

## Case study: the UK rules on unhealthy food marketing to children

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### Introduction

The UK has one of the highest rates of obesity in Europe and among all developed economies. In all four nations of the UK, around one in four adults is obese.<sup>1</sup> There was a marked increase in the proportion of adults that were obese between 1993 and 2012 from 13.2 per cent to 24.4 per cent among men and from 16.4 per cent to 25.1 per cent among women. While obesity rates continue to rise, latest recent data for England suggests they are rising less steeply than previously.<sup>2</sup> Excess weight is a leading cause of type 2 diabetes, heart disease and cancer and contributes to back pain, breathing problems and infertility. Obesity creates costs to the health care services for treatment of related diseases and indirect costs to society associated with lost productivity from time off work and premature mortality, and social care costs. The wider social costs were estimated at almost £16bn in 2007 (over 1% of GDP), with a potential rise to just under £50bn if trends continued unchecked.<sup>3</sup> Overweight and obesity in children has risen steadily from the mid 1990s with a slight levelling off of the rising trend since 2004. Around one in three 11-year-olds in the UK is overweight or obese with prevalence of obesity almost twice as high in the most deprived areas compared to the least deprived.<sup>4</sup> The National Child Measurement Programme in England and Wales indicates a significant number of children are obese before they reach school age. In England and Wales, one in ten four- to five-year-olds are obese.<sup>5,6</sup>

The UK was one of the first countries in the world to adopt restrictions on the marketing of unhealthy food to children. As we will discuss in this contribution, the Ofcom regulations banning the advertising on television in and around children's programmes were rightly seen as pioneering at the time of their introduction in 2007. As they were implemented before the WHO Recommendations were adopted, the Ofcom rules (and all preparatory works) do not refer to the Recommendations. However, the Recommendations provide a useful yardstick to evaluate and monitor the UK regulatory framework and make suggestions for its improvement. After presenting the rules currently in force in the UK (I), this contribution focuses on their loopholes (II) and the need for the current UK Government to tighten these rules in line with the WHO Recommendations and thus ensure that children are more effectively protected from the harmful influence which the marketing of unhealthy food has

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<sup>1</sup> Health Survey for England 2010-2012, Welsh Health Survey 2012, Scottish Health Survey 2013 and Health Survey Northern Ireland 2010/11: obesity analysis.

<sup>2</sup> Health Survey for England 2010-2012.

<sup>3</sup> Tackling Obesity: Future Choices - Modelling Future Trends in Obesity and Impact on Health (Foresight, Government Office for Science, 2007).

<sup>4</sup> Health and Social Care Information Centre. [www.hscic.gov.uk/ncmp](http://www.hscic.gov.uk/ncmp).

<sup>5</sup> Child Measurement Programme for Wales 2013-14 (Public Health Wales NHS Trust, May 2015).

<sup>6</sup> National Child Measurement Programme data source: Health and Social Care Information Centre <http://www.hscic.gov.uk/ncmp>.

on their consumption preferences. In particular, it assesses the rules that extend current broadcasting rules to a range of non-broadcast media and are due to take effect from 1<sup>st</sup> July 2017 (III).

## **I. Existing rules on the marketing of unhealthy food to children**

Prior to the introduction of the Ofcom restrictions, controls over marketing of foods to children relied on the self-regulatory codes, the Code of Advertising Practice (CAP) and Broadcasting Code of Advertising Practice (BCAP). The content dealt largely with misleading advertising rather than any limits on marketing of food because of potential health consequences. Concern about rates of obesity, particularly in children, as well as diet-related disease more broadly, prompted calls for more specific restrictions to protect children. The food industry challenged the legitimacy of food marketing restrictions, claiming that marketing did not, as such, contribute to childhood obesity and that any impact on preferences worked at a brand level, rather than affecting overall consumption.

To address this contention, UK public authorities commissioned an independent systematic review of the evidence to determine the influence that food marketing had 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 and that the advertised diet contradicted the recommended one.<sup>7</sup> 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. This review itself was challenged in a critique commissioned by the Advertising Association and so put to further peer review by the FSA, confirming its validity. In 2003, the Secretary of State for Culture, Media and Sport asked Ofcom, the independent regulator for the UK communication industries,<sup>8</sup> to consider the need for proposals for strengthening the rules on television of food advertising aimed at children. In response, Ofcom commissioned its own research into the role played by television advertising in influencing children's consumption of unhealthy food. The report which followed 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.<sup>9</sup> On this basis, while noting the multiple factors

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<sup>7</sup> G Hastings et al., Review of Research on the Effects of Food Promotion to Children (University of Strathclyde 2003). This review has been regularly updated. The most recent update has been prepared for the WHO: G Hastings et al., The Extent, Nature and Effects of Food Promotion to Children: A Review of the Evidence to December 2008 (WHO, December, 2009): [http://www.who.int/dietphysicalactivity/Evidence\\_Update\\_2009.pdf](http://www.who.int/dietphysicalactivity/Evidence_Update_2009.pdf).

<sup>8</sup> For information on Ofcom and its activities, see <http://www.ofcom.org.uk/>.

<sup>9</sup> 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 <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. For a different interpretation of existing evidence, see D Buckingham, 'The Application of Science: The Role of Evidence in the Making of Regulatory Policy on Children and Food Advertising in the UK' (2009) 15 International Journal of Cultural Policy 201.

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.

In November 2004, the UK Health Department published the White Paper 'Making Healthy Choices Easier' which aimed to set out the key principles and areas for action for the Government and food industry to support the public to make healthier and more informed choices with regard to their health. On the basis of existing evidence linking food marketing to children's food preferences, this warned the food industry that it would introduce legislation if it failed to change the nature of its advertising campaigns: "The Government is committed to ensuring that measures to protect children's health are rigorously implemented and soundly based on evidence of impact. We will therefore monitor the success of these measures in relation to the balance of food and drink advertising and promotion to children, and children's food preferences to assess their impact. If, by early 2007, they have failed to produce change in the nature and balance of food promotion, we will take action through existing powers or new legislation to implement a clearly defined framework for regulating the promotion of food to children."<sup>10</sup>

The UK Government subsequently mandated Ofcom to take action. In November 2006, following an extended period of analysis and consultation, Ofcom announced scheduling restrictions and tightened content rules. These included a ban on the scheduling of unhealthy food advertising in or around programmes made for children (including pre-school children), in dedicated children's channels or in or around programmes likely to be of particular appeal to children aged 4 to 15.<sup>11</sup> These scheduling restrictions were introduced in order 'to reduce significantly the exposure of children under 16 to unhealthy advertising, as a means of reducing opportunities to persuade children to demand and consume unhealthy products'.<sup>12</sup> To minimize the impact of these restrictions on business actors, the scheduling restrictions were phased in from 1 April 2007 to 1 January 2009 when all unhealthy advertising was excluded from children's channels. In the impact assessment accompanying the rules, Ofcom engaged with the proportionality of the restrictions: in particular, drawing on the research it had commissioned on the effect of food advertising on children, it decided to impose restrictions to protect all children of less than 16 years old on the ground that 'the ability to distinguish between advertising and programming and to understand its commercial intent did not equate to immunity from the persuasive effect of advertising'.<sup>13</sup> It concluded that it

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<sup>10</sup> *Making Healthier Choices* (Department of Health 2004), Cm 63740:

[http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH\\_4094550](http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_4094550), para 58.

<sup>11</sup> Details can be found on Ofcom's website: [http://www.ofcom.org.uk/consult/condocs/foodads\\_new/](http://www.ofcom.org.uk/consult/condocs/foodads_new/).

<sup>12</sup> *Television Advertising of Food and Drink Products to Children: Final statement* (Ofcom 2007): [http://www.ofcom.org.uk/consult/condocs/foodads\\_new/statement/](http://www.ofcom.org.uk/consult/condocs/foodads_new/statement/), para 1.9.

<sup>13</sup> *Annex 7 – Impact Assessment: Annex to Consultation on Television Advertising of Food and Drink to Children* (Ofcom 2006): [http://stakeholders.ofcom.org.uk/binaries/consultations/foodads\\_new/annexes/ia.pdf](http://stakeholders.ofcom.org.uk/binaries/consultations/foodads_new/annexes/ia.pdf), para 2.5. Paragraph 2.5 continues as follows: 'Children are affected by advertising at all ages. Surprisingly little is known of how media affect children differently at different ages, though it is commonly assumed that younger children are more influenced. Empirical studies of the effects of television advertising on children's food choice were re-examined according to the age of the sample. Contrary to widespread belief, this did not show that

did seem realistic to assume that even if children between 10 and 15 years old were able to discern the commercial intent of advertising, it still had the capacity to influence their consumption decisions and that these eating patterns once developed had long lasting effects.<sup>14</sup>

Alongside the scheduling restrictions, the Advertising Standards Authority (ASA)<sup>15</sup> introduced certain restrictions on the content of advertisements for unhealthy food through its BCAP.<sup>16</sup> It banned the use of advertising techniques which are particularly effective with pre-school or primary school children. These techniques include promotional offers such as free toys, nutritional and health claims, licensed characters and celebrities. These rules are in addition to those which apply to all food advertising to children under 16 years of age; that advertisements should not encourage excessive consumption of any food and drink product; they must ensure that the portion sizes shown are relevant; and they cannot appeal to emotions such as pity, fear, loyalty or self-confidence or suggest that having the advertised product somehow confers superiority, for example making a child more confident, clever, popular or successful.<sup>17</sup> These content-related rules apply to advertisements aimed at pre-school or primary aged children and were introduced to ‘reduce children’s emotional engagement with unhealthy advertisements, and reduce the risk that children and parents may misinterpret product claims, and to reduce the potential for pester power’.<sup>18</sup>

Subsequently, the UK banned product placement on television in children’s programmes as well as product placement for unhealthy food in any programming.<sup>19</sup> These rules derive from a series of three consultations, held between 2005 and 2009, on how the UK should implement the Audiovisual Media Services Directive (also referred to as the AVMS Directive<sup>20</sup>) which grants a broad margin of discretion to Member States of the European Union regarding how far they would like to allow product placement in certain programmes.<sup>21</sup> By banning the placement of unhealthy food in all British made television

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young children, being more vulnerable, are more readily affected than more media-literate teenagers. Instead, findings of effects are rather mixed for younger children and more clear-cut for older children and teenagers. It is argued that all age groups are affected by advertising, both because different persuasion processes operate at different ages and because, presumably as a consequence, each age group is targeted by age-specific forms of advertising.’

<sup>14</sup> At para 2.7.

<sup>15</sup> The ASA is the UK’s regulator of advertising across all media. For more information on the ASA, see <http://www.asa.org.uk/>.

<sup>16</sup> See section 13 of the UK Code of Broadcast Advertising: <http://www.cap.org.uk/Advertising-Codes/Broadcast-HTML.aspx>.

<sup>17</sup> Details can be found on Ofcom’s website: [http://www.ofcom.org.uk/consult/condocs/foodads\\_new/](http://www.ofcom.org.uk/consult/condocs/foodads_new/).

<sup>18</sup> *Television Advertising of Food and Drink Products to Children: Final statement* (Ofcom 2007): [http://www.ofcom.org.uk/consult/condocs/foodads\\_new/statement/](http://www.ofcom.org.uk/consult/condocs/foodads_new/statement/), at para. 1.9.

<sup>19</sup> The Audiovisual Media Services (Product Placement) Regulations 2010 were adopted on 18 March and entered into force on 16 April 2010. 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 explicitly confirmed at para 1.1. For the Code and the Guidance, see: <http://stakeholders.ofcom.org.uk/broadcasting/broadcast-codes/broadcast-code/commercial-references-television/>.

<sup>20</sup> On the AVMS Directive, see the contribution below.

<sup>21</sup> Article 11 of Directive 2010/13/EU, OJ 2010 L 95/1.

programmes, the UK has therefore used the discretion which the Directive have granted all EU Member States to increase the minimum level of protection it provides.<sup>22</sup>

These measures were a significant step in the right direction and particularly noteworthy for at least three reasons. Firstly, they addressed two related problems which the WHO has identified as a concern in the fight against childhood overweight and obesity: the problem of excessive exposure to unhealthy food advertising (how much advertising?), as well as the problem of the power of certain specific advertising techniques which have been found to be particularly effective with children (what kind of advertising?).

Secondly, the UK rules on food marketing to children set clear mechanisms to classify food into different categories.<sup>23</sup> Determining what constitutes unhealthy food requires that food be categorized on the basis of its nutritional value and its contents of fat, salt and sugar. In the absence of such categorization of food, it will be impossible to determine the healthiness of each food and determine whether it should be subjected to marketing restrictions. When reflecting on a food categorization system, countries must ensure that it is evidence-based, objective and independent from industry's vested interests.<sup>24</sup> Relying on an independent, well established and uniformly applied nutritional profiling model as the UK has done allows food business actors to promote the food within their portfolios which does not fall within the unhealthy food category. This may in turn increase competition between food business actors and provide them with incentives to innovate or reformulate some unhealthy into healthier food.

The rules were adopted after long periods of consultation and stimulated a vigorous public debate about the impact of food advertising on children. In some limited regard this has led to the adoption of tighter restrictions than the Government initially proposed, for example the ban on product placement for unhealthy foods in all TV programmes and the application of some of the unhealthy restrictions to programmes for children aged 4-15 years (rather than originally 4-9 years).

## **II. The loopholes contained in the UK regulatory framework**

Nevertheless, several loopholes remain in the UK regulatory framework. First of all, the definition of children's programmes confirms that children are still exposed to a range of food marketing. A range of programmes may be watched by a high number of children

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<sup>22</sup> The AVMS Directive merely prohibits the placement of tobacco products and medicinal products or medical treatments available only prescription (see Article 11(4)). On the regulation of product placement on UK television, see A Garde, 'Towards the Liberalisation of Product Placement on UK Television?' (2011) 16 *Communications Law* 92.

<sup>23</sup> On the UK nutrition profiling model, see <https://www.gov.uk/government/publications/the-nutrient-profiling-model>.

<sup>24</sup> Member States must ensure compliance with international trade rules, and more specifically the requirement under WTO law that they shall not discriminate against imports. See B McGrady, *Trade and Public Health: Diet, Tobacco and Alcohol* (Cambridge University Press 2011).

without being covered by the prohibition: the definition therefore allows for a shift of investment from children's to adult airtime. This has been acknowledged by Ofcom itself. In July 2010, it published a final review of the effectiveness of these rules restricting unhealthy advertising. It noted the high compliance rate of broadcasters with both the letter and the spirit of the scheduling restrictions, and it noted that between 2005 and 2009, children saw at least 37% less unhealthy food advertising (52% for children between 4 and 9 years old and 22% for children of 10 to 15 years old). It also noted that exposure fell in all day parts before 9pm and by 25% between the peak hours of 6 and 9pm. Nevertheless, Ofcom found that the volume of unhealthy food advertising aired throughout the day had increased, and children only saw 1% less unhealthy food advertising overall in adult airtime.<sup>25</sup> The relatively high threshold adopted by Ofcom is therefore still too low to ensure that children are adequately protected from harmful unhealthy advertising. Other research findings even suggest that children's exposure to unhealthy food advertising has increased. For example, researchers from Newcastle University found that children were exposed to the same level of unhealthy food advertising as they were before the entry into force of Ofcom rules, confirming that children are still being exposed to unhealthy food adverts during programming which is not specifically aimed at them.<sup>26</sup> Similarly, researchers from the University of Liverpool concluded that despite regulation, children in the UK were exposed to more TV advertising for unhealthy than healthy food items, even at peak children's viewing times and that there remained scope to strengthen the rules regarding advertising of HFSS foods around programming popular with children and adults alike, where current regulations do not apply.<sup>27</sup> A range of stakeholders, not least the Academy of Medical Royal Colleges, representing 200,000 members, called for a tightening of the rules, arguing that a 9pm watershed would be a more proportionate response to the problem of childhood overweight and obesity in that it would more effectively limit the exposure of children to unhealthy food advertising than existing rules do at present.<sup>28</sup> Others have highlighted the need to address the nature of advertising during family and early evening viewing times, while also ensuring that restrictions reflect the evolving and fluid way in which TV and TV programmes are now viewed by children, on-demand.<sup>29</sup>

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<sup>25</sup> *HFSS Advertising Restrictions: Final Review* (Ofcom, 26 July 2010):

<http://stakeholders.ofcom.org.uk/binaries/research/tv-research/hfss-review-final.pdf>

<sup>26</sup> J Adams et al, 'Effect of Restrictions on Television Food Advertising to Children on Exposure to Advertisements for 'Less Healthy' Foods: Repeat Cross-Sectional Study' (2012) 7(2) PLoS ONE e31578.

<sup>27</sup> E Boyland et al, 'The extent of food advertising to children on UK television in 2008' (2011) 6 *International Journal of Pediatric Obesity* 455.

<sup>28</sup> Academy of Medical Royal Colleges, *Measuring up report: The medical profession's prescription for the Nation's obesity crisis* (AMRC 2013).

<sup>29</sup> Supporting national and regional organisations include the British Heart Foundation, the Association for the Study of Obesity, the British Dietetic Association, the Children's Food Campaign, the Family and Childcare Trust, the Faculty of Public Health, the Royal College of Paediatrics and Child Health, Heart of Mersey, and the UK Health Forum. The loopholes in the UK regulatory framework have been criticized by a broad range of NGOs, other actors of civil society and parliamentary committees. See in particular: the report commissioned by the government and published by the National Heart Forum (now the UK Health Forum) in June 2011: <http://www.heartforum.co.uk/our-work/policy/nutrition/marketing-food-and-drink-to-children/>. See also (listed by chronological order): The House of Lords' Science and Technology Committee Report on *Behaviour Change*, London, 2011: <http://www.publications.parliament.uk/pa/ld201012/ldselect/ldsctech/179/179.pdf>; Sustain's Report on *The Obesity Games – Junk Food Sponsorship of the Olympic Games*, London, 2012: <http://www.sustainweb.org/publications/?id=237>; The House of Commons' Environmental Audit Committee

Secondly, certain marketing techniques which are extremely popular and effective with children are left out of the content-related rules. In particular, many food business actors use brand-equity characters to promote their products across a range of media (i.e. characters created by advertisers which have no separate identity and which are designed to appeal to young children, such as characters promoting breakfast cereals). Brand-equity characters differ from licensed characters, in that the latter are covered by the content-related rules in force in the UK, whereas the former are not. This difference therefore entails a high risk that advertisers use brand-equity characters more extensively than they previously did. Ofcom has found that there had been a 58% increase in the number of food and drink spots featuring brand-equity characters between 2005 and 2009, though it also noted a 56% reduction in children's exposure to food and drink commercials featuring a brand-equity character during the same period.<sup>30</sup>

Thirdly, Ofcom rules only apply to broadcasting activities, which leaves several media or settings where children gather unregulated. The ASA did review its 'non-broadcast' CAP Code at same time as the review of the BCAP Code linked to the Ofcom restrictions. The changes at the time were, however, more limited. Key principles that Ofcom was able to insist on were reflected to a certain extent within BCAP, such as distinguishing unhealthy foods and protecting children up to 16. However these were not followed through within the CAP changes. The industry rules therefore only distinguish fruit and vegetables (healthy foods) and only apply to younger children up to the age of 12. The CAP Code also has no jurisdiction over more traditional media such as packaging and sponsorship, leaving marketers free to promote unhealthy food through cartoon characters, giveaways and augmented packaging. This is particularly problematic as children engage with more media, at a younger age, and marketers respond to these trends by adopting integrated strategies. The boundaries between socializing, entertainment and marketing (through the use of advergames as well as games on company-owned websites) are becoming increasingly blurred. This is particularly worrying as immersive marketing techniques have become more common and are likely to operate at a sub-conscious level. As a result, many of the marketing techniques to which children are exposed fall outside the scope of existing rules on food marketing.<sup>31</sup> For

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Report on Sustainable Food, London, 2012: <http://www.publications.parliament.uk/pa/cm201012/cmselect/cmenvaud/879/879.pdf>; Which? Consumer Report, *A Taste for Change?*, London, 2012: <http://www.which.co.uk/documents/pdf/a-taste-for-change---which-briefing---responsibility-deal-305379.pdf>; Academy of Royal Medical Colleges' Report *Measuring Up: The Medical Profession's Prescription for the Nation's Obesity Crisis*, London, 2013: [http://www.aomrc.org.uk/publications/statements/doc\\_download/9673-measuring-up.html](http://www.aomrc.org.uk/publications/statements/doc_download/9673-measuring-up.html); Sustain's Report *Through the Looking Glass: A Review of Topsy-Turvy Food Marketing Regulations*, London, 2013: <http://www.sustainweb.org/publications/?id=273>. See also J. Landon, 'Regulations and voluntary codes controlling food and drink marketing to children in the UK: an analysis of gaps and weaknesses', *Appetite* (2013).

<sup>30</sup> *HFSS Advertising Restrictions: Final Review* (Ofcom 2010): <http://stakeholders.ofcom.org.uk/binaries/research/tv-research/hfss-review-final.pdf>.

<sup>31</sup> It is true that business actors have made some voluntary commitments to limit the negative impact of the marketing of unhealthy food to children. Nevertheless, the threshold adopted is generally too low for these measures to be effective. In any event, one may question whether self-regulation should be seen as the way forward in this field, as discussed in the contribution above.

example, the proven power of advergames to change children's eating behaviour was not reflected. This loophole has been further exploited in that TV adverts that would not be allowed on children's TV are now available on food marketers websites so that children can see them at any time and watch them as many times as they like.<sup>32</sup> Supplementary self-regulatory initiatives adopted by food companies, such as the EU Pledge, have failed to plug any of these gaps. The situation is likely to change when the new CAP rules discussed in section III below will become enforceable on 1<sup>st</sup> July 2017.

Fourthly, doubts should be expressed as to the coherence of the overall obesity prevention strategy adopted. Many food companies have a significant presence in sports sponsorship, linking unhealthy food with sport and fitness and giving a positive image to the food industry as a major partner in the fight against childhood obesity. For example, McDonald's, Coca-Cola and Cadbury were all official sponsors of the London 2012 and Rio 2016 Olympic Games. Coca-Cola was also a major sponsor of the FIFA 2014 World Cup. PepsiCo also used the tournament and its stars to promote its products, including through packaging and social media. This is now particularly incongruous in view of the UK's Scientific Advisory Committee on Nutrition's recommendation to minimise consumption of sugar sweetened beverages<sup>33</sup> and evidence from the National Diet and Nutrition Survey<sup>34</sup> (NDNS) that 30 per cent of teenagers' consumption of free sugars comes from soft drinks. In the continuing struggle for coherence in a global strategy on diet, health and obesity and related chronic disease prevention, the food and beverage sector has sought to sway, if not divert completely, public health policy towards an exaggerated emphasis on increased exercise (by supporting participation in sport) rather than towards consuming fewer calories. Reinforcing sport's links with specific brands and the food sector as a whole, serves only to undermine public health messages and confuse consumers. It also facilitates the promotion of certain brands that have otherwise pledged to refrain from targeting children, in ways that will undoubtedly have a major impact on children.<sup>35</sup> When implementing the Recommendations, countries should look not only at the letter but also the spirit of the Recommendations so that their full effectiveness is ensured.<sup>36</sup>

### **III. From the 'Responsibility Deal' to the Childhood Obesity Plan**

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<sup>32</sup> A Nairn and H Hang, *Advergames, it's not child play* (Family and Parenting Institute 2012), 15.

<sup>33</sup> Scientific Advisory Committee on Nutrition, Report on Carbohydrates and Health, July 2015.

<sup>34</sup> Public Health England, National Diet and Nutrition Survey 2014, 14 May 2014.

<sup>35</sup> For a more detailed discussion of the sponsorship of sports events by food business actors, see A. Garde and N. Rigby, "Going for Gold – Should Responsible Governments Raise the Bar on Sponsorship of the Olympic Games and Other Sporting Events by Food and Beverage Companies?", *Communications Law* (2012) 17:42. See also Sustain's Report on *The Obesity Games – Junk Food Sponsorship of the Olympic Games*, London, 2012: <http://www.sustainweb.org/publications/?id=237>.

<sup>36</sup> Framework Implementation Report, at page 9: "The Recommendations refer to the marketing of products and services. They do not refer explicitly to the promotion of brands (as distinct from products and services); however, as certain brands and organizations are clearly associated with products or services whose marketing could fall within the scope of the Recommendations, efforts to restrict marketing in this area also need to consider how brands are marketed".



The previous Coalition Government launched a Public Health Responsibility Deal in March 2011,<sup>37</sup> aimed at securing action through voluntary industry pledges, followed by the White Paper on Obesity in October 2011.<sup>38</sup> In this latter document, it states ‘We will see a focus on voluntary agreements and supporting people in making healthier choices, rather than reducing choice’.<sup>39</sup> The work plan included food promotion as an area for voluntary action. A mapping and stakeholder analysis by the National Heart Forum (now UK Health Forum) was commissioned by the Department of Health and identified gaps in current regulatory and voluntary controls which could be fruitful areas of action for the Responsibility Deal.<sup>40</sup> These include point of sale marketing, marketing on digital media, sponsorship and in-school marketing. However, the food companies and retailers engaged with the Responsibility Deal failed to agree any collective pledge on promotions and marketing, saying the approach would not work on such a ‘commercially sensitive’ issue.<sup>41</sup> Conflicts of interests are indeed particularly stark when dealing with marketing and promotion: the main motive of food business actors is generally to increase their profits by maximising the sale of their food and catering services.<sup>42</sup> Thus, while the Responsibility Deal has managed to encourage action by some companies on certain issues, such as salt reduction and out of home calorie labelling, the scope of action and sign up overall was limited. There has been little appetite for further action in the area of marketing despite Ministers stating that they expected more action.<sup>43</sup>

In 2013, the Scottish Government tried to drive action through the development of a publicly available specification or standard, working with the British Standards Institute. The intention was to define best practice for the responsible marketing of food and drink products including wider promotions. However, the main food industry and advertising trade bodies pulled out of the initiative arguing that the plans were ‘prescriptive and unworkable’ and would set a dangerous precedent of government control.<sup>44</sup> Since then the Scottish Government has published a framework for voluntary action with the food industry, akin to the Responsibility Deal, which does not include any specific actions to limit food marketing to children. Instead the Scottish Government committed to convening a working group of stakeholders to ‘build on existing practice on the responsible marketing of food and drink high in fat, salt and sugar in order to reduce children’s exposure to messaging’.<sup>45</sup> The Scottish Government has also asked the UK Government to consider strengthening the TV advertising rules to a pre-9pm watershed ban, in the light of research from Newcastle University which suggested that children were exposed to the same levels of unhealthy advertising as before the introduction

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<sup>37</sup> Responsibility Deal, March 2011.

<sup>38</sup> Healthy Lives, Healthy People, October 2011.

<sup>39</sup> Healthy Lives, Healthy People, October 2011.

<sup>40</sup> J. Landon and Y. Gritschneider, *An analysis of the regulatory and voluntary landscape concerning the marketing and promotion of foods and drinks to children*. National Heart Forum. 2010

<sup>41</sup> Department of Health abandons plans to restrict unhealthy food promotions. *The Grocer*. 19 April 2014. <http://www.thegrocer.co.uk/home/topics/health/dh-abandons-plans-to-restrict-hfss-food-promotions/356616.article>.

<sup>42</sup> The issue of conflicts of interests is discussed in a previous contribution above.

<sup>43</sup> See for example: DH wants new Responsibility Deal measures to tackle unhealthy promotions, *The Grocer*, 18 January 2014.

<sup>44</sup> Industry groups quoted in *The Grocer*, 5 October 2013.

<sup>45</sup> Supporting Healthy Choices. A framework for voluntary action (The Scottish Government 2014).

of the Ofcom rules.<sup>46,47</sup> The Government in Northern Ireland has also made a similar request to the Westminster Government as this level of regulation is a reserved matter.<sup>48</sup>

### *1. A Childhood Obesity Strategy?*

In May 2015, the UK Government changed. Tackling childhood obesity became a stated Government priority, supported by Prime Minister David Cameron. In particular, ministers emphasised that they saw marketing and promotions as an area where more action was needed.<sup>49</sup> The public health agency for England – Public Health England – released a review of the evidence for policies to reduce sugar consumption including food and beverage marketing restrictions and fiscal measures in October 2015 which was commissioned by the Government to inform the Childhood Obesity Strategy.<sup>50</sup> This evidence review concluded that ‘children in England are exposed to a high volume of marketing and advertising in many different forms both old (eg TV advertising, radio, cinema, press and billboards) and new (eg advergames, social media, online advertising), as well as through sponsorship by food and drinks companies of TV programmes, public amenities and events. Available research evidence shows that all forms of marketing consistently influence food preference, choice and purchasing in children and adults’. Among its recommendations, it therefore stressed the need to ‘significantly reduce opportunities to market and advertise high sugar food and drink products to children and adults across all media including digital platforms and through sponsorship’. Public Health England’s findings were endorsed by the House of Commons Health Select Committee in November 2015. The report began with a call for governmental intervention: ‘The scale and consequences of childhood obesity demand bold and urgent action. We believe that if the Government fails to act, the problem will become far worse. We urge the Prime Minister to make a positive and lasting difference to children’s health and life chances through his childhood obesity strategy’ It then made specific recommendations in a number of areas, including ‘reducing exposure to marketing by setting broader and deeper controls on advertising of high sugar foods and drinks to children’. The Health Select Committee echoed the recommendations of Public Health England to:

- extend current restrictions to apply across the full range of programmes that children are likely to watch as opposed to limiting this to just children’s specific programming;
- extend current restrictions on advertising to apply across all other forms of broadcast media, social media and advertising (including in cinemas, on posters, in print, online and advergames);
- limit the techniques that can be used to engage with children, including plugging the ‘loopholes’ that currently exist around the use of unlicensed but commonly recognised cartoon characters and celebrity endorsement within children’s advertising

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<sup>46</sup> J Adams et al, ‘Effect of restrictions on television food advertising to children on exposure to advertisements for ‘less healthy’ foods: repeat cross-sectional study’ (2012) 7(2) PLoS ONE e31578.

<sup>47</sup> <http://www.bbc.co.uk/news/uk-scotland-17414707>.

<sup>48</sup> A Fitter Future for All. Progress Report 2012-14. DHSSPS (2014).

<sup>49</sup> See for example: DH wants new Responsibility Deal measures to tackle unhealthy promotions, *The Grocer*, 18 January 2014.

<sup>50</sup> Sugar Reduction – the evidence for action (Public Health England 2015).

- tighten the current nutrient profiling model that governs what can be advertised;
- consider limiting brand advertising of well recognised less healthy products including through restrictions on sponsorship on, for example, sporting events.<sup>51</sup>

The Government's long-awaited Childhood Obesity Strategy was expected for early 2016. However, the process was delayed by the UK referendum on membership of the EU. Ultimately, the new Government opted instead for the publication of a briefer childhood obesity plan.<sup>52</sup> As the House of Commons Health Select Committee subsequently put it, 'campaigners on childhood obesity were largely underwhelmed by its contents'.<sup>53</sup> The Plan contained no explicit reference to the need for further measures to tackle food advertising promotions. It did include measures aimed at reducing sugar intakes, particularly in children. There was for example an announcement of a levy on sugary drinks and a programme of sugar reduction across nine categories of foods that contribute the most to children's intakes. The Strategy does not propose any regulatory measures, although sets timelines to review whether this programme for example, is delivering effectively. The lack of any reference to advertising is extraordinary in light of the attention that this topic has received over the years and the efforts campaigners had made to ensure that the failure of the Responsibility Deal would be remedied in a comprehensive, multisectoral strategy. The Government's childhood obesity plan nonetheless announced that Public Health England would work with a broad range of relevant stakeholders to review the nutrient profile model to ensure it reflects the latest government dietary guidelines, in particular the recommendations made by the Scientific Advisory Committee on Nutrition.<sup>54</sup>

## ***2. Extending the scope of existing rules to several non-broadcast media***

The focus on childhood obesity prompted the CAP to announce a pre-consultation ahead of a review of its non-broadcast (CAP) Code in September 2015.<sup>55</sup> A formal consultation took place from May to July 2016, and the CAP announced on 8 December 2016 that it would extend existing restrictions on broadcast media to non-broadcast media falling within the remit of the CAP Code:

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<sup>51</sup> House of Commons Health Select Committee, *Childhood obesity— brave and bold action*, First Report of Session 2015-2016, HC 465, 30 November 2015: <https://www.publications.parliament.uk/pa/cm201516/cmselect/cmhealth/465/465.pdf>.

<sup>52</sup> Childhood Obesity: A Plan for Action, August 2016: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/546588/Childhood\\_obesity\\_2016\\_2\\_acc.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/546588/Childhood_obesity_2016_2_acc.pdf)

<sup>53</sup> House of Commons Health Select Committee, *Childhood obesity: Follow-up*, Seventh Report of Session 2016-2017, HC 928, 27 March 2017: <https://www.publications.parliament.uk/pa/cm201617/cmselect/cmhealth/928/928.pdf>.

<sup>54</sup> For information on the review process, see: <https://www.gov.uk/government/collections/review-of-the-nutrient-profiling-model>.

<sup>55</sup> <https://www.cap.org.uk/News-reports/Media-Centre/2015/Non-broadcast-advertising-of-food-and-soft-drinks-to-children.aspx#.VxitVvkrLIU>.

- ads that directly or indirectly promote an unhealthy food product will not be permitted to appear in children's media (children being defined as less than 16 years of age), including online platforms like social networks and techniques such as advergames;
- ads for unhealthy food products will not be permitted to appear in media where children under 16 make up over 25% of the audience;
- ads for unhealthy food products will not be allowed to use promotions, licensed characters and celebrities popular with children of less than 12 years of age; and
- brand advertising that has the effect of promoting specific unhealthy food products will also be prohibited, even if the products are not featured directly.

The ASA will enforce the new restrictions from 1<sup>st</sup> July 2017.<sup>56</sup>

These new rules are very welcome, in that they extend the protection of children from the harmful impact of unhealthy food marketing on their health to a broader range of media which had been left unregulated until then (EU pledge commitment aside<sup>57</sup>), as we discussed in the previous section of this contribution. Consequently, it brings the CAP Code into line with the BCAP Code and increases media neutrality. Furthermore, neutrality will be increased in that the same age cut off points (i.e. under 16 or 12 depending on the rule) and the same food classification system (i.e. the Department of Health nutrient profiling model) will apply irrespective of the media concerned. The extension of the scope of the rules therefore bring the UK regulatory framework a step closer to what the WHO Recommendations would regard as a comprehensive approach. They even recognize the importance of regulating brand advertising and brand sponsorship that has the effect of promoting a specific unhealthy food product, looking at the overall content and context of the promotion.<sup>58</sup> This recognition does not amount to a ban on food sponsorship, but it goes some way towards acknowledging the power of brands in influencing children's food preferences, purchase requests and consumption choices.

Nevertheless, this framework still contains significant gaps. If the broad definition of 'marketing' for the purposes of the Recommendations and the scope of the CAP Code are compared, several marketing practices are still left unregulated, despite their impact on children's food preferences. This is particularly the case for sponsorship, in-store and in-school promotion, as well packaging. These fall outside the remit of the CAP Code, however, the Government could extend the rules to unregulated media.

Furthermore, existing evidence on the effects of unhealthy food marketing should have warranted broader restrictions in relation to media falling within the scope of the CAP Code. There are two areas of particular concern. Firstly, the Code exempts unlicensed characters,

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<sup>56</sup> A three-month transitional period will apply to advertisers who can demonstrate to the ASA that the media space in question was booked prior to CAP's announcement on 8 December 2016: see Regulatory Statement, at page 26.

<sup>57</sup> The EU Pledge is discussed in the contribution on conflicts of interests.

<sup>58</sup> For guidance on how to identify brand advertising that has the effect of promoting unhealthy food product, see CAP Consultation: food and soft drink advertising to children, Regulatory statement: Annex A.

even though those are popular with children and therefore likely to influence their preferences for unhealthy food if used to promote such food. The distinction between licensed and equity brand characters remains, even though such distinction is not supported by existing evidence. Secondly, the Code uses a relatively high audience threshold to determine in which media the prohibition on unhealthy food marketing will apply: 25% or more of the audience must be made up (or must be likely to be made up) of children of less than 16 years of age. Thus, ‘advertising of junk food will still be allowed at the cinema, online, in print or at events if less than one quarter of the media’s audience is judged to be under the age of 16. Children are often exposed to junk food ads during early-evening family TV because programmes aren’t counted as ‘children’s TV’ and the Committee on Advertising Practice has missed an opportunity to lead the way on closing this type of loophole.’<sup>59</sup> Leaving aside concerns relating to the enforcement of this rule, the fact is that several media used by a high number of children in absolute terms will continue to escape the prohibition, allowing for marketing investment shifts from regulated to unregulated programmes (broadcast) or regulated to unregulated media (non-broadcast).

In a follow up inquiry on childhood obesity that assessed this approach, the House of Commons Health Select Committee stated that ‘the advertising regulators could — and should — go further’.<sup>60</sup> As discussed in the first contribution above, the more comprehensive the restrictions on unhealthy food marketing are, the more likely it is that the objectives pursued by the WHO Recommendations can be met and that the impact on children of such marketing may be significantly reduced. Gaps in the regulatory framework therefore still need to be addressed with advertising regulators going further. The proper functioning of the EU internal market requires that a high level of public health protection should be ensured and that, in the absence of common EU rules, Member States have a responsibility to protect the health of their citizens in areas of shared competence. Consequently, and as discussed more fully below in the contribution on the compatibility of marketing restrictions with EU internal market law, Member States have a broad margin of discretion to determine how they can best do so. Advertising regulators could therefore go further. In any case, they will have this flexibility once the UK leaves the EU.

## **Conclusion**

The difficulty in determining the impact of individual measures aimed at tackling growing childhood overweight and obesity rates when the causes are multi-factoral should not detract from the necessity of developing comprehensive rules to control the exposure of children to unhealthy food marketing and the power of marketing techniques used. Public authorities must take stock of existing evidence and devise effective policies limiting the impact on children of unhealthy food marketing, in conformity with the WHO Recommendations.

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<sup>59</sup> Evidence submitted by the Children’s Food Trust to the House of Commons Health Select Committee, at para 61 of the Committee’s Report.

<sup>60</sup> <https://www.publications.parliament.uk/pa/cm201617/cmselect/cmhealth/928/928.pdf>, para 68.

Despite several progressive efforts to tighten controls in this area, there is no doubt that, in light of the Recommendations, the UK regulatory framework still contains a few loopholes. Work remains to be done to address these and ensure that children are no longer exposed to unhealthy food marketing. There is no reason for the promotion to children of foods known to have detrimental health impacts should be allowed to continue unimpeded.

A comprehensive approach (as opposed to a stepwise approach) has the highest potential to achieve the desired objective, i.e. to reduce both exposure and power.<sup>61</sup> This will prevent the shift of unhealthy food marketing from certain more regulated sectors, such as television and now non-broadcast media, to others unregulated ones, including sponsorship, in-store and in-school promotion, as well packaging, as evidence suggests has been the case to date.

As the WHO Recommendations have also clearly highlighted, public authorities have a central role in ensuring that the rules are effective. They should be the key stakeholders in the development of policy and provide leadership for implementation, monitoring and evaluation, and they should not abdicate their overall responsibility to private parties: they must lead the process, preventing conflict of interests.<sup>62</sup> Arguably, to do so, they must set the standards to be achieved and be satisfied that they are properly implemented. In particular, they must lay down clear rules on the media and techniques to be covered, on the age at which children should be protected, on how target audiences should be assessed, as well as ensure that clear enforcement mechanisms and adequate sanctions are in place. The follow up to the Childhood Obesity Plan needs to address this.

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<sup>61</sup> Recommendation 3.

<sup>62</sup> Recommendation 6.