
Resolution on the protection of children from digital food marketing

Introduction

Food marketing contributes to childhood obesity, an ever-growing problem in the United States (U.S.) and the European Union (EU).¹ In the digital era, strong market forces target children and adolescents – who become consumers at an early age – with sophisticated, integrated and effective marketing strategies that promote unhealthy foods in popular digital spaces. To target this marketing to individuals, deep personal data is collected without sufficient user knowledge or control.² Implementation of policy recommendations to counteract the commercial exploitation of children and adolescents has progressed very slowly and only partially, leaving vulnerable consumers largely unprotected, particularly online.^{3,4}

Against this backdrop, TACD recommends that the EU and U.S. governments should develop policies and regulations to effectively protect children, including adolescents, from unregulated and inappropriate food marketing in digital media and technologies.

This resolution builds on the Transatlantic Consumer Dialogue's (TACD) [January 2006 Resolution on Nutrition, Obesity, and Diet-Related Disease](#), by considering the implications of digital food marketing on children and adolescents. It should also be seen in conjunction with TACD's [December 2018 Resolution on Competition, Privacy and Consumer Welfare](#).

Definitions

Marketing: Any form of commercial communication or message that is designed to, or has the effect of, increasing the recognition, appeal and/or consumption of certain products and services. It comprises anything that acts to advertise or otherwise promote a product or service.¹

Unhealthy foods: Foods and non-alcoholic beverages that are high in fat, sugar or salt as defined by authoritative nutrient profile models that are designed to categorize foods and define which foods can and cannot be marketed to children.⁵

¹ WHO: Set of recommendations on the marketing of foods and non-alcoholic beverages to children (2010):

<https://www.who.int/dietphysicalactivity/publications/recsmarketing/en/>

² See for example WHO Regional Office of Europe (WHO Euro): Tackling food marketing to children in a digital world: trans-disciplinary perspectives.

Children's rights, evidence of impact, methodological challenges, regulatory options and policy implications for the WHO European Region (2016): <http://www.euro.who.int/en/health-topics/disease-prevention/nutrition/publications/2016/tackling-food-marketing-to-children-in-a-digital-world-trans-disciplinary-perspectives.-childrens-rights,-evidence-of-impact,-methodological-challenges,-regulatory-options-and-policy-implications-for-the-who-european-region-2016>; Montgomery K and Chester J. Digital Food Marketing to Children and Adolescents. Problematic Practices and Policy Interventions (2011): https://www.foodpolitics.com/wp-content/uploads/DigitalMarketingReport_FINAL_web_20111017.pdf

³ WHO Euro: evaluating implementation of the WHO Set of recommendations on the marketing of foods and non-alcoholic beverages to children (2018): http://www.euro.who.int/_data/assets/pdf_file/0003/384015/food-marketing-kids-eng.pdf

⁴ Garde A, Byrne S, Gokani N, Murphy B: A Child Rights-Based Approach to Food Marketing: A Guide for Policy Makers (2018).

https://www.unicef.org/csr/files/A_Child_Rights-Based_Approach_to_Food_Marketing_Report.pdf

⁵ Models developed by national health authorities or normative bodies such as WHO, i.e. WHO Euro Nutrient Profile Model:

http://www.euro.who.int/_data/assets/pdf_file/0005/270716/Nutrient-children_web-new.pdf; and the Pan American Health Organization (PAHO) Nutrient Profile Model: <http://iris.paho.org/xmlui/handle/123456789/18621>

Recommendations

- TACD urges governments in the EU and the U.S. to acknowledge that public authorities are responsible for policy development and implementation to protect young consumers. They should develop or strengthen mandatory regulations that restrict the marketing of unhealthy foods through digital media to children, including adolescents.
- Policies should broadly define all relevant digital platforms, channels and applications that children, including adolescents, use, where marketing restrictions should apply. Examples of “digital platforms” would include, but should not be limited to, search engines, web pages, email, mobile phone texts, advergames, video-sharing/streaming platforms, apps, blogs/vlogs, digital television services and all social media platforms (such as YouTube, Instagram, Snapchat, Facebook).
- Policies should aim to limit children’s overall exposure to marketing of unhealthy foods. Current initiatives to reduce food marketing to children, in many cases industry-led self-regulation schemes, often limit their scope to marketing that is specifically targeted at children. This limitation excludes (other) media content and platforms that expose children to unhealthy marketing. Policies need to be flexible in order to encompass children’s actual exposure to unhealthy food marketing.
- Policies should apply age limits that protect both younger children and adolescents. Despite their increasing cognitive ability adolescents may be considered particularly vulnerable for other developmental reasons (such as their social and identity needs, and their greater freedom to navigate the environment and buy foods themselves), and because adolescents are heavily targeted by marketers of unhealthy foods in digital media.
- Governments should prohibit the collection of any data from children and adolescents through digital platforms and granting of permission should not be devolved to parents. In the EU, national governments should apply the 16-year age limit provided in the General Data Protection Regulation (GDPR). In the U.S., an enhanced protective policy would include additional legislation to extend the Children’s Online Privacy Protection Act (COPPA) to children under 15, a prohibition on targeted marketing to children and teens under the age of 17, and ensure fair marketing practices in digital media.
- Policies to limit digital marketing of unhealthy foods should apply authoritative nutrient profile models, such as the WHO Euro and the PAHO Nutrient Profile Models, in order to define what food and drinks can and cannot be marketed to children and adolescents.
- While maintaining clear accountability within a responsible agency, policy development to restrict digital food marketing should be based on interagency cooperation and processes, acknowledging that the restriction of digital food marketing is a complex issue where cross-disciplinary expertise is needed to achieve the objective of effectively protecting children from harm.
- Governments should recognize that harms stemming from the marketing of unhealthy foods are not distributed equally among populations. Governments in the U.S. and Europe must aim to put extra safeguards in place to protect marginalized populations, such as ethnic minorities and low-income populations - particularly children and adolescents - from such marketing, with the aim of achieving equitable public health outcomes.

- Governments of the EU and U.S. should establish comprehensive enforcement mechanisms to monitor food marketing to children, handle complaints and impose effective sanctions and penalties. In the U.S., state attorneys general should continue to have parallel investigative and enforcement authority through their consumer protection function and any future federal legislation should not pre-empt state action.
- Governments should consider the impact of cross-border marketing to ensure the effectiveness of national laws and policies and should devise cross-border preventative measures such as Memoranda of Understanding and post-market enforcement responses to avoid evasion of national rules. In particular, the EU should reflect on how best it could use its powers to regulate cross-border marketing at the regional level.
- Trade and investment agreements, including any future bilateral or plurilateral agreement signed by the U.S. and EU, should not limit governments' ability to regulate food marketing in the future with a view to protecting children from the harm resulting thereof.

Background

Childhood obesity and consequences for public health

In Europe, one in three school-aged children and one in four adolescents is overweight or obese, while in the U.S. the prevalence is even higher - around forty percent of children and adolescents are overweight or obese.⁶ Childhood obesity is a strong risk factor for obesity in adulthood and for diet-related non-communicable diseases (NCDs) such as heart disease, type II diabetes and several cancers, which seriously compromise public health and has become a major cause of death and disability worldwide including across the U.S. and the EU.

Food marketing and its relationship to unhealthy diets and dietary health

The food industry continues to direct enormous expenditure towards marketing of foods to children that disproportionately promote unhealthy foods and contribute to childhood obesity. Estimates of food marketing expenditure in recent years have shown a shift from broadcast advertising to Internet and other non-traditional digital advertising.⁷ A strong body of evidence shows that food marketing influences children's recognition and attitudes to foods; increases preference for unhealthy foods; leads to greater pestering of parents to buy unhealthy foods; and increases children's food intake in the short and long term, thereby undermining parents' efforts to feed children a healthy diet.⁸ New studies on the effects of digital food marketing confirm the established evidence and extend to include adolescents and young adults.⁹

Public concern over food marketing to children dates back decades and advocates have described the imbalance between strong market forces and vulnerable young consumers as a "crisis in the marketplace".¹⁰ A further concern is that marketing for unhealthy foods to a greater extent targets disadvantaged children and adolescents, which contributes to diet-related health disparities.¹¹

Digital food marketing in children's lives

Over a short period of time, children and adolescents have become avid users of new digital technology and media, and time spent on Internet and social media has rapidly increased. In 2015, youth in OECD countries spent on average two hours daily on the Internet. Mobile device ownership has also rapidly increased, enabling children to access Internet through tablets or smart phones. Notably, caregivers often do not monitor children's online use. Children and adolescents use a variety of digital locations, most of which are not child-specific, and are actively engaged on social media platforms such as YouTube, Facebook, Instagram and Snapchat. Underage

⁶ WHO: Global Health Observatory data repository (2017).

⁷ WHO Euro: Marketing of foods high in fat, salt and sugar to children: update 2012–2013. (2013). <http://www.euro.who.int/en/health-topics/disease-prevention/nutrition/publications/2013/marketing-of-foods-high-in-fat,-salt-and-sugar-to-children-update-20122013>

⁸ See for example Cairns G, Angus K, Hastings G. The extent, nature and effects of food promotion to children: a review of the evidence to December 2008. Institute for Social Marketing, University of Stirling and the Open University. Geneva: World Health Organization; 2009; McGale LS, Halford JCG, Harrold JA, Boyland EJ. The influence of brand equity characters on children's taste preferences and food choices. *J Pediatr-US*. 2016;177:33–8; Norman J, Kelly B, McMahon A, Boyland EJ, Baur L, Bauman A et al. Sustained impact of energy-dense food advertising on children's dietary intake: a within-subject, randomised, crossover, counter-balanced trial. *Int J Behav Nutr Phys Act*. 2018;15:37.

⁹ Buchanan L, Kelly B, Yeatman H, Kariippanon K. The Effects of Digital Marketing of Unhealthy Commodities on Young People: A Systematic Review. *Nutrients* 2018;10(148):pii: E148. doi: 10.3390/nu10020148; Buchanan L, Kelly B, Yeatman H. Exposure to digital marketing enhances young adults' interest in energy drinks: An exploratory investigation. *PLoS ONE*. 2017;12(2): doi:10.1371/journal.pone.0171226; Baldwin HJ, Freeman B, Kelly B. Like and share: associations between social media engagement and dietary choices in children. *Public Health Nutr*. 2018;21(17):3210-3215. doi: 10.1017/S1368980018001866

¹⁰ Harris JL, Pomeranz JL, Lobstein T, Brownell KD: A crisis in the marketplace: how food marketing contributes to childhood obesity and what can be done. *Annu Rev Public Health*. 2009;30:211-25. doi: 10.1146/annurev.publhealth.031308.100304.

¹¹ Harris JL, Frazier W, Kumanyika S, Ramirez A: Increasing disparities in unhealthy food advertising targeted to Hispanic and Black youth. Uconn Rudd Center, 2018. <http://uconnruddcenter.org/files/Pdfs/TargetedMarketingReport2019.pdf>

use of social media according to the terms and conditions of media platforms has been reported to be high in some countries.²

Consequently, a shift in food marketing from traditional broadcast media to powerful forms of cross-device marketing has occurred. New media, such as social networking sites, social media and mobile phone and computer games have become important spaces for food marketers to reach children and adolescents. A hallmark of digital marketing is the use of creative methods to activate implicit emotional persuasion. For example through engagement in social networks; entertaining and humour-based approaches; by using popular influencers; and by using augmented reality and online games.² These strategies can mean that even older children find it difficult to distinguish when they are being targeted by advertising, especially when contemporary machine learning tools are used to influence choices by taking advantage of emotional and cognitive vulnerabilities. Such strategies also create a personal and interactive connection with children and adolescents, which circumvents conscious processing of the persuasive intent of these marketing campaigns and escapes parental control. Teenagers, who are at a stage of development that may make them more impulsive, subject to peer influence, and more likely to identify with unhealthy foods marketed to them via engaging methods, are particularly susceptible to such marketing techniques, and are increasingly targeted.¹²

Another problematic hallmark of digital marketing is the use of deep data collection and analysis to target marketing to individuals and groups. This data collection is done in several complementary ways. The content individuals see online on each website, app or platform may be tracked (contextual advertising) and individual online behaviour, including likes and engagement in social media, may be combined across platforms, which creates deep individual profiles.¹³ Current data collection practices are inherently deceptive and unfair as it is extremely challenging even for trained experts to understand the extent to which personal data is collected, analysed and traded. Further, opting out of so-called privacy policies is virtually impossible.² The ability to target the most susceptible young consumers could further magnify already problematic health disparities.

In addition, classifying and predictive algorithms employed in digital marketing place marginalized populations at higher risk. This is partially because classifying algorithms sort individuals into categories that reinforce social, economic, cultural and historic segregation and discrimination. Data-driven technologies are used to optimize outcomes for their operators, which tend to create opportunities for some, but often limits opportunities for those already more disadvantaged. Populations with a larger digital footprint are especially at risk from the negative consequences stemming from data-driven digital marketing practices and surveillance.¹⁴

Regulations, gaps and challenges

Over the last decade, the role of food marketing has gained increased recognition in the context of addressing NCDs. In 2010, The World Health Assembly (WHA) adopted resolution WHA 63.14, which endorsed the WHO Set of recommendations on the marketing of foods and non-alcoholic beverages to children. The Set of recommendations encourages governments to take a leading role in developing policies to reduce the harmful

¹² See for example Potvin Kent, M. et al. (2019) Children and adolescents' exposure to food and beverage marketing in social media apps. *Pediatric Obesity* DOI: 10.1111/ijpo.12508.

¹³ Note 2; World Obesity (2018): Restricting digital marketing of food: Considerations for European policymakers. Policy brief. Available from: <https://www.worldobesity.org/resources/policy-dossiers/pd-2/marketing-briefing-and-webinar>

¹⁴ Declaration by the Committee of Ministers on the manipulative capabilities of algorithmic processes, adopted by the Committee of Ministers on 13 February 2019 at the 1337th meeting of the Ministers' Deputies, https://search.coe.int/cm/pages/result_details.aspx?objectid=090000168092dd4b

impact of children's exposure to marketing of unhealthy foods. Subsequently, other global strategies and initiatives to curb the growing burden of NCDs and childhood obesity have reiterated WHA 63.14.¹⁵

However, implementation of the set of recommendations has been limited and slow, largely due to industry opposition. Whereas in Europe several member states report taking steps to limit food marketing, only five include digital marketing.³ In the United Kingdom (UK), a co-regulatory system has implemented a legally binding, industry-led system to limit the exposure of children under 16 to HFSS marketing, including in online media.

On both sides of the Atlantic, industry self-regulation initiatives have emerged. The EU Pledge¹⁶ and Children's Food and Beverage Advertising Initiative (CFBAI)¹⁷ aim to limit food marketing to children and improve the nutritional profile of food and beverage marketed to children. In the EU, several countries have developed self-regulation codes based on such international models. These international and national efforts have resulted in some limited improvements in addressing food marketing to children. However, they have significant shortcomings in that many only protect children under the age of 12; apply inconsistent standards regarding which media, foods, and marketing techniques are covered; tend to lack independent monitoring mechanisms; and notably, they are voluntary so not all relevant companies participate.³ Evaluations of the effectiveness of different efforts to limit food marketing to children find that co-regulatory or statutory restrictions are more successful than self-regulation in protecting young consumers from food marketing.¹⁸

Specific regulations and possible entry points to protect children and adolescents from the impact of food marketing in the U.S. and EU

U.S.

In the U.S., there is little political will to regulate food marketing to children. At the state level, state attorneys general have played a leading role in challenging problematic practices marketing food and beverages to children.¹⁹ [TACD's 2016 Resolution](#) recommended that Congress should rescind limits on the authority of the Federal Trade Commission (FTC) to regulate food marketing and mandate regulatory programmes consistent with the First Amendment of the Constitution, and that FTC in turn should fully enforce existing laws that protect children from unfair and deceptive marketing practices.

COPPA proclaims that personally identifiable information cannot be collected from children under 13 years without verifiable parental consent. Since 2013, tracking across platforms with persistent identifiers, geo-location or behavioural advertising is not allowed. However, the protection given by this act is inadequate as it does not protect teenagers and the protection can be circumvented by parents who give verifiable consent for their children's data to be processed.²⁰

¹⁵ Note 1; WHO Global Action Plan for the prevention and control of non-communicable diseases for 2013-2020
http://apps.who.int/iris/bitstream/handle/10665/94384/9789241506236_eng.pdf;jsessionid=CFE96B9347F58E2B381FE67DBEE2AC83?sequence=1;
Report of the Commission on Ending Childhood Obesity (WHO, 2016):

http://apps.who.int/iris/bitstream/handle/10665/204176/9789241510066_eng.pdf?sequence=1

¹⁶ <http://www.eu-pledge.eu/content/enhanced-2014-commitments>

¹⁷ <https://bbbprograms.org/programs/CFBAI/>

¹⁸ Reeve B and Magnusson R: Regulation of Food Advertising to Children in Six Jurisdictions: A Framework for Analyzing and Improving the Performance of Regulatory Instruments (2018). Arizona Journal of International and Comparative Law, Vol. 35, No. 1, 2018; Sydney Law School Research Paper 18/09. Available at: <https://ssrn.com/abstract=3131414>

¹⁹ <https://publichealthlawcenter.org/sites/default/files/resources/phlc-fs-agstatefoodenforce-2010.pdf>

²⁰ See e.g. note 2, and Montgomery K. Youth and surveillance in the Facebook era: policy interventions and social implications. Telecommun Policy 2015;39:771-86. doi.org/10.1016/j.telpol.2014.12.006

With regard to trade agreements, the U.S. has aggressively pushed back against food, nutrition and digital privacy policies in other countries, including in the EU, and in annual reports calling out what it claims are trade barriers and violations of intellectual property rights.²¹

EU

The EU Action Plan on Childhood Obesity 2014-2020 addresses the need to limit food marketing to children and young people in order to tackle obesity. The Action Plan mentions some national and self-regulatory efforts to restrict food marketing to children but does not set out specific objectives at the EU level.²²

A revised version of the Audio-visual Media Services Directive (AVMSD) was adopted in November 2018.²³ Regrettably, the EU has failed to seize the opportunity to effectively regulate the marketing of unhealthy food to protect children from its harmful impact when using audio-visual media services. In particular, the revised directive continues to rely primarily on voluntary codes of conduct.²⁴ However, Member States retain their freedom to apply stricter rules on audio-visual media service providers established in their territories when transposing the AVMS Directive into national law.²⁵

In the context of privacy issues inherent to digital food marketing, the GDPR may be of help to achieve the right level of protection.²⁶ The GDPR contains requirements regarding children's data and states that parental consent is required for all youth under 16 years of age. However, Member States could lower this age threshold.²⁷ To ensure effective protection of young people below the age of 16, EU Governments should avoid lowering the age threshold. Ireland used the GDPR to develop the Data Protection Act, aimed at protecting children from the effects of digital marketing via profiling, which if implemented would limit all marketing targeted at children, including food marketing.²⁸

²¹ See the 2018 National Trade estimate, which details U.S. objections to EU regulations on nutritional labelling of food (p.162) and digital privacy rules (p.197); <https://ustr.gov/sites/default/files/files/Press/Reports/2018%20National%20Trade%20Estimate%20Report.pdf>

²² https://ec.europa.eu/health/sites/health/files/nutrition_physical_activity/docs/childhoodobesity_actionplan_2014_2020_en.pdf. On the powers of the EU to regulate food marketing, see Garde A. *EU Law and Obesity Prevention* (Kluwer, 2010), Chapter 5.

²³ Directive 2018/1808, Official Journal of the EU, 28 November 2018 L303/69,

²⁴ New Art. 9(4) and (5) AVMSD.

²⁵ Art. 4(1) AVMSD. It is important to note that this freedom is nonetheless limited by the State of Establishment principle as stated in Art. 3(1) AVMSD. On the relationship between Art. 3(1) and 4(1), see Bartlett O and Garde A, '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.

²⁶ Regulation 2016/679, Official Journal of the EU, 4 May 2016, L119/1.

²⁷ Article 8 GDPR.

²⁸ Data Protection Commission. Data Protection Act 2018. Office of the Attorney General; 2018. <http://www.irishstatutebook.ie/eli/2018/act/7/enacted/en/print#sec1>.