gen_ad_code_mar_07.pdf

⁹⁴ For section 7 of the Advertising Standards Authority Code on alcohol advertising, see

http://www.asai.ie/entiresection.asp?Section_Num=7&Section_Desc=Alcoholic%20Drinks.

⁹⁵ For a useful overview of the different rules on food marketing to children in EU Member States and beyond, see the map provided as part of the Stan-Mark project: <http://www.iaso.org/policy/marketing-children/policy-map/>.

⁹⁶ Details can be found at http://www.ofcom.org.uk/consult/condocs/foodads_new/.

⁹⁷ The Audiovisual Media Services (Product Placement) Regulations 2010 were adopted on 18 March and entered into force on 16 April 2010: SI 2010/831. They amend section 9 of Ofcom Broadcasting Code on commercial references featuring within television programming. Ofcom has subsequently published guidance on these rules, which entered into force on 28 February 2011. The Guidance is not binding, as

to exposure), the Advertising Standards Authority has introduced restrictions on the content of advertisements for HFSS food (power). Thus, the use of advertising techniques that are particularly effective on pre-school or primary school children is banned. These techniques include promotional offers such as free toys, nutritional and health claims, licensed characters and celebrities.⁹⁸ Similarly, the Irish Children's Advertising Code prohibits the use of celebrities or sport stars to promote HFSS food to children up to 18 years of age.⁹⁹ By contrast, the discussions which led to the amendment of the French Public Health Code in 2004 did not result in a ban on HFSS food marketing to children but, instead, in the compulsory disclosure of health messages in all advertisements for such products.¹⁰⁰

Nevertheless, the freedom that Member States derive from Article 4 is limited by Articles 3(1) of the AVMS Directive as well as by the general Treaty provisions on free movement.

The State of Establishment principle

Article 3(1) requires that:

“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 is commonly referred to as the State of establishment principle, Member States may only impose standards exceeding the minimum level of protection laid down in the AVMS Directive on audiovisual media service providers established in their jurisdiction.¹⁰¹ They cannot do so on providers established in other

explicitly confirmed at paragraph 1.1. For the Code and the Guidance, see: <http://stakeholders.ofcom.org.uk/broadcasting/broadcast-codes/broadcast-code/commercial-references-television/>. See A. Garde, “Towards the Liberalisation of Product Placement on UK Television?” (2011) 16 Communications Law 92.

⁹⁸ Details can be found at:

http://www.ofcom.org.uk/consult/condocs/foodads_new/.

⁹⁹ The Children's Advertising Code is available at:

http://www.bci.ie/codes/childrens_code.html.

¹⁰⁰ These health messages have given rise to vivid controversies, as discussed in M. Friant-Perrot and A. Garde, “La Publicité Alimentaire et la Lutte Contre l'Obésité Infantile en Droit Français et en Droit Anglais” (2011) Les Petites Affiches 27.

¹⁰¹ On the State of Establishment Principle, see A. Herold, “Country of Origin Principle in the EU Market for Audiovisual Media Services: Consumer's Friend or Foe?” (2008) 31 Journal of Consumer Policy 5; and Castendyk, Dommering and Scheuer, *European Media Law*, 2008, 847.

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.¹⁰² This reflects the concern that a balance should be struck between the free movement imperative of the internal market and other imperatives of public interest such as consumer and public health protection.¹⁰³ Thus, over 27 national standards have the potential to apply in the same Member State, depending on the place of establishment of the audiovisual media service provider transmitting its programme into its territory. Even if diversity is not problematic in itself, especially in areas where consumption patterns may vary significantly from one Member State to another, it becomes problematic if the common level of protection is not set at a sufficiently high level of protection across the EU and fails to reflect existing evidence, as is the case in relation to the provisions regulating the marketing of HFSS food and alcoholic beverages. This is most vividly illustrated when audiovisual media services are retransmitted from one Member State to another Member State with a higher level of protection, which is then prevented from enforcing its stricter standards even though the two countries share the same language and have strong cultural affinities which are likely to increase the movement of cross-border services (France and Belgium, Germany and Austria, the UK and Ireland...). It is therefore not surprising that in its Recommendations on food marketing to children the WHO has stressed the need to adopt *effective* cross-border standards.¹⁰⁴ The EU has an important responsibility to ensure that the efforts of its Member States are not frustrated. This is even mandated by the Treaty on the Functioning of the European Union.¹⁰⁵

The general free movement Treaty provisions

The second limit imposed on the freedom of Member States to adopt stricter standards than the ones laid down in the AVMS Directive stem from the general Treaty provisions, and in particular Article 34 TFEU on the free movement of goods and Article 56 TFEU on the free movement of services. The case law of the Court of Justice on these two provisions has tended to leave a relatively broad margin of

¹⁰² 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.

¹⁰³ This was clearly confirmed by the Court 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 harmonisation and the State of Establishment principle: Case C-34/95 *De Agostini* [1997] E.C.R. I-3875.

¹⁰⁴ Recommendation 6. Emphasis added.

¹⁰⁵ Articles 9, 114(3) and 168(1) TFEU require that the EU shall ensure a high level of public health protection in all its policies.

discretion when public health concerns had prompted a Member State to restrict the marketing of certain goods and services. Thus, in *Bacardi*, the *Loi Evin* imposing a near total ban on alcohol advertising in France was challenged.¹⁰⁶ After accepting that restrictions on the advertising of alcoholic beverages reflected public health concerns, the Court stated:

“[R]ules on television advertising such as those at issue in the main proceedings are appropriate to ensure their aim of protecting public health. Furthermore, they do not go beyond what is necessary to achieve such an objective. They limit the situations in which hoardings advertising alcoholic beverages may be seen on television and are therefore likely to restrict the broadcasting of such advertising, thus reducing the occasions on which television viewers might be encouraged to consume alcoholic beverages.”¹⁰⁷

Thus, in this decision, the Court hardly discussed the proportionality of the measure, leaving a particularly broad, largely unfettered discretion to Member States.¹⁰⁸ Similarly, when requested to assess the compatibility of the Norwegian visual display ban on tobacco products, the EFTA Court ruled that review of proportionality and of the effectiveness of the measures taken relied on findings of fact which the national court was in a better position to make.¹⁰⁹ It concluded:

“[I]t is for the national court to identify the aims which the legislation at issue is actually intended to pursue and to decide whether the public health objective of reducing tobacco use by the public in general can be achieved by measures less restrictive than a visual display ban on tobacco products.”¹¹⁰

¹⁰⁶ Case C-429/02 *Bacardi France* [2004] E.C.R. I-6613. See also the judgment delivered on the same day in Case C-262/02 *Commission v France* [2004] E.C.R. I-6569.

¹⁰⁷ Case C-429/02 *Bacardi France* [2004] E.C.R. I-6613, at [38].

¹⁰⁸ As Tridimas has noted, the Court paid lip service to the argument that indirect television advertising was allowed in multinational sporting events where the French audience was very high but not in bi-national events which tended to attract lower audience numbers. The Court confined itself to pointing out that bi-national events targeted specifically a French audience and therefore the restriction of the prohibition to such events made it proportionate. The Court was preoccupied not so much with upholding a consistent health policy but with national choice: T. Tridimas, *The General Principles of EU Law*, 2nd edition (Oxford: Oxford University Press, 2006), 222.

¹⁰⁹ Case E-16/10 *Philip Morris*, 12 September 2011, at [86], annotated by A. Alemanno, “Legality, rationale and science of tobacco display bans after the Philip Morris judgment” (2011) 4 *European Journal of Risk Regulation* 591.

¹¹⁰ Case E-16/10 *Philip Morris*, 12 September 2011, at [88].

Even though the EFTA Court stated that the national authorities needed to demonstrate that they had complied with the principle of proportionality,¹¹¹ it did not prove willing to check whether the Norwegian authorities had done so when adopting the contested measures.¹¹²

The diversity resulting from the regulatory framework laid down in the AVMS Directive therefore becomes a problem not only from the point of view of consumer and public health protection, but also from the point of view of market integration. Overall, therefore, the AVMS Directive is a failure on both counts: it does not adequately contribute to the proper functioning of the internal market and it does not ensure a sufficiently high level of consumer and public health protection. This conclusion becomes even more compelling if one replaces the provisions of the AVMS Directive within the broader EU framework of consumer and fundamental rights protection.

The protection of children as particularly vulnerable consumers

The EU regulatory framework of consumer protection explicitly acknowledges that children are particularly vulnerable consumers who deserve specific protection from harmful commercial practices. The provisions of the AVMS Directive discussed above somewhat reflect this view in that they contain provisions regulating marketing to children, as opposed to the public at large. However, as these provisions are not sufficiently effective in protecting children, the question arises whether any other EU legislative instruments offer a satisfactory alternative. We will briefly consider the Unfair Commercial Practices (UCP) Directive and the E-Commerce Directive, before considering the EU fundamental rights agenda.

The Unfair Commercial Practices and E-Commerce Directives

The UCP Directive regulates business-to-consumer commercial practices, the definition of which encompasses “commercial communications including advertising and marketing”.¹¹³ However, there are a number of worrying flaws in the UCP

¹¹¹ Case E-16/10 *Philip Morris*, 12 September 2011, at [85].

¹¹² The intensity of review and the use that the Court should make of evidence are discussed in more detail in A. Garde, “Freedom of Commercial Expression and Public Health Protection: The Principle of Proportionality as a Tool to Strike the Balance” in L. Gormley and N. Nic Shuibhne (eds) *From Single Market to Economic Union – Essays in Honour of John Usher* (Oxford: Oxford University Press, 2012), 117.

¹¹³ Article 2(d) of Directive 2005/29 on unfair business-to-consumer commercial practices in the internal market, [2005] OJ L149/22. It is true that the UCP Directive excludes from its scope health and safety concerns (Article 3(5)). It is nonetheless relevant to the argument as it covers all practices that are likely to have a substantial impact on the economic behaviour of consumers (Article 5). On the difficulties

Directive that mean that it too cannot be relied upon to effectively protect children from harmful commercial practices promoting the consumption of HFSS food and alcoholic beverages.

The first problem comes in the conception of the UCP Directive of what a vulnerable consumer is. Age is explicitly recognised as a factor of vulnerability:

“Commercial practices which are likely to materially distort the economic behaviour only of a clearly identifiable group of consumers who are particularly vulnerable to the practice or the underlying product because of their mental or physical infirmity, age or credulity in a way which the trader could reasonably be expected to foresee, shall be assessed from the perspective of the average member of that group.”

Regrettably, the prospects that this provision may have offered are significantly reduced by the last sentence of this article:

“This is without prejudice to the common and legitimate advertising practice of making exaggerated statements or statements which are not meant to be taken literally.”

Such advertising, commonly known as “puffery” or “puffs”, should be one of the prime examples of advertising that a vulnerable consumer such as a child should be protected against, since it is precisely because of their increased credulity or young age that they are unable to avoid taking exaggerated statements literally.¹¹⁴ The value of “puff” advertising to, for example, an alcohol producer lies in the incredulous or amused reaction the viewer has to it and their then increased tendency to remember it. Such practices, while recognisable by adults, could be very dangerous to children since they are far less likely to recognise “puff” advertisements as attention grabbing embellishments upon reality and not reflections of it, especially if the exaggeration is a fairly mild one. Therefore the decision to exclude the practice of “puff” advertising from situations in which the vulnerable consumer benchmark could apply

involved in drawing the line between the health and economic interests of children, see A. Bakardjieva-Engelbrekt, *EU Marketing Practices Law in the Nordic Countries: Consequences of a Directive on Unfair Business-to-Consumer Commercial Practices* (Helsinki: the Nordic Council of Ministers Committee on Consumer Affairs, 2005), 58; and A. Garde, “The Unfair Commercial Practices Directive: A Successful Example of Legislative Harmonisation?” in P. Syrpis (ed.) *The Judiciary, the Legislature and the Internal Market* (Cambridge: Cambridge University Press, 2012) 118, 143.

¹¹⁴ A. Garde, “Advertising Regulation and the Protection of Children-Consumers in the European Union: In the Best Interest of... Commercial Operators?” (2011) 19 *International Journal of Children’s Rights* 523, 528.

considerably reduces the protection the Directive offers against alcohol and HFSS food marketing employing such techniques, especially since, as Article 5(3) itself points out, such techniques are common. Importantly, it reduces the effectiveness of the UCP Directive against advertising that has complied with the requirements of the AVMS Directive yet remains appealing to children, perhaps through the use of humour or references to youth culture. Advertising practices complying with the letter of the AVMS Directive might still be viewed as unfair exploitation of a vulnerable group under the UCP Directive, however the exclusion described above drastically reduces the scope for such a conclusion.

A further problem with the vulnerable consumer benchmark in general, when bearing in mind the provisions of the AVMS Directive, is that Article 5(3) stipulates that a practice must distort the “economic behaviour only of a clearly identifiable group of consumers” which suggests, as confirmed in Recital 18, that a practice must be aimed specifically at a particular group of consumers. It has already been noted above that under the AVMS Directive rules on alcohol advertising can still legally reach children without being specifically aimed at them. Such an advertisement would not only fail to be caught by the AVMS Directive, but it would also probably not stand to be assessed according to the vulnerable consumer test laid down in the UCP Directive. The difficulties are further compounded by the fact that children are not a homogenous group of consumers – children of 6 years old will react differently to advertising from children of 14 years old, due to different cognitive abilities. This is not to say, however, that the latter category of children does not need specific protection.

Furthermore, and as the European Parliament noted in its 2010 report on the impact of advertising on consumer behaviour,¹¹⁵ the UCP Directive does not cover “hidden” internet advertising amounting to consumer-to-consumer, as opposed to business-to-consumer, in the form of comments posted on social networks, forums and blogs, the content of which is difficult to distinguish from mere opinion. The development of such advertising is all the more worrying as in some cases “certain business operators finance directly or indirectly any action to encourage the dissemination of messages or comments appearing to emanate from consumers themselves when in reality these messages are of an advertising or commercial nature”.¹¹⁶ The Parliament also voiced its concern about “the routine use of behavioural advertising and the development of intrusive advertising practices (such as reading the content of emails, using social networks and geolocation, and retargeted advertising), which constitute attacks on consumers’ privacy”.¹¹⁷

¹¹⁵ Report of the Committee on the Internal Market and Consumer Protection, 23 November 2010, A7-0338/2010.

¹¹⁶ At p. 8.

¹¹⁷ *Ibid.*

Regrettably, the E-Commerce Directive does not alleviate these concerns.¹¹⁸ As it is primarily intended to ensure the free flow of information society services between the Member States, including on-line advertising, one may have hoped that its provisions would have provided a degree of protection in areas not sufficiently well covered by the AVMS Directive, such as new or on-demand media popular with children. However, even a cursory examination of its provisions shows that it cannot make up for the shortcomings of the AVMS Directive. First, an information society service according to the Recitals is “any service normally provided for remuneration”, which means that the E-Commerce Directive will have the same problems in catching some important promotional tools as the AVMS Directive. Secondly, the provisions relevant to online advertising simply do not address the issue of the protection of children from harmful content. Articles 6 to 8, which deal specifically with commercial communications, only require that advertising and the advertiser be identifiable as such. Nothing of substance in the E-Commerce Directive therefore provides any extra measure of protection for children against the marketing of alcoholic beverages and HFSS food.

The EU Consumer Strategy for 2014-2020 explicitly recognises that vulnerable consumers will need specific protection.¹¹⁹ Nevertheless, it does not attempt to determine who these vulnerable consumers may be and what specific protection they may require.¹²⁰ In particular, if we look at the regulation of marketing to children, there is hardly anything at all to give us comfort. The Commission will determine whether new labelling rules are required for alcoholic beverages;¹²¹ it has also undertaken to report on whether the rules laid down in the UCP Directive are adequately enforced.¹²² There is no mention of the need to limit the exposure of children to marketing, and the marketing of alcoholic beverages and HFSS food more specifically. This is extremely disappointing. Not only does the EU framework fail to reflect existing evidence, but it also fails to comply with the rights-based rhetoric that EU institutions have endorsed in recent years.

For a fundamental-rights based approach

The knowledge that we have acquired from the EU’s tobacco litigation experience is that industry operators have tended to react quickly to the threat of marketing

¹¹⁸ Directive 2000/31/EC on electronic commerce [2000] OJ L178/1.

¹¹⁹ European Commission, *A European Consumer Agenda – Boosting confidence and growth* COM(2012) 225 final.

¹²⁰ The European Parliament issued a report laying down a strategy for strengthening the rights of vulnerable consumers, Committee on the Internal Market and Consumer Protection, 8 May 2012, A7-0155/2012. In this report, it noted the diversity of vulnerable situations (at p. 6).

¹²¹ At p. 14.

¹²² At p. 13.

restrictions by invoking fundamental rights, and in particular: Article 11 of the EU Charter on freedom of expression; Article 15 on the right to choose an occupation and the right to engage in work; Article 16 on the freedom to conduct a business; or Article 17 on the right to property.¹²³ By contrast, public health and consumer advocates have been slow to embrace the fundamental rights discourse, even though this discourse offers great potential to strengthen the public health agenda they pursue.

In two recent decisions, *Deutsches Weintor*¹²⁴ and *Sky Österreich*,¹²⁵ the Court rejected the rights-based arguments industry operators had put forward in order to protect their economic interests. In both cases, the Court concluded that the rights of commercial operators were not absolute and had to be balanced against competing fundamental rights also protected by the EU legal order. In particular, it clearly stated that the freedom to choose an occupation, the right to property and the freedom to conduct a business had to be considered in relation to their social function. Thus, restrictions may be imposed on the exercise of those rights and freedoms, provided that such restrictions are imposed by law, correspond to objectives of general interest pursued by the European Union and do not constitute, with regard to the aim pursued, a disproportionate and intolerable interference, impairing their very substance.¹²⁶

“Where several rights and fundamental freedoms protected by the European Union legal order are at issue, the assessment of the possible disproportionate nature of a provision of European Union law must be carried out with a view to reconciling the requirements of the protection of those different rights and freedoms and a fair balance between them.”¹²⁷

Thus, in *Sky Österreich*, the Court held that the EU legislature could limit the freedom to conduct a business and the right to property “to give priority, in the necessary balancing of the rights and interests at issue, to public access to information over contractual freedom”.¹²⁸ Similarly, and most interestingly for our purposes, the

¹²³ See in particular: C-376/98 *Germany v Council and the European Parliament* [2000] E.C.R. I-8419 (*Tobacco Advertising I*); Case C-491/01 *BAT and Imperial Tobacco* [2002] E.C.R. I-11453; and Case C-380/03 *Germany v Council and the European Parliament* [2006] E.C.R. I-11573 (*Tobacco Advertising II*).

¹²⁴ Case C-544/10 *Deutsches Weintor* [2012] E.C.R. I-xxx, 6 September 2012, not yet reported.

¹²⁵ Case C-283/11 *Sky Österreich* [2013] E.C.R. I-xxx, 22 January 2013, not yet reported.

¹²⁶ *Deutsches Weintor*, at [42] to [60], and *Sky Österreich*, at [45] to [50].

¹²⁷ *Sky Österreich*, at [60].

¹²⁸ *Sky Österreich*, at [66]. In this case, *Sky Österreich* challenged the validity of Article 15(6) of the AVMS Directive requiring, when read in conjunction with the rest of Article 15, that Member States shall ensure that any broadcaster established in

Court specifically relied, in its *Deutsches Weintor* decision, on Article 35 of the EU Charter, which requires that “a high level of human health protection be ensured in the definition and the implementation of all Union policies and activities”, to conclude that the EU legislature had not exceeded its margin of discretion by banning the use of health claims on all beverages containing more than 1.2% by volume of alcohol.¹²⁹ This article is not the place to analyse the right to health.¹³⁰ Suffice to say that a proportionality analysis would enable EU institutions to successfully invoke rights-based arguments to limit the marketing to children of alcoholic beverages and HFSS food far more strictly than they have done to date.¹³¹ This would also allow the Commission to reconcile its discourse on children’s rights with practice, closing an embarrassing gap.¹³² This depends, however, on whether the necessary political will is present. Unfortunately, the first application report on the AVMS Directive suggests that it clearly is not. The only commitment that the Commission has made is to “initiate necessary research in 2013” in order “to assess the impact of commercial communications, particularly for alcoholic beverages, on minors as regards exposure and consumption behaviour, and the effectiveness of the Directive’s restrictions in achieving the requisite protection”.¹³³ How much more evidence does the Commission need?

Conclusion

the EU has access to events of high interest to the public which are transmitted on an exclusive basis by a broadcaster established under their jurisdiction so that any broadcaster can choose short extracts to be used in general news programmes *without being charged more than the additional costs directly incurred in providing access*.

¹²⁹ Article 4(3) of Regulation 1924/2006 on nutrition and health claims made on foods, [2006] OJ L404/9, as last amended by Commission Regulation 116/2010, [2010] OJ L37/16.

¹³⁰ For a comprehensive analysis, see J. Tobin, *The Right to Health in International Law* (Oxford: Oxford University Press, 2012).

¹³¹ For a similar argument in relation to tobacco control, see the excellent contribution by O. Cabrera and L. Gostin, “Human Rights and the Framework Convention on Tobacco Control: mutually reinforcing systems” (2011) 7(3) *International Journal of Law in Context* 285.

¹³² On the EU Children’s Rights Strategy, see H. Stalford, *Children and the European Union – Rights, Welfare and Accountability* (Oxford: Hart Publishing, 2012). On the failure of the EU to uphold the best interest of the child in its consumer and public health policies, see A. Garde, “The Best Interest of the Child and EU Consumer Policy: A Major Gap between Theory and Practice?” in J. Devenney and M. Kenny (eds), *The Theory and Practice of EU Consumer Law and Policy* (Cambridge: Cambridge University Press, 2012), 164.

¹³³ At p. 8.

The difficulties involved in determining what constitutes a proportionate response to the growing burden of NCDs should not detract from the necessity of developing comprehensive rules on the marketing of alcoholic beverages and HFSS food. EU institutions must take stock of existing evidence and devise effective policies limiting the impact on children of alcohol and HFSS food marketing, reflecting the independent evidence that has accumulated over the years. This is particularly so as the budgets that public authorities have allocated to nutrition and responsible drinking education campaigns cannot match the budgets that food and alcoholic beverage operators devote to the promotion of their products to children. If NCD trends are to be reversed, the fundamental rights rhetoric should move away from the industry's narrow focus on the right to free expression to a focus on other rights such as the right to health, the right to education, the right to information or the right to (nutritious) food.

As Olivier de Schutter, the UN Special Rapporteur on the Right to Food, has stated:

“[I]t is unacceptable that when lives are at stake, we go no further than soft, promotional measures that ultimately rely on consumer choice, without addressing the supply side of the food chain. Food advertising is *proven* to have a strong impact on children, and must be strictly regulated in order to avoid the development of bad eating habits early in life.”

There is “no reason why the promotion of foods that are known to have detrimental health impacts should be allowed to continue unimpeded”.¹³⁴ The same goes for the marketing of alcoholic beverages. Perhaps the EU institutions will, one day, seize the (red) bull by the horns... It could give them wings!

¹³⁴ *The Right to an Adequate Diet: the Agriculture-Food-Health Nexus*, Report presented at the 19th Session of the United Nations Human Rights Council, 26 December 2011, A/HRC/1/9/59, http://www.srfood.org/images/stories/pdf/officialreports/20120306_nutrition_en.pdf.