PROTECTING CHILDREN FROM THE HARMFUL IMPACT OF UNHEALTHY FOOD AND ALCOHOL MARKETING

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Despite the accumulation of unequivocal evidence that unhealthy food[1] and alcohol marketing negatively affect children's preferences, purchase requests, consumption choices and, ultimately, their health, the EU has failed to reflect such evidence in the revised Audiovisual Media Services Directive (AVMSD), notwithstanding the sustained public health campaign advocating for a more evidence-based, EU-wide response to the problem.

After briefly highlighting the major gaps in the EU rules on unhealthy food and alcohol marketing to children (I), this strategic paper is intended to reflect on alternative avenues that could be envisaged to maintain the pressure on the EU, its Member States, as well as the food, alcohol and advertising industries, to ensure that children are no longer exposed to unhealthy food and alcohol marketing and are therefore effectively protected from the harm such marketing causes. It focuses more specifically on:

- the opportunities that the General Data Protection Regulation (GDPR) may offer for the regulation of marketing to children, and digital marketing more specifically (II);

- the extent to which food and alcohol marketing may be regulated at EU level in light of the constitutional principle of attributed powers (III);

I. The revised AVMSD: a continuing source of disappointment

In May 2016, the European Commission published a proposal for a revised AVMSD. After over two years of debate, the revised AVMSD was finally adopted on 6 November 2018.[2] Directive 2018/1808 was published in the Official Journal of the European Union on 24 November 2018.[3] As Directive 2010/13 which it amends, it is based on Articles 53(1) and 62 TFEU (free movement of services). Member States have until 19 September 2020 to implement its provisions at national level.

Overall, it is fair to say that, the marketing of tobacco products aside, the AVSMD has been a constant source of disappointment for public health and consumer advocates interested in the prevention of obesity and diet-related NCDs. The provisions it lays down on alcohol and food

[1] The notion of "unhealthy food" is to be fleshed out using nutrient profiles. It refers to nutritiously poor, high sugar, fat and salt food.

[2] On the main stages of the revision process, see: https://ec.europa.eu/digital-single-market/en/revision-audiovisual-media-services-directive-avmsd.

[3] OJ 2018 L 303/69: https://eur-lex.europa.eu/legal content/EN/TXT/PDF/?uri=CELEX:32018L1808&qid=1544850151346&from=en

marketing are particularly weak (1), whilst the scheme it has set up significantly limits the freedom of Member States to regulate such marketing in order to protect children as particularly vulnerable consumers (2). There may however be a few opportunities that EPHA may want to seize as Member States implement its provisions at national level (3).

This section does not propose to review in detail the limits of the existing regulatory framework.[4] It merely summarises them and highlights some opportunities that may arise from its implementation.

1. A weak regulatory framework

The standards adopted are low and not sufficiently in line with existing evidence supporting the adoption of comprehensive approaches to unhealthy food and alcohol marketing restrictions. If the EU has banned the specific targeting of children by alcohol marketing, this provision is not sufficient to effectively reduce the exposure of children to audiovisual commercial communications for alcoholic beverages. The responsibility is placed on industry operators through the adoption of codes of conduct.

The situation is worse for unhealthy food marketing: the EU has not even prohibited the marketing of unhealthy food specifically targeting children. Reliance is placed exclusively on self- and co-regulation. One should note the reference in the Preamble of the Directive to WHO EURO's nutrient profiling model.

There are major gaps in the scope of the AVMSD. In particular, the Directive only covers audiovisual commercial communications, leaving a broad range of media and marketing techniques uncovered. In particular, there is no equivalent legislation on food and alcohol marketing as there is for tobacco (see Directive 2003/33 on tobacco advertising and sponsorship and Directive 2014/40 on tobacco products, both discussed in section 3 below). Regulation 1924/2006 lays down conditions for the use of nutrition and health claims made on foods, but it does not cover the many other marketing techniques used to promote unhealthy food and alcohol. Similarly, and as discussed in the next section, the General Data Protection Regulation (GDPR) can only help to address limited aspects of the food and alcohol marketing debate.

The legislative provisions are complemented by unsatisfactory, not evenly applied industry self-regulatory standards: e.g. the EU Pledge. It is true that the revised AVMSD has increased the pressure resting on industry operators to develop more effective codes of conduct by requiring that "those codes of conduct shall aim to effectively reduce the exposure of minors" to audiovisual commercial communications for both alcoholic beverages and unhealthy food. Nevertheless, codes of conduct remain voluntary, and such voluntary measures have been shown to have largely failed to "effectively" protect children from such marketing. Not only are they ridden with loopholes which allow for significant marketing investment shifts, but they are also inherently flawed and fail to address the criticism that they do not account for "real, perceived or potential conflicts of interest". Furthermore, it is difficult to understand the claim made in Recital 31 that "in order to remove barriers to the free circulation of cross-border services within the Union, it is necessary to ensure the effectiveness of self-

[4] For a more detailed discussion, see: O. Bartlett and A. Garde, 'Time to Seize the (Red) Bull by the Horns: the EU's Failure to Protect Children from Alcohol and Unhealthy Food Marketing', *European Law Review* (2013) 498; and 'The EU's Failure to Support Member States in their Implementation of the WHO Recommendations: How to Ignore the Elephant in the Room?' (2017) 8(2) *European Journal of Risk Regulation* 251.

and co-regulatory measures aiming, in particular, at protecting consumers or public health". How can one genuinely hope that voluntary self-regulatory standards remove barriers to intra-EU trade and therefore achieve a level playing for businesses and a high level of health protection for all EU consumers?

Existing gaps relating to food and alcohol marketing are not filled in by other, more general provisions of the AVMSD. In particular, the provision prohibiting direct exhortation to children to buy (Article 9(1)(g)) or the provision prohibiting behaviour prejudicial to health (Article 9(1)(c)(iii) are too narrowly defined to contribute to the regulation of alcohol and unhealthy food marketing to children.

2. The Member States' limited freedom to regulate alcohol and food marketing

The revised AVMSD does not amend the **minimum harmonisation** provision contained in Article 4:

> Member States shall remain free to require media service providers under their jurisdiction to comply with more detailed or stricter rules in the fields coordinated by this Directive provided that such rules are in compliance with Union law.

Member States therefore retain their discretion to adopt more robust regulatory standards by exceeding the bare minimum provided at EU level, which several Member States have done. Several Member States have used this minimum harmonisation clause,[5] and Member States should be encouraged to do so when implementing the AVMSD in their national legal orders.

However, the freedom of Member States to effectively regulate unhealthy food and alcohol marketing to children is as limited in the revised version of the AVMSD as it previously was. In particular, **the State of Establishment principle** remains at the heart of the system in place and is enunciated in Article 3(1):

> 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.

Member States can derogate from this rule, in particular in the event of "a serious and grave risk of prejudice to public health" (Article 3(2)). This is most unlikely to include the harm caused by alcohol and unhealthy food marketing.

The problem stemming from the combination of a clause of minimum harmonisation with the State of Establishment principle is vividly illustrated by the complaint Sweden initiated against the broadcasting into its territory of alcohol advertising by two broadcasters established in the UK. While Sweden restricts the marketing and advertising of alcohol, the UK does not do so to the same extent. The Swedish authorities notified the European Commission that they intended to take measures against the broadcasting companies in question. However, on 31 January 2018, the Commission responded that Sweden could not derogate from the State of Establishment principle. In particular, the Commission rejected the argument put forward by

[5] For an overview of existing rules on the marketing of unhealthy food in Europe, see the recent report published by the WHO Regional Office in October 2018: www.euro.who.int/__data/assets/pdf_file/0003/384015/food-marketing-kids-eng.pdf.

Sweden that the broadcasters had established themselves in the UK in order to circumvent the stricter Swedish alcohol advertising rules.[6]

3. Some limited opportunities following the adoption of the revised AVMSD to argue for more effective regulation of alcohol and food marketing to children

EPHA should scrutinise the transposition of the revised AVMSD and use the implementation period to support the use of the minimum harmonisation clause by Member States, whilst continuing to expose the inadequacy of the EU response and its incompatibility with the EU mandate to ensure a high level of public health protection in the development and implementation of all its policies and to protect the rights of children (discussed further below).

A few changes noted below can help the development of EPHA's strategy in this field, and in particular:

- the explicit reference to the WHO EURO nutrient profiling model,[7] which could provide a level playing field as to how food should be categorised into healthier and unhealthier categories; and

- the explicit mention that codes of conduct should effectively tackle exposure – which implies that a narrow focus on the targeting of children is outdated to ensure the effective protection of children from unhealthy food and alcohol marketing.

At EU level, EPHA could reflect on how it could influence the ongoing work of the Joint Research Centre (JRC).[8] A meeting took place in Varese on 15 and 16 May 2018 where the JRC gathered several experts with a view to defining the parameters of what could constitute "best practice" in this policy area. During the Austrian EU Council Presidency Conference on Healthy Food Systems held in Vienna on 22 November, the JRC noted that they were in the process of analysing all existing codes of conduct in the EU dealing with alcohol and food marketing to children.

Even it is indeed appropriate to assess what amounts to "best practice" in the eyes of the EU Commission with a degree of scepticism, it would be useful to follow the process carefully:

- to address any gaps between evidence and (best) practice;
- to maintain the issue of unhealthy food and alcohol marketing high on the EU agenda and in public debates; and
- to increase the pressure on the EU, its Member States and industry operators to account for their failure to protect children effectively.

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[6] Commission decision COM(2018) 532 final: https://ec.europa.eu/digital-single-market/en/news/commission-decides-swedish-ban-alcohol-advertising-not-compatible-eu-rules.
[7] http://www.euro.who.int/__data/assets/pdf_file/0005/270716/Nutrient-children_web-new.pdf.
[8] https://ec.europa.eu/jrc/en/health-knowledge-gateway/promotion-prevention/other-policies/marketing.

II. The potential of the GDPR to restrict the profiling of children for marketing purposes

Several EU legislative instruments recognise children as particularly vulnerable consumers who should be protected from harmful marketing practices.[9] It is therefore interesting to investigate the extent to which existing EU legislation could be invoked to ensure that children are more effectively protected from unhealthy food and alcohol marketing. This section focuses more specifically on Regulation 2016/679 on data protection (also known as the General Data Protection Regulation or GDPR).[10] If the GDPR is intended to protect the rights to data subjects to privacy and data protection (1), it also suggests that the use of data is a legitimate practice – though it recognises child as data subjects requiring special protection (2), opening new avenues of work for EPHA and other similarly minded organisations (3).

1. The rights to privacy and data protection at the heart of the GDPR

The GDPR is seen as a cornerstone of the EU Digital Single Market Strategy[11] and recognises that the free movement of data should not be unconditional: it should respect the right to privacy and the right to data protection. It is based on Article 16 of the TFEU and refers explicitly to Article 8 of the EU Charter of Fundamental Rights.

Article 16 TFEU

1. Everyone has the right to the protection of personal data concerning them.

2. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall lay down the rules relating to the protection of individuals with regard to the processing of personal data by Union institutions, bodies, offices and agencies, and by the Member States when carrying out activities which fall within the scope of Union law, and the rules relating to the free movement of such data. Compliance with these rules shall be subject to the control of independent authorities.

[...]

Article 8 EU Charter
Protection of personal data

1. Everyone has the right to the protection of personal data concerning him or her.

2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the

[9] OJ 2005 L 149/22. The UCPD considers children as a group of particularly vulnerable consumers (Article 5(3)) and therefore prohibits the inclusion in an advertisement of a direct exhortation to children to buy advertised products or persuade their parents or other adults to buy advertised products for them (Point 28 of Annex I which lists all the commercial practices considered unfair in all circumstances). The Commission has published guidance on the scope of protection of children-consumers, identifying special issues regarding online games and social media (COM(2016) 320 final: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016SC0163&from=EN). For a discussion of the complex relationship of the UCPD with the AVMSD, see…

[10] OJ 2016 L 119/1.

[11]

right of access to data which has been collected concerning him or her, and the right to have it rectified.

3. Compliance with these rules shall be subject to control by an independent authority.

Nevertheless, Recital 4 notes that the rights to privacy and data protection are not absolute:

> **The processing of personal data should be designed to serve mankind**. The right to the protection of personal data is **not an absolute right**; it must be considered in relation to **its function in society** and be **balanced** against other fundamental rights, in accordance with the principle of **proportionality**. **This Regulation respects all fundamental rights and observes the freedoms and principles recognised in the Charter as enshrined in the Treaties**, in particular the respect for private and family life, home and communications, the protection of personal data, freedom of thought, conscience and religion, freedom of expression and information, freedom to conduct a business, the right to an effective remedy and to a fair trial, and cultural, religious and linguistic diversity.

In other words, the GDPR allows the restriction to the right to data protection only if the restriction is proportionate. In relation to advertising, the argument can be made that advertising itself can be problematic from a rights-perspective and that health and privacy concerns, particularly when involving children, should be primary. Bearing in mind the increasingly invasive marketing techniques used to target consumers, the GDPR may therefore offer an effective entry point into the regulation of particularly worrying forms of direct online marketing to children, not least the collection of their personal data for marketing purposes.

2. Conditions for the lawful collection and processing of personal data

The collection and processing of personal data is subject to various conditions. In particular, **Article 6(1) – the key provision of the GDPR** – lists the various situations in which it is lawful.

> Processing shall be lawful only if and to the extent that at least one of the following applies:
>
> (a) the data subject has given **consent** to the processing of his or her personal data for one or more specific purposes;
>
> […]
>
> (f) processing is necessary for the purposes of the **legitimate interests** pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child.

This provision raises several questions, not least the interpretation of the notion of "consent", which is particularly difficult when the data subject is a child, and the extent to which data processing for marketing purposes pursues legitimate interests, and if so whether, when and in

which conditions these interests can be overridden by the fundamental rights and freedoms of the child.

These questions will require far more investigation than I have done at this stage. However, there is a growing body of relevant documents which help answer these questions. My research this year will focus on developing a more thorough understanding of the law on privacy and data protection and how it relates to the regulation of marketing and its impact on child health.

Here are a few reference points to bear in mind.

Firstly, the **Article 29 Working Party** has provided authoritative (though not legally binding) guidance on the key notions underpinning the provisions of the GDPR (and its predecessor Directive 95/46 on data protection[12]).

Secondly, a growing number of complaints have been filed before the **national data protection authorities** established under the GDPR and responsible for its effective application. On January, the CNIL (France) delivered a first decision condemning Google's privacy policy for violating the GDPR, and more specifically its provisions on consent.

Thirdly, the case law of the EU Court of Justice is developing. In particular, there is a case pending against Facebook. There is also relevant case law fleshing out the key notions of "legitimate interests" and "consent" for the purposes of EU data protection law.

As the GDPR itself confirms, "given that children merit specific protection, any information and communication, where processing is addressed to a child, should be in such a clear and plain language that the child can easily understand" (Recital 58). It is only then that **consent** can be informed (see Articles 7 and 8 on consent).

Marketing is generally considered as a legitimate inteirest in EU law. In particular, it is seen as an instrument of market integration and is viewed as a form of expression (commercial expression) worthy of protection under Article 10 of the European Convention on Human Rights and Article 11 of the EU Charter on Fundamental Rights as interpreted respectively by the European Court of Human Rights and the CJEU. However, the right to free commercial expression is not absolute and can be limited significantly, as the case law of the CJEU upholding the validity of the EU Tobacco Advertising and Tobacco Products Directives has demonstrated. This position is similarly reflected in the GDPR: Recital 47 suggests that "the processing of personal data for direct marketing purposes may be regarded as carried out for a legitimate interest", whilst Article 6(1)(f) itself refers to the need to balance potentially competing interests: the rights and legitimate interests of commercial operators to promote their goods, services and brands *v* the rights and interests of children. A proportionality analysis will be key to the implementation of this provision of the GDPR.

In particular, there is a strong argument to be made that children should not be subject to profiling and their data should not be processed to target them directly with marketing

[12] OJ 1995 L 281/31.

communications, particularly for unhealthy food and alcohol. Firstly, Recital 71 explicitly mentions that automated processing should not concern a child. Secondly, if the GDPR is replaced within the broader context of EU consumer protection law and policy, it is clear that the direct exhortation to children to buy is unlawful, as discussed above in relation to the UCPD, and that online profiling has no other purpose than the direct targeting of children: profiling is as personalised as marketing can ever be. Thirdly, it is very clear that children's rights are negatively impacted as a result of such practices (the rights to privacy and data protection, but the right to health, the right to adequate food and other related rights if the question is considered in the context of alcohol and unhealthy food marketing).

3. Bringing together public health, consumer and data protection/privacy experts

The GDPR can contribute to the debates relating to the marketing of unhealthy food and alcohol to children, and could offer new advocacy avenues for EPHA and public health associations, and. The potential of this legislative instrument is particularly significant in light of three factors:

- The GDPR applies to technology and marketing giants such as Google and Facebook who are established outside the EU.

- The GDPR mandates the establishment in each Member State of an independent national authority and provides for a complaint mechanism which is in addition to and does not prejudice possible law suits.

- The enforcement of the GDPR provisions is further reinforced by the possibility to impose significant fines in case of non-compliance: total fines can reach 4 percent of global turnover in certain cases. Based on Google's worldwide annual revenue in 2017, that figure could be a staggering $4 billion.

Time is all the riper to expose the harmful practices of marketing giants such as Facebook and Google in the wake of the various scandals affecting them and the growing public distrust that seems to have resulted therefrom. EPHA could reflect on the extent to which it could leverage on these developments and use the momentum to argue for a stricter regulation of the marketing practices used in the digital environment to promote alcohol and unhealthy food to children. This is all the more so as the EU has already proven willing to challenge the commercial practices of these powerful economic operators.
On 27 November 2018, complaints have been lodged simultaneously against Google in seven Member States, with the support of BEUC. These cases do not focus specifically on children, but they should nonetheless be followed closely for a number of reasons:

- They will contribute to the interpretation of key notions underpinning the GDPR that will have significant repercussions for any possible public health campaign calling for the restriction of unhealthy food and alcohol marketing to children (e.g. What is informed consent? What constitutes a "legitimate interest"?)

- They will allow for a better understanding of who the key actors are and can therefore help forge more effective alliances. To seize these opportunities, EPHA will need to liaise with new advocacy groups, and in particular experts in digital marketing, privacy and children's rights.

- If a growing number of complaints are lodged, this would re-open the debate on digital marketing to children – an area where the EU has very clear competences to regulate, in spite of the failure of the AVMSD to address the issue effectively. This might, in turn, have a snowball effect, putting the issue back onto the EU legislative agenda.

III. The scope of EU powers to regulate the marketing of unhealthy food and alcohol to children

As discussed above, one of the significant limits of the EU regulatory framework for food and alcohol marketing is that it relies essentially on the inadequate provisions of the AVMSD to protect children from the harm such marketing causes. Rather, the EU should seriously consider the adoption of a regulatory instrument placing child health at its heart: this will help shift the focus and hopefully allow for a more effective, evidence based response to the marketing of food and alcoholic beverages to children. Nevertheless, the scope of this instrument will need to be defined carefully, in light of the principle of attributed powers (also known as the principle of conferral or the principle of competence).

During the debates relating to the revision of the AVMSD, we repeatedly heard that the responsibility to protect children from the harm caused by marketing lay primarily with Member States rather than the EU. Such statements are over simplistic and do not accurately reflect the extent to which the EU is empowered under its constituting Treaties to regulate the marketing of unhealthy food and alcoholic beverages to children. It is true that EU powers are not unlimited; nevertheless, these powers are significant. All actors involved in EU policy making must understand their scope.

After briefly setting out the key EU constitutional principle of conferral (1), this section reflects on the extent to which the EU can regulate unhealthy food and alcohol marketing to protect children from the harm it causes (2). It concludes with a few remarks on EPHA's advocacy strategy for EU-level food and alcohol marketing restrictions (3).

1. The principle of attributed powers

Article 5(1) TEU provides that "the limits of Union competences are governed by the principle of conferral", whereas their use "is governed by the principles of subsidiarity and proportionality". The question of EU competence is fundamental in that it circumscribes EU intervention and thus determines its legality in all areas of policy-making. One of its corollaries is that, if the EU is given the necessary powers to regulate certain fields of activity, these powers are defined by the provisions of the EU Treaties. The general power to act rests with Member States, subject to the transfer of their sovereign rights which they have to the EU in specific areas and specific areas only.[13] The difficulties therefore reside in the need to draw the boundaries separating what is permissible from what is not.

The rest of this section attempts to delineate the extent to which the EU can regulate food and alcohol marketing to protect children from its harmful effects. We will focus specifically on

[13] Article 4(1) TEU: "competences not conferred upon the Union in the Treaties remain with the Member States". Article 1(1) TEU reiterates this principle: "By this Treaty, the High Contracting Parties establish among themselves a European Union, hereinafter called 'the Union' on which the Member States *confer competences* to attain *objectives they have in common*" (emphasis added).

the relationship between the EU's supportive Public Health competence and the competence it shares with Member States to ensure the functioning of the internal market.

2. The extent to which the EU can regulate the marketing of unhealthy food and alcohol to protect children from harm

The limited regulatory powers of the EU to promote public health and prevent NCDs

Even though they do not define "health", it is clear that the EU Treaties, and Article 168 TFEU more specifically, adopt a broad approach of what is required to ensure a high level of human health protection, by focusing not only on the treatment of patients, but also on the prevention of illness and diseases, and health promotion. This is arguably reinforced by the provision in Article 3(1) TEU that "the Union's aim is to promote peace, its values and *the well-being of its peoples*" (emphasis added) – good health being a precondition for well-being.

The EU derives extensive "soft law" powers from Article 168 TFEU. This is uncontroversial. However, **Article 168(5) TFEU** explicitly excludes the adoption at EU level of "any harmonisation of the laws and regulations of the Member States".[14] Consequently, the EU does not have the authority, on the basis of this provision, to impose a common EU-wide harmonising legal framework which would replace existing national rules (even on a minimum harmonisation basis) on food and alcohol marketing. This does not mean, however, that the EU has no powers to adopt legally binding measures to limit commercial practices harming child health: it needs to identify a different Treaty basis to do so.

Mainstreaming public health in all EU policies: from 168(1) to Article 9 TFEU

By requiring that "a high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities", Article 168(1) recognises that public health should not be pursued only via ear-marked, distinct policies, but must be incorporated in all other EU policy areas. Such a "mainstreaming" provision is all the more relevant in areas such as childhood obesity and NCD prevention which require a coordinated, multisectoral response.

The Lisbon Treaty reinforced the EU's duty to mainstream public health concerns in all its policies in two ways. Firstly, it introduced Article 9 TFEU, which provides that "in defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of […] protection of human health". The mainstreaming provision is therefore given more prominence within the TFEU. Secondly, the EU Charter of Fundamental Rights – including Article 35 on health – has acquired the same legal value as the Treaties,[15] further reinforcing the importance of health protection to the EU agenda and the process of EU integration.

Mainstreaming provisions do not extend the competences of the Union as defined in the Treaties. However, they may help, and increase the pressure on, the EU to ensure consistency between its policies and activities, taking all of its objectives into account. Furthermore, they mandate the EU to take a "high" level of public health protection in all its policies (though not necessarily "the highest"), at all stages of the policy process, and they have been invoked as

[14] This exclusion is subject to Article 168(4) TFEU.
[15] Article 6(1) TEU.

interpretation aid to help shift the balance in favour of public health protection over potentially competing interests, as the CJEU did when it upheld the validity of Directive 2014/40 on tobacco products in its *Philip Morris* decision.[16] The CJEU also referred specifically to Article 114(3) TFEU laying down an obligation for the EU legislature to take as a base a high level of protection, with particular regard for any new development based on scientific facts, when discussing internal market harmonising measures concerning health, safety, environmental protection and consumer protection.

Extensive EU powers to ensure the establishment and functioning of the internal market

Article 114 TFEU is the key provision empowering the EU to adopt the measures necessary for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market,[17] which is defined as "the area in which the free movement of goods, services, people and capital shall be ensured in accordance with the provisions of the Treaties"[18] and has always been a cornerstone of the process of EU integration.[19]

The question has often arisen before the CJEU of how far the EU can accommodate health concerns in the internal market harmonisation process. On the one hand, the CJEU clearly stated in its *Tobacco Advertising I* judgment that Article 114 should not be relied on to "circumvent the express exclusion of harmonisation" under Article 168(5) TFEU and rely on Article 114 TFEU to adopt "disguised public health measures".[20] On the other hand, it also emphasised that this should not be understood as meaning that harmonising measures based on Article 114(1) could not have a strong impact on public health. On the contrary, as mentioned above, Article 114(3) explicitly mandates the EU to take a high level of health protection as a base for its internal market policy, supplementing other health mainstreaming Treaty provisions. As the Court has observed, "provided that the conditions for recourse to [Article 114 TFEU] as a legal basis are fulfilled, the [EU] legislature cannot be prevented from relying on that legal basis on the ground that public health protection is a decisive factor in the choices to be made".[21]

The crucial point for the EU legislature therefore is to ensure that the three conditions which the CJEU has restated in its *Vodafone* judgment are fulfilled for a measure to be validly adopted on the basis of Article 114 TFEU:

- there must exist an "internal market barrier" resulting from the disparities in the legal systems of the Member States;

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[16] Case C-547/14, judgment of 4 May 2016. See in particular paragraph 157: "Indeed, as is apparent from the second sentence of Article 35 of the Charter and Articles 9 TFEU, 114(3) TFEU and 168(1) TFEU, a high level of human health protection must be ensured in the definition and implementation of all the European Union's policies and activities."

[17] The TFEU also contains more specific internal market legal bases, not least Article 53(1) and 62 TFEU which allow the European Parliament and the Council, also acting in accordance with the ordinary legislative procedure, to issue directives to promote the freedom of establishment and the free movement of services within the EU. As mentioned in section 1 above, the AVMSD was adopted on the basis of these Treaty provisions.

[18] Article 26(2) TFEU.

[19] From a formal point of view, measures may be adopted on the basis of Article 114 by qualified majority voting only in Council, i.e. without the need for the unanimous agreement of the Member States. Moreover, the ordinary legislative procedure applies in that both the Council and the European Parliament must reach a common decision.

[20] Case C-376/98 *Germany v Council and the European Parliament (Tobacco Advertising I)* [2000] ECR I-8419.

[21] Joined Cases C-154 and 155/04 *Alliance for Natural Health* [2005] ECR I-6451.

- this market barrier must not consist of an "abstract risk of obstacles", but should be "such as to obstruct the fundamental freedoms" or create "distortions of competition" within the internal market; and
- the intended harmonisation should "genuinely have as its object the improvement of the conditions for the establishment and functioning of the internal market".[22]

The case law of the CJEU has interpreted these conditions generously.[23] Therefore, there is significant though not unlimited scope for the EU to regulate the marketing of unhealthy food or alcoholic beverages to protect children from the harm which such marketing causes.

The WHO broad notion of marketing and the need to coordinate EU and national responses to harmful marketing

In its set of recommendations on the marketing of foods and non-alcoholic beverages to children, the WHO has defined the key notion of marketing broadly as "any form of commercial communication or message that is designed to, or has the effect of, increasing the recognition, appeal and/ or consumption of particular products and services. It comprises anything that acts to advertise or otherwise promote a product or service". Furthermore, the WHO has also identified that the impact of marketing on children has two main constitutive elements: exposure and power. Hence the importance of addressing both components to ensure that the harmful impact that marketing has on children is effectively reduced and children are protected.

A lot can be learned from the challenges mounted against EU tobacco control legislation before the CJEU. Drawing on the Court's case law, it is clear that **the EU** can regulate all forms of cross-border marketing, including:

- broadcast advertising on television and on the radio and other forms of broadcast commercial communications (e.g. teleshopping, sponsorship, product placement);
- digital marketing (including on-demand television, social media, advergames on both manufacturer and third party websites);
- print advertising;
- international sponsorship of sports and cultural events; and
- product packaging and labelling

Similarly, other media should be regulated **at national level** to ensure that the EU does not exceed the powers it has been granted by Article 114 TFEU:

- cinema advertising;
- billboard advertising;
- other forms of static advertising such as the use of merchandising in cafes (adverts on parasols, ashtrays…);
- retail at point of sale advertising;
- local sponsorship; and
- in-school marketing.

[22] Case C-58/08 *Vodafone* [2010] ECR I-4999.
[23] E.g., Case C-380/03 *Germany v Council and the European Parliament (Tobacco Advertising II)* [2006] ECR I-11573.

To ensure the adoption of comprehensive marketing restrictions of unhealthy food and alcohol to children, it is necessary for Member States to complement the EU's response. This should not in any way detract from the significant responsibility that the EU has to "up its game" and remove the outstanding gaps in the EU regulatory framework as it stands.

In the absence of such EU-level intervention, Member States may find themselves under pressure to justify the potentially trade-restrictive measures they may decide to adopt at national level to protect their citizens from the harm stemming from unhealthy food and alcohol marketing. Even though the CJEU has confirmed that such challenges can be successfully defended (e.g. *Scotch Whisky*), the fact remains that the burden of proof rests on Member States to determine that the measures they have taken meet the proportionality test, i.e. that they are both legitimate to achieve the objectives pursued and not more restrictive of trade than is necessary to do so. This can lead to costly litigation and delay the implementation of effective national rules.

EPHA has an important responsibility to continue to call on the EU to regulate the marketing of unhealthy food and alcohol to protect children from the negative impact it has on their health, whilst promoting the process of EU market integration. However, EPHA could (and arguably should) "play it safe" and limit its call for EU-level regulation of the media/techniques that have already been held by the CJEU to have a cross-border dimension, leaving the others to be regulated by Member States. This will ensure that resources are not spent responding to industry claims that the measures proposed would fall outside the scope of EU internal market powers and could not therefore be adopted on the basis of Article 114 TFEU. It is also realistic in light of the lack of appetite we have repeatedly witnessed over the last fifteen years for the adoption of effective EU-level rules on the cross-border marketing of unhealthy food and alcoholic beverages.