

Collective Consultation Response
EU Children's Rights Strategy 2021-2024

Dear Members of the European Commission,

8 December 2020

We very much welcome the European Commission's consultation on the forthcoming EU Children's Rights Strategy 2021-2024 (the Strategy) and are grateful for the opportunity to shape the Strategy. The Strategy offers an opportunity to reflect on how the EU uses its existing powers to comply with its twin obligations to ensure a high level of public health protection and promote children's rights in all its policies.

We are a group of leading NGOs, scholars and experts on public health, consumer protection and child rights, who work to raise awareness of the impact of commercial advertising and marketing - particularly for harmful goods, services and brands - to which children are exposed in Europe and beyond, and to promote its regulation and effective enforcement.

This submission addresses child rights relating to the following thematic priorities identified in the consultation: *Health, welfare and social inclusion; Education, leisure and culture; Digital and Information Society; Child participation.*

We argue that harmful marketing infringes many of the rights enshrined both in the UN Convention on the Rights of the Child (UNCRC) and in the EU Charter on Fundamental Rights and Freedoms (the EU Charter), including the rights to health; adequate food; life, survival and development; participation; non-discrimination; education; leisure, culture and play; privacy and data protection; freedom from all forms of economic exploitation; and the right to have the best interests of the child considered as a primary consideration in all policy areas. Therefore, as duty bearers, EU Member States acting individually at national level or collectively at EU level must ensure that harmful marketing is effectively regulated, and rules effectively enforced to ensure that children's rights are duly respected, protected and fulfilled.

SUMMARY OF OUR RECOMMENDATIONS. The EU should:

- adopt an evidence-led, child rights-based approach to harmful marketing
- regulate harmful marketing strictly to protect all children (0-18 years) from its impact
- entrust the regulation of harmful marketing to DG Health (not other Commission DGs)
- adopt EU-wide legally binding provisions to protect children from exposure to all forms of harmful marketing (recognising that Codes of Conduct do not work)

More specifically: to protect children, the EU should:

- ban all harmful marketing on broadcast media between 6am and 11pm
- ban all online harmful marketing
- ensure the GDPR is effectively enforced throughout the EU to protect children's personal data
- ban harmful marketing in all print media which are not adult-only publications
- ban harmful sponsorship of sports and other events with a cross-border appeal which are not adult-only events
- prevent the use of marketing techniques appealing to children on packaging

These recommendations are without prejudice to the stricter rules in place for, e.g., tobacco.

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This submission addresses child rights relating to the following thematic priorities identified in the consultation: *Health, welfare and social inclusion; Education, leisure and culture; Digital and Information Society; Child participation.*

Based on our collective expertise, we call on the EU to adopt an evidence driven, child rights approach to the regulation of all forms of harmful marketing which negatively affect children's rights. We have repeatedly noted, individually or collectively, that the EU has failed to effectively regulate and/or ensure the effective enforcement of existing rules to protect children from unfair commercial practices, and in particular the marketing of harmful goods, services and brands, including the marketing of tobacco and other smoking products, alcoholic beverages, unhealthy food, energy drinks, gambling services, and slimming/weight management/cosmetic products and treatments whose consumption entails specific public health concerns, and smoking products (harmful marketing). We also note that the EU has not effectively regulated the marketing of breastmilk substitutes and infant food to mothers and other carers, which is not conducive to the enjoyment by infants of the highest attainable standard of health. In this submission, we make the case that the EU's failure to act decisively is even more problematic bearing in mind:

- the obligation resting on the EU to mainstream children's rights and ensure a high level of public health protection in the development and implementation of all its policies (1);
- the harms stemming from such marketing (2); and
- the cross-border nature of much marketing in the digital age (3).

We conclude by making a range of recommendations as to how the EU should regulate harmful commercial advertising and marketing to protect child health and child rights (4).

1. Upholding the best interests of the child as a primary consideration: the twin obligation resting on the EU to mainstream children's rights and to ensure a high level of public health protection in the development and implementation of all its policies

The EU itself has a legal obligation to ensure that it regulates harmful marketing effectively. This obligation stems from a diverse range of EU primary legislation as interpreted by the CJEU:

- the EU Treaties, specifically Articles 3(5) and 6 TEU and Articles 9, 114(3) and 168(1) TFEU;
- the EU Charter, and particularly Articles 24 (children's rights), 35 (health) and 8 (data protection); and
- the fundamental rights laid down in the UNCRC, which - following various rulings of the CJEU – are part of the common constitutional traditions of the Member States and therefore constitute general principles of EU law.

In the last three years alone, several EU Council Presidencies have specifically considered the impact of unhealthy diets and alcohol consumption on children, highlighting the specific contribution of EU cross-border marketing regulation (e.g. Malta, Estonia, Bulgaria, Austria). The EU has also expressed a growing interest in the use of child rights-based approaches to address harmful marketing. Not only are children's rights increasingly mentioned in high-level policy documents, but they feature prominently in, for example, the 2019 Joint Research Centre report on food and alcohol marketing. This change in the EU's discourse on marketing to children is welcome and reflects the

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growing consensus in the EU and beyond that harmful marketing should be envisaged as a major children's rights concern. In particular, the EU has recognized, at least in relation to unhealthy food, that further progress is required on the implementation of the 2010 WHO Set of Recommendations on the marketing of foods and non-alcoholic beverages to children, in line with the best interests of the child principle and the EU's public health mainstreaming obligation.

However, human rights commitments must translate into practice and contribute to the improvement of children's daily lives. After mandating that 'children shall have the right to such protection and care as is necessary for their well-being', Article 24 EU Charter mandates that 'in all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration'. This provision implements Article 3(1) UNCRC which has been interpreted extensively by the Committee on the Rights of the Child (the Committee), requiring that policymakers should prioritize possible solutions which are in the child's best interests.

The obligation to make the best interests of the child a primary consideration becomes crucial when weighing competing priorities. The best interests of the child principle requires that the EU explain how the right to have the best interests of the child considered has been respected in decision-making, including how it has been weighted against other considerations.

Although the Committee has stopped short of stating that short-term economic considerations (often invoked against regulation by business actors) should not be given priority over longer-term child development considerations, the requirement to 'explain' increases the burden on States (and consequently the EU) to ensure that they move away from mere rhetoric and engage with actual evidence when balancing competing rights and interests, using children's rights impact assessments and children's rights impact evaluations.

2. The need to effectively protect children from exposure to harmful marketing

Calls are multiplying for the prohibition of harmful marketing in all media, not least digital media, to which children are exposed. In particular, the UNICEF-WHO-Lancet Commission has recently emphasised the 'severe threats' posed to children by 'harmful commercial marketing', and called for regulation, urging the international community to work towards the adoption of an Optional Protocol to the CRC. Without prejudging the outcome of this process, we urge the EU to anticipate these developments and adopt effective restrictions on the marketing of harmful goods, services and brands to children.

We call on the EU to take note of four key points that all stem from the accumulation of extensive research on our part and others' and the existence of a growing consensus on the relationship between harmful marketing and child health.

Exposure

Firstly, the focus should be on children's exposure to harmful marketing. Measures intended to protect children often focus on marketing 'targeted/directed at' or 'appealing to' children, or on 'children's programming/media'; although the largest absolute child audiences are found for mixed content specifically designed for general audiences, this is often not classified as children's content. From a rights perspective, however, the best interests of the child require that children be protected from actual exposure to harmful marketing.

Precautionary approach

Secondly, and particularly in the digital environment, States should adopt a precautionary approach, as there is no method which allows them to reliably determine children's exposure to online commercial advertising or marketing. We advocate for a cautious, expansive interpretation of children's potential exposure. Companies in the digital ecosystem operate behind 'walled gardens'; in the absence of transparency regarding online marketing strategies, States should assume that children are exposed and prohibit such marketing to protect children. Such an approach is the only one likely to protect children from actual exposure to harmful marketing without restricting their right to participation, and is therefore in keeping with the letter and spirit of the child's best interests principle.¹ The UK example is interesting: it originally announced regulating digital marketing of unhealthy food via a 9pm watershed, but has now launched a further consultation for a total ban of unhealthy food marketing online on two main grounds: 1) lack of transparency; and 2) wide public support for effective online food marketing restrictions.

All children

Thirdly, all children (up to 18 years of age, and not only those below 12 years of age) are negatively affected by commercial advertising and marketing and should therefore be protected therefrom.

Ineffectiveness of self-regulation

Fourthly, self-regulation has not fulfilled its promises of 'marketing responsibly to children' and is not – and should not be viewed as – an appropriate mechanism to ensure that children are effectively protected from harmful marketing.

3. Cross-border marketing and EU competences

It is clear that a comprehensive, government-led approach to the regulation of commercial advertising and marketing is necessary to protect children effectively from exposure to such marketing. However, we are well aware that the EU alone cannot adopt the comprehensive marketing restrictions required because of the limits that the principle of attributed powers places on its legislative competences. We call on the EU to use the extensive powers that it derives from the EU Treaties, and Article 114 TFEU more specifically, to regulate all forms of harmful cross-border marketing, including broadcast media, online media, print media, product packaging and sponsorship of events with cross-border appeal. The diversity of national rules on harmful marketing gives rise to a high level of market fragmentation, which is likely to worsen as Member States take stock of the growing evidence base supporting extensive restrictions of the marketing of harmful goods, services and brands. This is all the more problematic as gambling services, food and beverages (both alcoholic and non-alcoholic) and media services move extensively within the EU.

The EU has embraced the regulation of tobacco cross-border marketing for over two decades, yet has resisted evidence-driven calls to regulate other forms of harmful cross-border marketing, not

¹ In particular, the implementation of food marketing restrictions to children in the EU and the UK by Google has not given rise to any consultation on the nutrient profiling, and there is no transparency in its implementation: Update to Other restricted businesses policy (October 2020), <https://support.google.com/adspolicy/answer/9919030>. Devolving the protection of children and their rights to the grace and favour of commercial entities is bad practice, not least from an accountability perspective.

least gambling, alcohol or unhealthy food, preferring instead to limit its intervention to promoting (largely ineffective) industry pledges and exchanging best practice between Member States of national-level action.

It is striking that there is no sector-specific EU legislation in the field of gambling services, whose marketing remains unregulated at EU level, beyond general consumer protection rules. The absence of any legally binding EU-wide harmonising rules is surprising considering the internal market implications of online gambling, which are aggravated by the fact that commercial gambling is sustained and promoted by a powerful global industry in ways that not only make it more widespread but also shape how we think about appropriate policy responses to the health effects of its products.

As far as alcohol and unhealthy food marketing is concerned, the EU may have attempted to protect children from its harmful impact, but it has consistently failed to do so effectively. This is surprising for many reasons. Firstly, as noted above, unhealthy diets and alcohol are two of the main risk factors for chronic diseases, and their marketing contributes to increased consumption. As a result, the international community has called for over a decade for wide ranging restrictions on their marketing, including the regulation of cross-border marketing. Even in the absence of an equivalent to the legally binding Framework Convention on Tobacco Control, countless commitments have been made by EU Member States to reduce the harmful impact of alcohol and food marketing on children. If nutrition and health claims made on food, including alcohol, are regulated at EU level, they are only one of many marketing techniques, and their regulation should only constitute a small part in the implementation of these commitments.

Secondly, as the food and alcohol industries are powerful business actors engaging in extensive lobbying against the imposition of marketing restrictions, it is counter-intuitive that they should be entrusted with the design and implementation of policies that they oppose. Real, perceived or potential conflicts of interest must be avoided, or at the very least carefully managed. However, throughout the years, the EU has put in place governance structures such as the EU Platform for Action on Diet, Physical Activity and Health or the EU Alcohol and Health Forum that allow conflicts of interests to flourish, with no reflection on what would constitute appropriate forms of engagement. It is well documented that industry pledges to promote food "responsibly" to children, are riddled with loopholes, and even though the EU Pledge has been reviewed over time, it remains inadequate. Public-private partnerships have inherent limits and cannot protect children from harmful marketing.

Thirdly, the EU has missed countless opportunities to effectively reduce the harmful impact of alcohol and food marketing on children, despite nearly two decades of evidence-based civil society advocacy. The latest amendment of the AVMSD does contain a few improvements in comparison with the 2007 version of the AVMSD. In particular, it refers explicitly to the WHO EURO Nutrition Profiling Scheme and to the need to protect children from exposure. However, it is unfortunately in most other respects a resounding failure. Its operative provisions remain far too limited in scope to reduce children's actual exposure to unhealthy food and alcohol marketing. To make matters worse, the freedom that the AVMSD grants Member States to adopt stricter standards is strictly circumscribed by the State of Establishment principle that prevents such standards from applying to audiovisual media service providers established in other territories.

Is it not paradoxical that Member States may be better off in the absence of existing EU rules purporting to protect public health? At the very least, we argue that if the EU cannot regulate effectively due to a lack of political will, it should leave the door open to the Member States who would be willing to do so at national level. For example, in the absence of sufficient political will for the adoption of a single EU-wide tobacco plain packaging scheme at the time the second EU Tobacco Products Directive (TPD) was being adopted, the EU has left the initiative to Member States, subject to general EU free movement provisions, without stifling their regulatory efforts. When Philip Morris and other tobacco manufacturers called on the CJEU to 'clarify' the regulatory discretion Member States retained to adopt national laws exceeding the requirements of the TPD, the Court clearly stated that the directive was a measure of partial harmonization which did not harmonize all aspects of tobacco products packaging and that Member States could therefore adopt national measures imposing the plain packaging of tobacco products on their territories, which the UK (then an EU Member State), France, Ireland, Slovenia, Hungary, Belgium and the Netherlands have done.

The EU should be much bolder in how it regulates harmful cross-border marketing. The development of a new EU Children's Rights Strategy provides yet another opportunity for the EU to reconcile its rhetoric on children's rights and the harmonizing measures required to protect children from such marketing.

4. Recommendations for the effective regulation of marketing regulation and child rights protection

Firstly, the EU should acknowledge that its current piecemeal, disjointed approach has proven ineffective and allowed for major gaps in the EU regulatory framework. The harmful impact of tobacco, alcohol, food and gambling marketing should be primarily envisaged as major public health concerns with significant children's rights implications. Consequently, its regulation should be entrusted to DG Health, rather than other Commission DGs.

Secondly, the EU should seriously reflect on the extent to which codes of conduct have failed to protect children from exposure to harmful marketing and consider adopting EU-wide legally binding provisions to this effect.

Thirdly, the EU should align its regulatory framework with existing evidence and systematically rely on child rights impact assessments and child rights impact evaluations rather than empty industry rhetoric to determine where the child's best interests lie. In particular, it should recognize that all children, including adolescents, are negatively affected by commercial advertising and marketing and deserve protection from its harmful impact. It should also acknowledge that the distinction between direct and indirect marketing to children is artificial and adopt comprehensive restrictions, within the limits of the principle of attributed powers, which protect children from actual exposure to harmful cross-border marketing on all programmes and media which they engage with and in all settings where they gather, irrespective of whether these programmes, media and settings are 'for', 'directed at' or 'targeted at' children. More specifically:

- The EU should ban all harmful commercial advertising and marketing on broadcast media (radio and television) when children may reasonably be expected to be exposed to such marketing. We argue for a ban of harmful marketing on broadcast media from 6am to 11pm based on the 2016 ECORYS *Study on the exposure of minors to alcohol advertising*.

- The EU should also address the extensive and pervasive marketing on all online digital media. Regulating digital marketing admittedly raises acute challenges, not least because large advertising and technology (ad tech) companies tend to operate behind 'walled gardens', preventing policymakers from fully understanding their modus operandi. In the absence of transparency and any means of demonstrating that children are not exposed to harmful marketing, one should adopt a precautionary approach that presumes that children are exposed online to harmful marketing. Such marketing should therefore be prohibited across the EU and an online marketing ban effectively enforced.
- In particular, the EU should ensure that the GDPR which bans the extraction of children's personal data for commercial advertising and marketing purposes is effectively enforced.
- The EU should prohibit all forms of harmful commercial advertising and marketing in print media sold to consumers of less than 18 years of age (in other words, business-to-consumer marketing may only be allowed in adult-only publications, whilst business-to-business marketing remains permitted).
- The EU should also regulate all forms of harmful sponsorship with cross-border effects in a way that children can attend family events without running the risk of being exposed to such forms of commercial promotions. Therefore, in the spirit of protecting children of all ages from harm, gambling, alcohol and food companies may only sponsor sports and other events with a cross-border appeal if they are adult-only events (assuming such sponsorship is allowed at all).
- Last, but not least, recognizing the power of packaging as a marketing tool, the EU should prevent the use of marketing techniques appealing to children on packaged goods too, including the use of celebrities and characters popular with children (both licensed and equity brand characters).
- **IMPORTANTLY, ALL THESE RECOMMENDATIONS SHOULD BE WITHOUT PREJUDICE TO STRICTER EU RULES THAT ARE ALREADY IN PLACE OR COULD BE ADOPTED FOR SPECIFIC GOODS AND SERVICES** (e.g. cigarettes and other tobacco products, medicines and medicinal treatments available only on prescription).

The internal market shall work for the sustainable development of Europe. The extent to which harmful cross-border marketing is regulated at EU level is a question of political will. It is also a leadership failure of the EU not to have used the tools at its disposal to try and convince reluctant Member States of the need for harmonized cross-border marketing restrictions to ensure the proper functioning of the internal market, whilst protecting children from harm and ensuring a high level of public health protection. As stated above, the EU itself has contributed for years to the rhetoric that self-regulation and the exchange of best practice promote better health. This flies in the face of evidence, and as such does not contribute to the protection of public health, consumer and children's rights which the EU Treaties and the EU Charter mandate the EU to ensure in the development and implementation of all its policies.

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The Strategy offers the EU yet another opportunity to regulate harmful marketing effectively by protecting children from exposure to such marketing and putting their best interests at the heart of its health, consumer and internal market policies. It must seize it. The COVID-19 pandemic further increases the urgency to regulate the commercial determinants of health effectively. Not only do chronic diseases increase the risk of suffering and dying from COVID-19, but it is also particularly important to ensure that all children can access online services and participate in the digital environment, whilst ensuring that their access and participation does not entail the infringement of any of their rights. This is all the more so as the tobacco, alcohol, food and gambling industries have been shown to ‘capitalise’ on a public health pandemic by engaging in marketing activities detrimental to public health in Europe and beyond.

Thanking you in advance for your consideration, we look forward to the publication of the Strategy. We very much hope that our recommendations are duly taken into account, in line with what the EU Treaties, the EU Charter and the UNCRC require. We are available to discuss any of the issues we have discussed in this contribution.

OUR RECOMMENDATIONS SPECIFICALLY DRAW ON THE FOLLOWING PUBLICATIONS THAT WE HAVE WRITTEN INDIVIDUALLY OR COLLECTIVELY

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