

Marketing Restrictions and Public Health Protection

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The AVMS Directive – Article 3e(2)

- “Member States and the Commission *shall encourage* media service providers to develop *codes of conduct* regarding *inappropriate audiovisual commercial communication*, accompanying or included in *children’s programmes*, of foods and beverages containing nutrients and substances with a nutritional or physiological effect (...), in particular those such as fat, trans-fatty acids, salt/sodium and sugars, excessive intakes of which in the overall diet are not recommended.”
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The AVMS Directive – Article 3e(g)

- “Audiovisual commercial communications shall not cause physical or moral detriment to minors. Therefore they shall not *directly* exhort minors to buy or hire a product or service by exploiting their inexperience or credulity [or] *directly* encourage them to persuade their parents or others to purchase the goods or services being advertised...”
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The AVMS Directive: Minimum Harmonisation

- Minimum standards only:
 - Sweden bans TV advertising to children of less than 12
 - UK: since 2007, unhealthy food advertising is banned in and around children's programmes (child: below 16)
 - **BUT** obligation of Member State to apply the “Transmitting State” principle
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The AVMS Directive – Some Interesting Lessons to Learn

- Important to regulate cross-border advertising
 - Clearly acknowledged in WHO Recommendations of May 2010
 - BUT the standards must be sufficiently high
 - The WHO should provide the yardstick against which measures must be assessed
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The need to balance potentially conflicting interests

- Starting point: freedom of commercial operators to promote their goods and service v public health protection
 - Freedom is not absolute
 - Proportionality test: the restriction must be proven necessary and the least restrictive of competing interests
 - Burden of proof rests on competent regulatory authorities
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Discharging the burden of proof

- Issue goes beyond the regulation of food marketing to children – tobacco, alcohol, gambling services
 - See the Tobacco Advertising litigation in the EU
 - The CJEU found that the EU had not “manifestly exceeded the limits on its discretion” without engaging with existing evidence
 - Approach may have perverse effects
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Discharging the burden of proof

- Courts should check whether the legislator has given consideration to existing evidence
 - Different from substituting their assessment to that of the legislator, not least because complex economic, social and political assessments are required
 - Role of health impact assessments
 - Role of precautionary principle
 - Role of the best interests of the child principle
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Thank you for your attention

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