“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.”
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...”
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
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
The need to balance potentially conflicting interests

- Starting point: freedom of commercial operators to promote their goods and service vs 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
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
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
Thank you for your attention

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