

A missed opportunity for public health: How impact assessment shaped EU rules on the marketing of unhealthy commodities to children

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The article, which examines the impact assessment process that informed the EU's rules on advertising of unhealthy commodities to children, was published in *Social Science & Medicine – Qualitative Research in Health* in 2024 (volume 5).

Abstract:

The 2015-2018 revision of the European Union's Audiovisual Media Services Directive, which governs the marketing of alcohol and unhealthy food to minors, failed to align with international best practice. Previous research has explained this 'missed opportunity' with reference to deficient political will, difficulties advocating for health, and industry pressure. We explore another explanation: the role of the impact assessment (IA) process in shaping decision-making. *Methods:* We first conducted an in-depth comparison of three versions of the IA report, employing qualitative content and framing analyses to establish *what changed* in the substantive content, framing, and evidence cited. Second, we used process-tracing, a qualitative method drawing on multiple data sources, to explore causal mechanisms, to assess *why these changes occurred*. Data sources include policy documents published proactively and obtained through access-to-document requests.

Findings: Previously unpublished versions of the IA report show that stronger rules on advertising were preferred early in the policy process but later abandoned, and that concern for 'balancing' consumer protection and competitiveness shifted to focus on the latter. Following review by the Regulatory Scrutiny Board, a revised IA report narrowed the policy options, removing a requirement for member states to prevent children's exposure to alcohol advertising. Consequently, decision-makers were provided with an IA that did not offer adequate information on available measures to protect children. *Interpretation:* Changes made during the IA process, which determines the policy options presented to decision-makers, side-lined health concerns. We argue that engaging with the institutional structures which shape decision-making is crucial for those working to further public health.

Core messages:

- Reducing exposure to marketing, particularly for children, is key in reducing the consumption of health-harming products. However, while the EU legislation restricts tobacco marketing, it is still lacking regulation in other sectors of health harmful products, compared to international recommendations. For instance, the WHO has called since the early 2010s for the regulation of marketing for high fat, sugar and salt (HFSS) foods and alcohol.
- In 2018, despite evidence of the adverse health impacts of exposure to unhealthy food and alcohol marketing for children and the limits of existing provisions, and opportunity to strengthen EU law was missed. The reasons commonly identified include an absence of political will, the European Commission's belief in the benefits from self-regulation, difficulties in advocating for health within non-health committees in the European Parliament, and industry efforts to prevent regulation. By contrast, this paper looks at how the draft text (determining the policy options) presented to the legislators was prepared.

Regulating marketing

- At the EU level, the legal framework for regulating marketing of HFSS food and alcohol is the Audiovisual Media Services Directive (AVMSD). The AVMSD regulates all broadcast and on-demand television services, with the overarching aims of enabling the provision of cross-border services whilst protecting cultural diversity, children and consumers, media pluralism, and the independence of national media regulators. It therefore regulates advertising and marketing techniques (i.e., product placement).
- The AVMSD was revised in 2015 as part of the REFIT programme (part of Better Regulation and ensuring that regulations are fit for purpose) but also to reflect changes in the media scene, such as increased use of on-demand services. The revised directive was adopted in 2018, but disappointed the public health community, as the new regulation does not go beyond the original one in terms of health. Only small changes were noted (i.e., reducing children's exposure instead of not targeting children through marketing).

Better Regulation and the revision of AVMSD

- The paper argues that programmes such as Better Regulation are neither objective nor value-free and can shape policy dynamics. The Commission's legislative proposal for a revised AVMSD was informed by a REFIT evaluation. It drew in parallel on an impact assessment that included stakeholder consultation. However, even though mandatory restrictions on HFSS food and alcohol advertising were an option early in the process, the final impact assessment report suggests that such measures were not assessed, while the public health community had provided campaigns and evidence on the need for such measures.
- The analysis presented in the paper shows that the unpublished first draft impact assessment report, from 22 February 2016, included stronger rules on alcohol advertising as the preferred policy option. However, following the negative opinion from the Regulatory Scrutiny Board on 18 March 2016, a revised version removed entirely the option to tighten alcohol advertising rules, and the language for the preferred options for audiovisual commercial communications changed. The Regulatory Scrutiny Board eventually published a positive opinion with reservations.
- Furthermore, the problem framing shifted between the two impact assessments. The first report includes an "uneven playing field" weakening the internal market for audiovisual services following the introduction of on-demand services, and a deficit of consumer and minor protection. The revised impact assessment includes as a third problem, namely that the rules on audiovisual commercial communications might no longer be fit for purpose. Moreover, whilst alcohol and HFSS food advertising are considered a consumer protection problem in the first impact assessment, the revised draft does not discuss alcohol and HFSS food advertising. In the final document, the need for action is mentioned again, but toned down to an improvement or a strengthening of self- and co-regulatory initiatives.

Lessons learnt

- The analysis presented in the paper shows a narrowing of the problem framing from balancing consumer protection and internal market concerns, to presenting existing rules as an obstacle to broadcasters' competitiveness and requiring simplification.
- It also shows a shift in how existing sources were framed and used between the different drafts, particularly on the point of reducing minors' exposure to alcohol advertising. This includes the use of the same source to reach two opposing conclusions.

- In terms of stakeholder input, the public health community's concerns about the ineffectiveness of existing provisions on alcohol and HFSS food are mentioned in the first version of the impact assessment, with calls for stronger rules. It is not present in the second version, and the final draft mentions only that the public health community asks for stronger rules on alcohol.
- Between the three versions of the report, the most cited external publication comes from EGTA, a business association that represents the interests of television and radio sales houses. There is also a striking silence on the substantial evidence on the health implications of HFSS food and alcohol marketing, and effective ways to mitigate them.
- The paper identifies three factors which may have contributed to the de-prioritisation of health concerns during the development of the Commission proposal: a shift in the evidence base, the RSB review process, and stakeholder pressure. Detailed analysis of these factors concludes that no new evidence was identified during the amendment of the impact assessment, and that one of the other two factors is thus likely to explain the change.
- Noting that the Commission justified its decision not to tighten the advertising rules with reference to lack of evidence of effectiveness, the analysis identifies a large body of known evidence demonstrating the effectiveness of proposed interventions, thereby contradicting this explanation.
- None of the written recommendations from the Regulatory Scrutiny Board explicitly address the proposal for tightening advertising rules. Later comments on the revised report suggest that the revision left out issues identified in the evaluation, including consumer protection issues related to the advertising of HFSS food and alcohol. This explains why health elements were reintroduced in the final report.
- The Commission's dismissal of strengthened advertising rules aligns with long-standing opposition to such rules by commercial actors, especially from health-harming industries. Several sources indicate that meetings took place between DG Connect and industry. DG Connect and other relevant Commission Directorate-Generals engaged consistently and repeatedly with commercial actors during the agenda-setting stage, and officials also discussed the AVMSD in meetings with broadcasting groups. However, limited evidence prevents establishing a clear link between the meetings and the responsibility of stakeholder influence in the shift between the different versions of the impact assessment.
- The article contributes to the wider debate on evidence-based policymaking, arguing that there can be political agency in deciding on the preferred option between competing values. The article examines the notion of technical bias, which refers to the strategic use and omission of evidence in policymaking, which can be fostered by Better Regulation. Indeed, evidence on the need for restrictive measures on HFSS food and alcohol marketing was provided, but not considered as it did not result in adopted measures.
- The paper shows the importance of examining the black box of EU agenda-setting, since the proposal on which a final law is based is developed at a much earlier stage.