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The Regulation of Food Advertising and Obesity
Prevention in Europe:
What Role for the European Union?

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Abstract

Since 1998, the World Health Organisation has recognised obesity as a problem of epidemic proportions. As none of the EU Member States is spared, the European Commission has recently published a Green Paper aimed at gathering evidence on how it could develop an obesity prevention strategy at European level. It is therefore the right moment to reflect on the principles which should guide EU policy in this field. This paper concentrates on one particular aspect of obesity prevention, namely the role that the European Union can play to curb the epidemic by regulating how food is marketed to consumers. That is not to say that the regulation of food advertising will, on its own, solve this public health issue. Obesity being by definition a multifactorial disease, the concerted action of all stakeholders is crucial to the successful outcome of the strategy which the Commission will choose to adopt

Keywords

Law – European law – Competences – Harmonisation – Free movement

The Regulation of Food Advertising and Obesity Prevention in Europe: What Role for the European Union?

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INTRODUCTION

Since 1998, the World Health Organisation has recognised obesity as a problem of epidemic proportions.¹ None of the Member States of the European Union is spared. Obesity levels in the EU have risen up to 40% over the past decade, and current data suggest that the range of obesity prevalence in EU countries is from 10% to 27% in men and up to 38% in women.² In some Member States, more than half the adult population is overweight,³ and in parts of Europe the combination of reported overweight and obesity in men exceeds the 67% prevalence found in the most recent measured survey in the United States of America.⁴ The trend is even more pronounced for children and adolescents, with the number of EU school children affected by overweight and obesity estimated to be rising by around 400,000 a year, adding to the 25% children who are already overweight.⁵

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1 “Obesity – preventing and managing the global epidemic”, report of a WHO Consultation, Geneva: WHO, 1998 (Technical Report Series, n°894). The primary measure of obesity is Body Mass Index, or BMI. BMI is measured as weight in kilograms divided by height in meters squared. Optimal BMI levels are generally believed to lie between 20 and 25. Persons with a BMI between 25 and 30 are considered overweight, and those with a BMI above 30 are obese.

2 IOTF (International Obesity Task Force) EU Platform Briefing Paper, March 2005. Available at: http://europa.eu.int/comm/health/ph_determinants/life_style/nutrition/documents/iotf_en.pdf

3 “The European Health Report”, World Health Organisation, 2002.

4 Finland, Germany, Greece, Cyprus, the Czech Republic, Slovakia and Malta. For the breakdown by Member State, see the table of overweight and obesity among adults in the European Union produced by the IOTF (see the EU Platform Briefing Paper, cited above).

5 There are currently 14-million plus of the EU child population who are already overweight (including at least 3 million obese children). IOTF, “Childhood Obesity Report”, May 2004. Spain, Portugal and Italy report overweight and obesity levels exceeding 30% among children aged 7-11. The rates of the increase in childhood overweight and obesity vary, with England and Poland showing the steepest increases. See further the IOTF EU Platform Briefing Paper, cited above.

Several health threats are associated with overweight and obesity.⁶ Six out of the seven most important risk factors for premature death (blood pressure, cholesterol, BMI, inadequate intake of fruit and vegetable, physical inactivity, excessive alcohol consumption) relate to diet and physical activity (the odd one out being tobacco).⁷ Apart from the suffering it causes, it is estimated that obesity already accounts for up to 7% of direct health care costs in the European Union.⁸ Limiting overweight and obesity is therefore important not only in public health terms, but also to “reduce the long-term costs to health services and stabilise economies by enabling citizens to lead productive lives well into old age.”⁹ This is why the Commission considers that tackling obesity is an essential part of the work to meet the Lisbon Agenda objective of boosting EU competitiveness.¹⁰

Determining the causes of obesity is central to defining an effective prevention policy. However, in light of the multicausal character of the epidemic, the task is far from straightforward.

In simple terms, people become heavier if they consume more calories than they spend; obesity flows from an increase in food consumption, a decrease in physical activity or a combination of both. It is therefore necessary to address the two sides of the energy equation. Energy expenditure, both through voluntary exercise and through involuntary expenditure associated with employment, has dropped considerably in the last thirty years, while the number of cars has doubled. In the United Kingdom, for example, only just over a third of men and around a quarter of women achieve the Department of Health's target of 30 minutes physical activity five times a week. Children are also increasingly sedentary both in and out of school. A fifth of boys and girls undertake less than 30 minutes activity a day, while television viewing has doubled since the 1960s.¹¹ The fact that the cost of exercising has

⁶ They include, among others, cardiovascular diseases, certain cancers, hypertension, strokes, respiratory diseases, osteoporosis, skin problems, type 2 diabetes. The development of type 2 diabetes in children is particularly symbolic of the extent of the problem, as this disease never affected children until a few years ago and is thought to be exclusively related to increase in obesity levels. This fact has been reported in several studies. See, for example, “Pestering Parents: How Food Companies Market Obesity to Children”, Center for Science in the Public Interest (CSPI), November 2003, at pages 5 and 6. Available at: <http://www.cspinet.org/pesteringparents>

⁷ World Health Organisation, “The World Health Report 2002: Reducing risks, promoting healthy life”, Geneva: WHO, 2002.

⁸ 1998 WHO Report, cited above. These direct costs do not take into account reduced productivity due to disability and premature mortality.

⁹ European Commission Green Paper, “Promoting healthy diets and physical activity: a European dimension for the prevention of overweight, obesity and chronic diseases”, CO: (2005) 637 final, at paragraph II.4. Recent studies on the US population showed that the annual healthcare costs of an obese adult were 37% higher than those of a person of normal weight. The price of obesity becomes even higher when indirect costs such as reduced productivity, demands on insurance and social security and social exclusion are taken into account.

¹⁰ European Commission Memorandum, “Questions and Answers on the EU approach to tackling obesity”, Memo/05/470, 8 December 2005. Legal intervention is all the more justified to curb the current trends, as income and obesity are negatively associated today, at least for women. Cutler, Glaeser and Shapiro, “Why Have Americans Become More Obese?”, Harvard Institute of Economic Research, Harvard University, January 2003, at page 13. See also Poulain, *Sociologies de l'alimentation – Les mangeurs et l'espace social alimentaire*, PUF, 2002.

¹¹ House of Commons Health Committee, Obesity, Third Report of Session 2003-2004, Volume 1, May 2004. Available at: <http://www.publications.parliament.uk/pa/cm200304/cmselect/cmhealth/23/23.pdf>

increased, thus making it less appealing, further reinforces these trends.¹² At the same time, technological innovation in food production and transportation has made it easier for firms to mass prepare food and ship it to consumers for ready consumption, thereby taking advantages of economies of scales in food preparation. The result of this change has been a significant reduction in the time costs of food and a significant increase in consumption.¹³ Moreover, energy-dense foods, which are highly calorific without being correspondingly filling, have become more widely available and encourage the tendency to eat outside meals, anywhere and at any time of the day. In the European Union, just as much as in the United States, snacking is systematically put forward as one of the main causes of obesity.¹⁴ Environmental factors have therefore multiplied to make it increasingly easy for people to consume more calories than they need, which in turn gives rise to more acute problems of self control.¹⁵

Even if some uncertainties remain as regards the relative importance of the causes of obesity,¹⁶ it is nonetheless necessary to tackle the epidemic, in light of its scope, as a matter of urgency.

¹² Inserm report, commissioned by the French Sénat, “La prévention et la prise en charge de l’obésité”, September 2005. Available at: <http://www.senat.fr/rap/r05-008/r05-008.html>

¹³ Cutler, Glaeser and Shapiro, “Why Have Americans Become More Obese?”, Harvard Institute of Economic Research, Harvard University, January 2003. On page 2, the authors give the example of the potato. Before World War II, Americans ate massive amounts of potatoes, largely baked, boiled or mashed, which were generally consumed at home. In the post-war period, a number of innovations allowed the centralisation of French fry production. French fries are now typically peeled, cut and cooked in a few central locations using sophisticated new technologies. They are then frozen at -40 degrees and shipped to the point of consumption, where they are quickly re-heated either in a deep fryer (in a fast food restaurant), in an oven or recently a microwave (at home). Today, the French fry is the dominant form of potato and America's favourite vegetable. From 1977 to 1995, total potato consumption increased by about 30%, accounted for almost exclusively by increased consumption of potato chips and French fries. See also Poulain, *Sociologies de l'alimentation – Les mangeurs et l'espace social alimentaire*, PUF, 2002.

¹⁴ People do not eat more during their meals; rather, they eat more often.

¹⁵ The standard model of consumption involves rational individuals – people decide how much to consume on the basis of price and income, fully accounting for the future health consequences of their actions. But at least some food consumption is almost certainly not rational. People continue to over eat, despite substantial evidence that they want to be thinner and try to lose weight (there is indeed a 30 to 50 billion dollar annual diet industry in the USA). Food is addictive and brings immediate gratification, while health costs of over consumption occur only in the future. As a result, people with self-control problems may find themselves over consuming food, particularly when the time costs of food preparation fall. It is often the case that they want to begin a diet tomorrow, because the long-term benefits justify the lost utility tomorrow, but not today, because the immediate gratification from food is high. In this situation, lower time costs of food preparation may be a welfare loss. It is common feature of many behavioural change programs – smoking and drinking cessation, weight loss – that they encourage keeping the offending items as far away as possible. Raising time costs is believed to reduce consumption. See Cutler, Glaeser and Shapiro, “Why Have Americans Become More Obese?”, Harvard Institute of Economic Research, Harvard University, January 2003, at page 22.

¹⁶ Questions remain on the role of breastfeeding in preventing obesity, the extent to which obesity is determined before birth (depending on how the mother eats and whether she smokes), and – of particular significance for the purpose of this article – the actual effect of food advertising on children's diets. Research is therefore ongoing so as to better identify the most effective ways to deal with obesity. It is carried out at several levels (global, regional, national, local), and often involves members of various disciplines (members of the medical profession and medical organisations, as well as economists, sociologists, consumer organisations, members of the food and advertising industries, parents' associations...). The European Commission has financed, through the Public Health Action Programme (2003-2008), a number of projects related to obesity, its effects and how to address them. Among these is a major project, coordinated by the European Heart Network, aimed at fighting childhood obesity (“Children, obesity and associated avoidable chronic diseases”, available at:

This article concentrates on one particular aspect of obesity prevention, namely the role that the European Union can play to curb the epidemic by regulating how food is marketed to consumers.¹⁷

The proposed programme of Community action in the field of health and consumer protection (2007-2013) emphasises that health policy and consumer policy share the common objective of increasing the capacity of citizens to take better decisions about their health and interests as consumers.¹⁸ It is therefore not surprising that consumer information, advertising and marketing, as well as consumer education, are considered key elements of the European Union's obesity prevention strategy. This is not to say, however, that informing and educating consumers will, on their own, provide the solution to the obesity epidemic. No stakeholder believes that there is ever going to be a “magic bullet”, i.e. a single action that will solve the obesity problem.¹⁹

The role which food marketing has played in the obesity epidemic is visible from the development in recent years of obesity related litigation which has prompted a change of attitude of the food industry towards this public health issue. However, progress has been rather slow so far and it is, in any event, most unlikely that the industry is really willing to solve the problem (1). Thus, in light of the urgency of the situation, the European Commission has started to develop an obesity prevention strategy (2). At this stage, EU institutions are very much in the process of deciding what course of action it should take. It is therefore the right moment to reflect on the principles which should guide its policy (3). Two specific areas are then considered in light of these guiding principles: the regulation of nutrition and health claims made on food (4) and the regulation of food advertising to children (5).

I. THE DEVELOPMENT OF OBESITY LITIGATION AND ITS IMPACT ON THE FOOD INDUSTRY

In September 2003, the New York District Court threw out a class-action lawsuit by two Bronx teenagers.²⁰ The plaintiffs had explained that they had consumed McDonald's products

http://europa.eu.int/comm/health/ph_projects/2003/action3/action3_2003_04_en.htm#3), as well as the “Eurodiet” report which looked at the science and policy implications of nutrition and diet in the European Union (“Nutrition and Diet for Healthy Lifestyles in Europe – Science and Policy Implications”, available at: http://europa.eu.int/comm/health/ph_determinants/life_style/nutrition/report01_en.pdf). For a list of all the projects financed by the European Commission under the Public Health Programme (2003-2008) in relation to the promotion of health and prevention of disease through addressing health determinants across all policies and activities, see http://europa.eu.int/comm/health/ph_projects/action3_en.htm.

¹⁷ In this article, the word “food” is used to refer to both food and drinks.

¹⁸ Proposal of 6 April 2005. COM (2005) 115 final.

¹⁹ To use the words of Lucia Reisch: http://europa.eu.int/comm/health/ph_determinants/life_style/nutrition/platform/docs/ev20051130_mi_en.pdf

²⁰ *Pelman and Bradley v McDonald's Corporation*, judgment of 3 September 2003, US District Court, Southern District of New York, 02 Civ. 7821, 2003 US Dist. LEXIS 15202, 2003 WL2205278 (“Pelman II”). The District Court (Robert W. Sweet, Judge) had previously dismissed the original complaint without prejudice to re-plead. See *Pelman v McDonald's Corporation*, 237 F. Supp. 2d 512, 543 (“Pelman I”). Plaintiffs then filed an amended complaint.

on a regular basis and that such consumption had been a significant factor in the development of their obesity, as well as other obesity related diseases. In particular, the plaintiffs argued that McDonald's used unknown ingredients in foods such as French fries, *Chicken McNuggets* and *Filet O-Fish* sandwiches which were damaging to consumers' health. Moreover, in response to McDonald's finding that 72% of its customers were heavy users, meaning that they visited McDonald's at least once a week, the plaintiffs alleged that to achieve that goal, McDonald's engaged in advertising campaigns which misleadingly represented that its foods were nutritious and could easily be part of a healthy lifestyle.

The New York Court held that the plaintiffs had failed to draw an adequate causal connection between their consumption of McDonald's food and their alleged injuries, and that the plaintiffs had not made any attempt to isolate the particular effect of McDonald's foods on their obesity and related diseases. Other pertinent but unanswered questions included: what else did the plaintiffs eat? How much did they exercise? Was there a family history of the diseases alleged to have been caused by McDonald's products? The plaintiffs had also failed to show that McDonald's food was dangerous in any way other than that which was obvious to a reasonable consumer. McDonald's cannot be blamed by consumers who choose to eat there. "If a person knows or should know that eating copious orders of super-sized McDonald's products is unhealthy and may result in weight gain, it is not the place of the law to protect them from their own excess." On the question of advertising, the Court ruled that the plaintiffs had made no explicit allegations that they had witnessed any particular deceptive advertisement. By so doing, however, it left a door open to future claims based on misleading advertising.

The decision was appealed and, on 25 January 2005, a federal judge reinstated the case against McDonald's on the ground that "the allegations were serious ones that needed to be seriously examined. These are not frivolous cases."²¹ Three counts of the claim will therefore need to be re-examined: 1) that the combined effect of McDonald's various promotional representations during the period at stake was to create the false impression that its food products were nutritionally beneficial and part of a healthy lifestyle if consumed daily; 2) that McDonald's failed adequately to disclose that its use of certain additives and the manner of its food processing rendered certain of its foods substantially less healthy than represented; and 3) that McDonald's deceptively represented that it would provide nutritional information to its New York customers when in reality such information was not readily available at a significant number of outlets in New York visited by the plaintiffs and others.²²

A similar trend may be observed in Europe, where obesity related litigation is also developing. In Germany, for example, a consumer sued Masterfoods on the ground that the daily consumption of Mars and Snickers chocolate bars had caused his diabetes. The Federal Court

²¹ *Pelman and Bradley v McDonald's Corporation*, Order of 25 January 2005, US Court of Appeals, Second Circuit.

²² At the same time, a class-action lawsuit has been threatened to get the soft drinks giants PepsiCo and Coca-Cola out of school. It is expected to allege that soft drinks in schools breach state consumer protection laws and that vending machines are illegal as an "attractive nuisance". Reported on <http://www.BeverageDaily.com>. The Centre for Science in the Public Interest confirmed that it too was preparing obesity lawsuits against soft drink companies. See the article of the New York Times of 7 December 2005, "Lines are Drawn for Big Suits over Sodas". Vending machines have recently disappeared from schools in France, following the entry into force on 1st September 2005 of Article 29 of the Public Health Act of 9 July 2004.

of Düsseldorf rejected the claim, stating that Masterfoods had not violated any duty of care. In particular, it was not obliged to issue any warnings in respect of the sugar content of its products and the potential negative effects of sugar consumption on health.²³ More recently, in France, the Nanterre Tribunal de Grande Instance ruled, on the same day, in two cases brought against the food companies Nestlé and Harry's in relation to the way they marketed as healthy a peach flavoured drink and a chocolate bun respectively, notwithstanding the fact that these products had a high sugar content. In the first case, the Court upheld the claim of misleading advertising on the ground that by selling its products in similar bottles than its mineral water and on the same shelf, Nestlé had created the false impression that they were similar products.²⁴ In the second case, however, the court ruled that Harry's had not misled consumers by stating that its *Doo Wap* bun was high in calcium, even if it contained high levels of sugar and fat.²⁵ *UFC Que Choisir*, the consumer association which issued legal proceedings against these two food companies as part of its obesity prevention campaign, has appealed against this second judgment.

It therefore appears that in Europe and in the United States alike, the debate is moving from claims related to the composition of foodstuffs to claims related to the way these foodstuffs are marketed to consumers, and in particular whether the information provided by the food industry is misleading. While there are limits to the responsibility of food business operators for the nutritional content of their products,²⁶ as the causal link with obesity – by definition a multifactorial disease – will always be inextricably difficult to establish, the food industry has realised that it is not immune from obesity related claims based on the presentation and advertising of foodstuffs. A study on the use of litigation to defend public health, published in January 2006 in the United States, claimed that while it was hard to prove that certain food products had a direct impact on obesity-related diseases, it was likely that litigation would be needed to address the obesity problem in the United States; just as it was needed against tobacco firms: “successful litigation does not always require a victory in court; the goal of litigation can be to change public perception of an industry and ultimately to induce a change in industry practices.”²⁷

Aware of the damage to reputation which these largely publicised lawsuits may cause, the food industry has started to acknowledge that it has a role to play in limiting the dramatic increase of obesity and to take measures, also largely publicised, against the criticism that it is partly responsible for the global obesity epidemic. In particular, the food and drink industry increasingly focuses on improvements to the health value of its products; something the tobacco industry was never able to do. For example, Nestlé has undertaken to reduce the fat and salt content of several of its products, as well as the protein content of infant formulas.²⁸ At the same time, the American Beverage Association, backed by Coca-Cola and PepsiCo,

23 Information available at: <http://www.123recht.net/article.asp?a=4245>

24 *UFC Que Choisir v Nestlé Waters France*, judgment of 16 December 2005, RG 04/0739.

25 *UFC Que Choisir v Harry's France*, judgment of 16 December 2005, RG 04/07393.

26 Provided, of course, that they conform with food safety regulations.

27 Alderman and Daynard, “Applying Lessons from Tobacco Litigation to Obesity Lawsuits”, *American Journal of Preventive Medicine*, 30 (2006) issue 1.

28 http://www.nestle.fr/Entreprise/NotreResponsabilite/Notrepositionsur/demarche_nutrition/Consommateurs/produits/consommateurs.htm. Similarly, Krafts announced in July 2004 that it would reduce the size of its individual portions, that it would offer more nutrition information on its packages and that it would improve the quality of its ingredients, while McDonald's has introduced a new range of salads and Burger King a menu containing less than 7 grams of fat.

has attempted to head-off complaints by voluntarily banning fizzy drinks in elementary schools. It also took on voluntary restrictions in middle and high schools, and announced just before Christmas 2005 that sales of regular soft drinks in schools dropped by 24 percent between 2002 and 2004. The financial impact of the ABA's sacrifice was, however, questioned after it emerged that Coca-Cola only got around one per cent of its sales from schools in North America.²⁹ The industry claims to care for consumer health, and does so to some extent (would it be only out of commercial necessity), while making huge profits to its detriment.³⁰

This dual game of the food industry is also visible in relation to the development of business codes of conduct. On the one hand, the multiplication of self-regulatory norms by both national and European food industry professional bodies is to be welcomed, as it provides an opportunity for the industry to develop common standards. On the other hand, these codes of conduct often are of limited use for consumers first, because they may not be effectively enforced, thus leaving consumers whose interests have been infringed without a remedy, and, secondly, because they are generally developed by the industry itself without due regard for other stakeholders' input – and not least that of consumers.³¹ Consequently, self-regulatory codes of conduct have a complementary role to play, but they cannot replace the adoption of legally binding norms by public authorities.³²

It nonetheless remains that it is in the interest of the food industry to accompany the obesity prevention movement rather than go against it. Its ability to do so, and to communicate effectively, will be crucial to determine the level of involvement of public authorities – at both national and Community level – to curb the epidemic.

II. THE FIRST STEPS OF THE EU STRATEGY TO TACKLE THE OBESITY EPIDEMIC

Nutrition, physical activity and obesity have become key priorities in EU public health policy, and have been given much focus under the Public health action programme (2003-2008).³³

In particular, the European Commission set up the Network on Nutrition and Physical Activity in 2003, which brings together Member State experts to exchange views and information on public health nutrition and on the contribution of physical activity to the

²⁹ Reported on <http://www.BeveragesDaily.com>

³⁰ For a critique of the dual game played by the food industry, see UFC Que Choisir “Marketing alimentaire: le double jeu des industriels”, in *60 Millions de Consommateurs*, July 2004.

³¹ See Murray, “Effective self-regulation in advertising and marketing”, Brussels, 19 October 2005, BEUC/X/041/2005.

³² This view finds some support in the approach advocated by Community institutions themselves. See in particular the Commission's White Paper on European Governance (COM (2001) 428 final), as well as the Directive on Unfair Commercial Practices, the Proposal for an amending Television Without Frontiers Directive, the Proposal for a Regulation on Nutrition and Health Claims (all discussed in detail in sections 4 and 5 below).

³³ Decision 1786/2002/EC of the European Parliament and of the Council of 23 September 2002, OJ 2002 L 271 of 9 October 2002.

improvement and maintenance of good health. The role of the Network is to advise the Commission on the formulation of an EU strategy against obesity and to support policy-making in this area. International observers such as the World Health Organisation, non governmental organisations and industry representatives are sometimes invited to take part in the Network's bi-annual meetings.³⁴

More recently, in March last year, the Commission launched a wider discussion forum: the European Platform for action on Diet, Physical Activity and Health, through which EU-level representatives of the food and advertising industries, consumer organisations and health non governmental organisations work together to tackle the obesity problem. Five areas in which action should be taken in order to meet the Platform objectives have now been laid down: consumer information and labelling; education; physical activity promotion; marketing and advertising; composition of foods (including issues such as healthy options, portion sizes...).³⁵ The Platform is not designed to pre-empt, but rather to stimulate, other initiatives at national, regional or local level. As the Commission has emphasised, the Platform creates input for integrating the responses to the obesity challenge into a wide range of EU policies, develop a comprehensive vision on this issue and ultimately contribute – alongside the work carried out in the context of the NPA Network – to the definition of strategic goals at European level to reverse current trends. To this end, discussions have already been held within the Platform with various Commission services (DG Research, DG Education and Culture, DG Agriculture)³⁶ and other stakeholders.³⁷ Part of the motivation for members to follow through on their commitments lies in the fact that they will assess and evaluate each other's actions within the Platform.

The Commission's commitment to prevent obesity was also made clear in the publication, on 8 December 2005, of a Green Paper which “aims at opening a broad-based consultation process and at launching an in-depth discussion, involving the EU institutions, Member States and the civil society, aiming at identifying the possible contribution at Community level of promoting healthy diets and physical activity.”³⁸ The Commission is seeking “concrete and evidence-based proposals for policy building mainly at EU level” from economic operators on the various issues which fall within their specific areas of interest, patient associations and

³⁴ More specifically, Members of the Network share best practice experiences, examine the possibilities of common actions to promote physical activity and reduce diet-related diseases, examine the impact of other Community policies on public health and physical activity, contribute to the co-ordination of activities on nutrition, physical activity and the fight against obesity between the Community public health programme and relevant international organisations, and evaluate the best way to proceed in tackling the obesity problem. See http://europa.eu.int/comm/health/ph_determinants/life_style/nutrition/ev_20030630_en.htm

³⁵ See http://europa.eu.int/comm/health/ph_determinants/life_style/nutrition/platform/platform_en.htm

³⁶ This is how, for example, the Deputy Director General of the Commission's Directorate General for Agriculture made a comprehensive presentation at the Platform's last Plenary Meeting on 30 November 2005 of the Common Agricultural Policy, the reform and the possible links between the Common Agricultural Policy and nutrition. He discussed how the CAP could contribute to the improvement of the nutritional situation, with particular reference to campaigns promoting the consumption of fruit and vegetables and healthy oils and the planned reform of the market organisation regulation for fruit and vegetables, and confirmed that Directorate General Agriculture supported the Platform's objectives: http://europa.eu.int/comm/health/ph_determinants/life_style/nutrition/platform/docs/ev20051130_co01_en.pdf

³⁷ In particular, all EU Sports Ministers agreed at their informal meeting in Liverpool of 19-20 September 2005 to support the physical activity aspects of the Platform, and similar cooperation is foreseen with other policy sectors such as education.

³⁸ COM (2005) 637 final, at paragraph III.1.

health and consumer protection organisations.³⁹ The Green Paper identifies ten areas for action: 1) consumer information, advertising and marketing; 2) consumer education; 3) children and young people; 4) food availability, physical activity and health education at the work place; 5) building overweight and obesity prevention and treatment into health services; 6) addressing the obesogenic environment; 7) socio-economic inequalities; 8) fostering an integrated and comprehensive approach towards the promotion of healthy diets and physical activity; 9) recommendations for nutrient intakes and for the development of food-based dietary guidelines; and 10) cooperation beyond the European Union. Under each heading, the Commission invites contributions on certain specific questions which it has listed and on which it wishes to be informed.⁴⁰ The Commission will publish a report summarising the contributions it has received by June 2006. It will then reflect upon the most appropriate follow-up and will consider any measures that may need to be proposed, as well as the instruments for their implementation.⁴¹

If European institutions are now fully aware of the extent of the obesity epidemic, they have not yet decided on the most appropriate course of action which should be adopted to tackle it. The process is very much at a consultative stage. It therefore seems appropriate to reflect on the principles which should guide future Community action.

III. WHAT SHOULD BE THE GUIDING PRINCIPLES OF THE COMMUNITY OBESITY PREVENTION STRATEGY?

3.1. Which level of action? The principle of attributed powers

In light of the multifactorial nature of obesity, the development of a prevention strategy requires the adoption of a comprehensive package of coherent measures (at Community, national or local level) in fields as diverse as agricultural, nutrition, consumer, audiovisual, sport, transport, town planning, environmental, work health and safety, social and education policies.

However, it is essential to bear in mind that Community action in matters of obesity prevention just as in any other matter is subject to the principle of attributed powers. The Community can act only if the EC Treaty confers on it the required powers to do so. Consequently, if no legal basis chosen on objective factors amenable to judicial review exists, action may only be taken by Member States. Thus, notwithstanding the fact that obesity is without frontiers, the limited competence of the Community in health matters prevents it from adopting the comprehensive package of measures required to curb the epidemic, thus pre-empting Member States action. That does not mean that the Community cannot take any measures in this field.

Article 152(1) of the EC Treaty provides that Community action, in the field of public health, “shall be directed towards improving public health, preventing human illness and diseases, and obviating sources of danger to human health. Such action shall cover the fight against the

³⁹ At paragraph III.2.

⁴⁰ The list of questions is, however, not exhaustive. See paragraphs V.1. to V.11.

⁴¹ At paragraph VI.

major health scourges, by promoting research into their causes, their transmission and their prevention, as well as health information and education.”⁴² Article 152(1) also makes it clear that Community action shall, so as to “complement national policies”, “encourage cooperation between the Member States and, if necessary, lend support to their action.”

In its Communication of May 2000 establishing a Community strategy in the field of public health, the Commission noted that the Community could bring added value by coordinating the health-related activities of the Member States.⁴³ That would not only enable the Community to meet its key responsibility to contribute towards a high level of health protection, but it would also allow Member States to improve the cost-effectiveness of their health systems and better respond to cross-border health threats. In particular, the Commission noted that there was an increasing recognition that to reduce morbidity and mortality, underlying health determinants had to be effectively addressed.⁴⁴

Moreover, even if Article 152(4) explicitly prevents the Community from adopting measures harmonising the laws of the Member States on its basis,⁴⁵ Article 152(1) nonetheless imposes that “a high level of human health protection shall be ensured in the definition and implementation of all Community policies and activities.”⁴⁶ Health protection must therefore

⁴² Particularly relevant for any policy related to obesity prevention, the scope of Community action now not only covers the prevention of diseases, but also the promotion of good health, specifically through health information and education.

⁴³ Communication from the Commission of 16 May 2000 on the health strategy of the European Community, COM (2000) 285. This Communication is a follow-up to the earlier Communication of 15 April 1998 on the development of a public health policy in the European Community, COM (1998) 230 final.

⁴⁴ The Community action programme 2003-2008 in the field of public health also focuses on health information and on the prevention of diseases and illnesses and underlines the necessity to address key health determinants associated with lifestyle, socio-economic situation and the environment, such as smoking, drinking, drug addiction, *nutrition* and stress. Decision 178/2002/EC of the European Parliament and of the Council of 23 September 2002, OJ 2002 L 271 of 9 October 2002. For example, tackling smoking, a leading cause of death in the Community, requires an integrated strategy on tobacco control involving measures taken both at the level of the Member States and the Community. See, in particular, Resolution of the Council and the Ministers of Health of the Member States on banning smoking in places open to the public (OJ C 189 of 26 July 1989), Directive 2001/37 on the manufacture, presentation and sale of tobacco products (OJ L 194 of 18 July 2001), Commission Regulation 2182/2002 with regard to the Community Tobacco Fund (OJ L 331 of 7 July 2002), Council Recommendation 2003/54 on the prevention of smoking and on initiatives to improve tobacco control (OJ L 22 of 25 January 2003), Directive 2003/33 on the advertising and sponsorship of tobacco products (OJ L 152 of 20 June 2003), Commission Decision on the use of colour photographs or other illustrations as health warnings on tobacco packages (OJ L 226 of 10 September 2003). The same is true of obesity prevention.

⁴⁵ Article 152(4)(c). Two exceptions are explicitly made for measures on the quality and safety of organs and substances of human origins, blood and blood derivatives and measures in the veterinary and phytosanitary fields which have as their direct object the protection of public health (Article 152(4)(a) and (b) respectively). Thus, in light of this limit to Community competence, the Commission has so far stated that it was not competent to take any measure to regulate in-school marketing (note that Community competence is also limited in this field as a result of Article 149(4) of the Treaty which excludes the adoption of harmonising measures in the area of education). See the report conducted at the Commission's request on “Commercial Practices in schools”, October 1998 (available in French at: http://europa.eu.int/comm/dgs/health_consumer/library/surveys/sur03_fr.pdf) and the Green Paper of 8 December 2005 cited above, at paragraphs V.1.2 and V.3.1 (“Relevant measures could be considered at the appropriate level”).

⁴⁶ This reflects the amendments which the Amsterdam Treaty introduced in Articles 2 and 3 which now provide that the Community's tasks include “raising the standard of living and quality of life” and its activities “a contribution to the attainment of a high level of health protection.”

be considered in all fields of Community action, and health interests taken into account when pursuing potentially competing goals in other policy areas.⁴⁷

It is with a view to implementing the Community's mainstreaming obligation that the Council emphasised, in its Conclusions of 8 June 1999, the necessity to integrate health protection requirements in all Community policies.⁴⁸ Since then, the Community has produced various documents on the need to develop a comprehensive and coherent public health policy. Of particular relevance to obesity are:

- the Council Resolution of 14 December 2000, which stresses the importance of nutrition as a key determinant of human health and makes an express reference to the significant rise in obesity and changes in eating habits: it focuses on integrating nutritional health not only into the programme of Community action in the field of public health, but also into other Community policies with an impact on nutritional health, such as agriculture;⁴⁹
- the Proposal for a European Parliament and Council decision establishing a programme of Community action in the field of health and consumer protection (2007-2013) which builds on the two existing Public Health and Consumer Programmes and seeks to maintain and develop their specific areas of work.⁵⁰ Common actions would aim at improving information, strengthening the role of the European Health and Consumer organisations, further developing consultation mechanisms and strengthening the impact that Health and Consumer policy have on other policy areas.

In *Tobacco Advertising*, the European Court of Justice annulled Directive 98/43⁵¹ for lack of Community competence.⁵² The Directive had been adopted by a qualified majority vote as an internal market measure, on the basis of Article 95. Germany argued that the Community was not competent to adopt such a measure. The Court held that Article 95 was intended to improve the conditions for the establishment and functioning of the internal market, as opposed to vesting in the Community legislature a general power to regulate the internal market: this would not only be contrary to the express wording of the provisions but it would also be incompatible with the principle embodied in Article 5 of the Treaty that the powers of the Community are limited to those specifically conferred on it.⁵³ Thus, it is only if a measure genuinely has as its object the improvement of the conditions for the establishment and functioning of the internal market that Article 95 can be relied upon.⁵⁴

As regards the relationship between the internal market and public health, the Court made it clear that the national measures to be harmonised by the Directive were "to a large extent"

⁴⁷ It is noteworthy that the Amsterdam Treaty has strengthened this obligation from a requirement to "contribute" to ensuring a high level of human health protection under Article 129 to the duty to "ensure" a high level of health protection in all Community activities.

⁴⁸ OJ C 195 of 13 July 1999.

⁴⁹ OJ C 20 of 23 January 2001.

⁵⁰ Proposal of 6 April 2005. COM (2005) 115 final.

⁵¹ OJ 1998 L 213, at page 9.

⁵² Case C-376/98 *Germany v Council and the European Parliament* [2000] ECR I-8419. On the validity of Directive 2003/33, see Case C-380/03 *Germany v Council and the European Parliament*, pending.

⁵³ At paragraph 83.

⁵⁴ At paragraph 84.

public health measures, and that the Treaty explicitly excluded harmonisation in this field.⁵⁵ It stressed that the legal basis should not be determined to “circumvent the express exclusion of harmonisation” under Article 152(4).⁵⁶ However, it also pointed out that such exclusion did not mean that harmonising measures based on other Treaty provisions could not have an impact on public health, since the latter had to form a constituent part of the Community’s other policies, as confirmed by the third paragraph of Article 95.⁵⁷ It therefore went on to check whether the conditions for recourse to Article 95 had been fulfilled and concluded that they had not.⁵⁸

This judgment should not be interpreted as suggesting that it is only if a measure has, as its primary objective, the proper functioning of the internal market, that it can validly be adopted on the basis of Article 95. The harmonisation powers of the Community are more extended in the area of health than the isolated reading of Article 152(4) may suggest. Provided that Community harmonising measures adopted on the basis of Article 95 have an impact on the functioning of the internal market, then they are valid. In other words, the centre of gravity approach does not have any role to play in cases where the choice is between Community or Member State competence, as this approach is only relevant where there is a dispute as to whether a measure should have been adopted by reference to one or other of two possible competing legal bases.⁵⁹ In *Tobacco Advertising*, the issue was not so much whether there was a choice between two areas of Community competence within which the contested directive fell, but – rather – whether the Community was competent at all to adopt this directive. The mainstreaming obligation contained in both Article 95(3) and Article 152(4) confirms that, provided a measure is not exclusively concerned with public health protection and the Community legislature's intention is not to “circumvent the express exclusion of harmonisation” under Article 152(4), then it may be validly adopted on the basis of Article 95.⁶⁰ This analysis has been confirmed in subsequent cases. For example, in *Alliance for Natural Health*, the Court observed that “provided that the conditions for recourse to Article 95 as a legal basis are fulfilled, the Community legislature cannot be prevented from relying on that legal basis on the ground that public health protection is a decisive factor in the choices to be made.”⁶¹

By analogy, some forms of food advertising regulation fall within the scope of Community competence, such as television advertising and other forms of advertising that affect the functioning of the internal market and can lawfully be adopted on the basis of Article 95,

⁵⁵ At paragraph 76.

⁵⁶ At paragraph 79.

⁵⁷ At paragraph 78.

⁵⁸ Advocate General Fennelly emphasised that the content of a harmonisation measure also had to be, in principle, influenced by substantive concerns such as public health, as required under Article 95(3) and Article 152(1) of the Treaty. “The obvious concern with public health which motivated the initial, disparate national advertising restrictions in some Member States, and the policy chosen by the Community legislature, evidently on the basis of similar concerns, do not *per se* lead to any doubt, to my mind about the competence of the Community to adopt an internal market measure. That fact alone does not show either that the Community has invaded a domain reserved exclusively to the MS or that the objective of the measure is health protection to the exclusion of all other aims”. At paragraph 66 of the Opinion.

⁵⁹ To this effect, see paragraphs 67 to 69 of Advocate General Fennelly's Opinion.

⁶⁰ More recent cases of the Court confirm this interpretation. See in particular Joined Cases C-154 and 155/04 *Alliance for Natural Health*, judgment of 12 July 2005, at paragraph 30.

⁶¹ Joined Cases C-154 and 155/04 *Alliance for Natural Health*, judgment of 12 July 2005.

whereas others fall outside its competence, such as in-school marketing, despite the fact that it is one of the fastest growing marketing techniques directed at children. The Commission published an independent report on this issue in 1998,⁶² which showed that schools are seen by the industry as the ideal place for spreading advertising messages targeted at children, since that is where they are gathered together, and that food companies are a very visible part of this increasing marketing effort.⁶³ Yet it is still hardly regulated even if it may be particularly damaging to children's education, precisely because it takes place in an environment where they expect to learn what is right for them; they may get the impression that the school endorses this marketing technique, which makes it even more difficult for them to distinguish between advertising and education.⁶⁴ Despite the ambit of the problem, however, the competence of the Community remains strictly limited in the fields of both education and health, and as it is unlikely that there is a Community market for educational materials used in schools, it would be difficult, if at all possible, to establish that the Community is competent under Article 95 of the Treaty to regulate in-school marketing at EU level.⁶⁵ As Member States are all confronted to this issue, there is nonetheless a strong case that the Commission should support their action by coordinating research into the effects of this marketing technique on children and how best to address them.⁶⁶

Notwithstanding the restrictive wording of Article 152, the European Union has some competence to act in relation to obesity prevention, and even has a duty to do so in light of the scope of the epidemic and the EU mandate to ensure a high level of human health protection. Nevertheless, it must act in accordance with the principle of attributed powers and comply with the rule that, if a measure is concerned with public health without pertaining to any other fields of Community competence, Article 152(4) of the Treaty prevents the Community from adopting legislative measures harmonising the laws of the Member States.

In its recent Green Paper, the Commission has requested contributions covering a broad policy spectrum. At the same time, however, it has explicitly acknowledged that, "given the multifactorial nature of diseases linked to unhealthy dietary habits and physical inactivity, and the multi-stakeholder response needed to address them, this Green Paper includes certain issues that fall primarily under the competence of EU Member States (e.g. education, town planning); it should also help determine where the EU could nevertheless provide added value, e.g. by supporting networking amongst stakeholders and disseminating good practice."⁶⁷ This comprehensive approach is to be approved, insofar as the Commission's intention to coordinate research and foster best practices in all the Member States – even in areas where it is not itself competent to propose binding Community legislation – fully complies with the wording of Article 152 of the Treaty: it upholds the principle of attributed competence, while encouraging cooperation between the Member States and lending support to their action where necessary.

⁶² Cited above.

⁶³ The report noted that in-school marketing could take several forms. The most common consists in companies providing education packs to schools containing sponsored material mentioning the company and often providing free coupons or samples together with educational material. Alternatively, companies may organise contests in the school environment, send free samples to schools or sponsor school equipment...

⁶⁴ On in-school marketing, see also Hawkes, "Marketing Food to Children: the Global Regulatory Environment", WHO, 2004, at page 32.

⁶⁵ See section 1 above on the relationship between the Community's health and internal market policies.

⁶⁶ See the Commission's Green Paper of 8 December 2005, cited above.

⁶⁷ At paragraph III.4.

3.2. At what point in time should action be taken? The precautionary principle

There is currently some disagreement on how marketing influences children's diets and health.

On the one hand, a Joint World Health Organisation/Food and Agriculture Organisation of the United Nations (WHO/FAO) Expert Consultation concluded in 2002 that the heavy marketing of fast food and energy-dense, micronutrient-poor foods and beverages is a “probably” causal factor in weight gain and obesity.⁶⁸ The following year, a systematic review commissioned by the United Kingdom's Food Standards Agency found that advertising does affect food choices and does influence children's dietary habits.⁶⁹

In the United Kingdom, children see on average 13h35 minutes of commercial television per week (which means a total of 217 adverts). Food advertising to minors comprises the largest category of products advertised to children – up to 70%, between 95% and 99% of which are high in either fat, sugar or salt (in particular fizzy drinks, chocolate bars, biscuits and pre-sweetened breakfast cereals).⁷⁰ In the United Kingdom alone, during 2001, £594 million was spent on advertising food, of which around 20% was spent by the four confectionery manufacturers: Nestlé, Mars, Cadbury and Wrigley.⁷¹ More generally, the pan-European project on children, obesity and associated avoidable chronic diseases, coordinated by the European Heart Network and co-funded by the European Commission, has shown that the percentage of television advertisements for food aimed at children that were for unhealthy food ranged, in the European Union, from 49% in Italy to nearly 100%, as has just been mentioned, in the United Kingdom.⁷² Yet in nearly all Member States there is no mechanism to regulate against the potentially detrimental cumulative effect of food advertising to children,⁷³ despite the fact that some research has established that advertising to children does have an effect on their preferences, purchase behaviour and consumption. These effects are apparent not just for different brands, such as a switch from Pepsi to Coca-Cola, but also – and it is more worrying – for different types of food, such as a switch from water or milk to sodas high in sugar.

On the other hand, the two Livingstone reports commissioned by Ofcom, the independent regulator and competition authority for the UK communications industries, argued that the existing research was not conclusive and that uncertainties remained on the precise nature of this effect and on the ability to resist the effects among specific audiences, with young

⁶⁸ “Diet, nutrition and the prevention of chronic diseases”, Report of a Joint WHO/FAO Expert Consultation. Geneva, WHO, 2003 (WHO Technical Report Series, N°916).

⁶⁹ For a recent example, see the Hastings report, commissioned by the Food Standards Agency, September 2003 (available at: <http://www.food.gov.uk/multimedia/pdfs/foodpromotiontochildren1.pdf>).

⁷⁰ Sustain, TV Dinners: What's being served up by advertisers?, 2001.

⁷¹ For figures on the spending of the food industry on advertising in comparison with the budgets invested in nutrition education, see “Pestering Parents: How Food Companies Market Obesity to Children”, Center for Science in the Public Interest (CSPI), November 2003, at page 11. Available at: <http://www.cspinet.org/pesteringparents>

⁷² See section I above.

⁷³ Submission on behalf of the National Heart Forum in the context of the review of the Television Without Frontiers Directive, July 2003, at 2.

children representing the most widely accepted special case of a relatively vulnerable group.⁷⁴ On 28 March this year, Ofcom launched a broad consultation process to gather the views of stakeholders so as to decide what the most appropriate course of action was.⁷⁵

The only clear consensus to have emerged from this debate so far is that the role of marketing on children's diet and health warrants closer scrutiny and more detailed research.⁷⁶ However, in light of the complexity of the obesity phenomenon, the question arises what public authorities should do. Should they wait for conclusive evidence, and if so for how long, before taking legislative action? In other words, does the remaining uncertainty justify that no action should be taken at all?

The Commission's approach should be based on the precautionary principle: while there is at present no conclusive scientific evidence that controls on food advertising directed at children alone are likely to lead to direct reductions in either consumption or harm, there is evidence that the promotion of food impacts on cultural attitudes and patterns of eating. An absence of conclusive evidence should not be interpreted as evidence of an absence of any adverse effect.⁷⁷ The seriousness of the obesity epidemic justifies that action is taken on every possible fronts where positive results may ensue; and it is not because food advertising is not its main cause, in light of the multifactorial character of the disease, that it should not be regulated at all.

This approach is gaining more and more acceptance in public spheres. The UK's Chief Medical Officer's 2002 Annual Report on the State of Public Health provides that "there is a case for adopting the precautionary principle for the marketing of foods to children. Industry should be asked to take a more responsible approach to the promotion (especially to children) of foods high in fat, salt and added sugars and balance this with the promotion of healthier options, including fruit and vegetables."⁷⁸ Further, the report to the Treasury *Securing Good Health for the Whole Population* cautions that "the lack of conclusive evidence for action should not, where there is a serious risk to the nation's health, block proportionate action to that risk."⁷⁹

At Community level, there is also support that policy should be based on the precautionary principle. Even if there is only explicit reference to this principle in the Treaty,⁸⁰ its practical scope is much wider and also covers consumer policy and public health. It may be invoked when the potentially dangerous effects of a phenomenon, product or process have been identified by a scientific and objective evaluation, and this evaluation does not allow the risk

⁷⁴ See the two Livingstone reports, commissioned by OFCOM, February and April 2004 (respectively available at: http://www.ofcom.org.uk/research/tv/reports/food_ads/appendix1.pdf and http://www.ofcom.org.uk/research/tv/reports/food_ads/appendix2.pdf)

⁷⁵ The press release giving details of the consultation is available at : http://www.ofcom.org.uk/media/news/2006/03/nr_20060328

⁷⁶ Hawkes, "Marketing Food to Children: the Global Regulatory Environment", WHO, 2004, at page 1.

⁷⁷ For the same reasoning in relation to commercial communications of alcohol beverages, see the submissions of Eurocare – the European Alcohol Policy Alliance, September 2005, at 5.

⁷⁸ http://www.dh.gov.uk/PublicationsAndStatistics/Publications/AnnualReports/AnnualReportsBrowsableDocument/fs/en?CONTENT_ID=4094860&MULTIPAGE_ID=4875027&chk=6lWQj/

⁷⁹ Also known as the Wanless Report.

⁸⁰ See Article 174(2) on environmental protection.

to be determined with sufficient certainty.⁸¹ In relation to food more specifically, the precautionary principle has been embodied in Regulation 178/2002 laying down the general principles and requirements of food law.⁸² In particular, Article 7 provides, in its first paragraph, that “in specific circumstances where, following an assessment of available information, the possibility of harmful effects on health is identified but scientific uncertainty persists, provisional risk management measures necessary to ensure the high level of health protection chosen in the Community may be adopted, pending further scientific information for a more comprehensive risk assessment.” As stated above, it seems that this conditions is fulfilled: there is a sufficient number of pointers which would justify that food marketing has some detrimental effects on public health, despite the fact that the exact nature and scope of these effects have not yet been conclusively established. Article 7 further specifies, in its second paragraph, that “measures adopted on the basis of paragraph 1 shall be proportionate and no more restrictive of trade than is required to achieve the high level of health protection chosen in the Community, regard being had to technical and economic feasibility and other factors regarded as legitimate in the matter under consideration. The measures shall be reviewed within a reasonable period of time, depending on the nature of the risk to life or health identified and the type of scientific information needed to clarify the scientific uncertainty and to conduct a more comprehensive risk assessment”, thus reflecting the Commission’s general approach to risk management.⁸³ The principle of proportionality would not be infringed if measures were taken to limit the marketing of unhealthy food, especially to children, as the potentially highly detrimental relation between bad diets and food advertising exposure, and its related cost for society, may justify that strict measures be taken.⁸⁴ The risk of doing nothing must be assessed against the potential benefits of doing something.

A generous reading of Article 7 is therefore called for to prevent, as far as possible, the damaging effects which are likely to derive from the all too frequent advertising of foodstuffs, the repetitive consumption of which leads to rising obesity levels.⁸⁵ This approach also finds some support in recent case law. For example, the Court stated in *Alliance for Natural Health* that the Community legislature had to take account of the precautionary principle when it adopted, in the context of the policy on the internal market, measures intended to protect human health.⁸⁶

The rest of this article considers two areas of consumer policy where legislative measures are either being considered or are already in place to tackle the obesity epidemic: the first concerns the regulation of nutrition and health claims which the food industry makes on their

81 Communication of the Commission of 2 February 2002 on the precautionary principle (COM (2000) 1 final).

82 OJ L 31 of 1st February 2002.

83 See its Communication of 2 February 2002, cited above.

84 In support of this argument, see “The Ultimate ‘Public Health’ Shield”, a petition from the public health movement, presented to the leaders of the G8 on 14 September 2005. Available from the TCS Daily website at: <http://www.tcsdaily.com/article.aspx?id=091405E>

85 Paragraphs 20 and 21 of the Preamble of Regulation 178/2002 respectively provide that “the precautionary principle has been invoked to ensure health protection in the Community, thereby giving rise to barriers to the free movement of food or feed. Therefore it is necessary to adopt a uniform basis throughout the Community for the use of this principle” and that “in those specific circumstances where a risk to life or health exists but scientific uncertainty persists, the precautionary principle provides a mechanism for determining risk management measures or other actions in order to ensure the high level of health protection chosen in the Community.”

86 Joined Cases C-154 and 155/04 *Alliance for Natural Health*, judgment of 12 July 2005, at paragraph 68.

foodstuffs, while the second deals with the regulation of food advertising directed at children. The effectiveness (or likely effectiveness) of these measures is assessed in light of the two guiding principles which have just been described.

IV. THE REGULATION OF NUTRITION AND HEALTH CLAIMS

Prevention being better than cure, it is a recurring theme of the Commission's policy to enable consumers to make healthy choices by giving them all the necessary information in an easily accessible way. Harmonisation of the different national rules on the labelling and the nutritional content of foodstuffs, which clearly falls within Community competence, has been a continuing concern of the European Community since 1979.⁸⁷ However, the White Paper on Food Safety of January 2000 identified several gaps in the legislation, which make it difficult for consumers to make informed choices of the foods they eat.⁸⁸ In particular, if existing rules ensure that the labelling, presentation and advertising of foods must be truthful and not misleading, there are no specific provisions, as Community law currently stands, on the use of nutrition and health claims which are provided to consumers *voluntarily* by the food industry.

4.1. The importance of nutrition and health claims in informing consumer choice

As food production has become more and more complex, consumers are increasingly interested in the information appearing on food labels. They have also become more interested in their diet, its relationship to health and, more generally, the composition of foods that they select. The food industry has responded to their concerns by providing nutrition labelling on many foods and by highlighting the nutritional value of products through claims in their labelling, presentation and advertising beyond what existing Community legislation requires them to do.

A claim is “any message or representation which is not mandatory under Community or national legislation which states, suggests or implies that a food has particular characteristics”⁸⁹; for example, stating that “*Red Bull* gives you wings”. Nutrition claims are a subcategory of food-related claims, a nutrition claim being defined as “any claim which suggests or implies that a food has a particular nutrition properties due to the energy it provides (or does not provide) or the nutrients or other substances it contains or does not contain”;⁹⁰ for example, indicating that *Sainsbury's crème fraîche* is “50% less fat”. A health claim “states, suggests or implies that a relationship exists between a food and health”;⁹¹ for

⁸⁷ See in particular Directive 2000/13 (OJ 2000 L 109 of 6 May 2001) which consolidates and repeals Directive 79/112 on the labelling, presentation and advertising of foodstuffs and its subsequent amendments (Council Directives 85/7, 86/197 and 89/395, Commission Directives 91/72, 93/102 and 95/42 and Directive 97/4 of the European Parliament and of the Council).

⁸⁸ COM (1999) 719 final.

⁸⁹ As defined in Article 2(1) of the Commission's Proposed Regulation on Nutrition and Health Claims. See below.

⁹⁰ As defined in Article 2(4) of the Commission's Proposed Regulation on Nutrition and Health Claims. See below.

⁹¹ As defined in Article 2(5) of the Commission's Proposed Regulation on Nutrition and Health Claims. See below.

example, advertising *Kellog's Frosties* as helping with “healthy bones”, “concentration”, “energy” and “heart health”.

As research from a wide range of countries suggests that nutrition labels have been shown to encourage healthier diets among people who read the label, it is arguable that the increased reliance on nutrition and health claims is a positive evolution, to the extent that they can provide consumers with more elements to make informed purchasing decisions, which may in turn contribute to public health objectives by encouraging food companies to develop more foods with lower quantities of less healthy nutrients.

On the other hand, reliance on nutrition and health claims also provides the industry with an opportunity to use them as a marketing tool, which may give rise to difficulties when claims mislead the consumers, rather than inform their choices. For example, *Kellog's Frosties* actually contain 40% sugars, which makes them not so healthy a food as first appears on the packaging. It is also difficult to understand what the comparator for *Sainsbury's crème fraîche* is when trying to assess its fat content.⁹²

Many nutrition and health claims are misleading because they are questionable, meaningless, vague, ambiguous or pseudo-scientific. Yet, they are not mere expressions of opinions or claims of trendiness that we are all accustomed to in advertising; rather, they aspire to be treated as objective truths that are to be taken seriously and influence the physical and mental health of the user, as well as his eating decisions and consumption patterns. The need for regulation is all the stronger as nutrition and health claims tend to be made on branded foods which are more pre-processed than unbranded foods (on potato chips rather than on raw potatoes, for example) and which therefore play a larger role in the obesity epidemic. Moreover, cost-benefits analyses suggest that savings in health care costs are relatively greater than the costs incurred by labelling regulation.⁹³

The need for regulation further stems from the fact that the laws of the Member States relating to food claims vary greatly from one to the other, which make them potentially trade restrictive. For example, a product can be labelled “light” if the dry matter contains less than 20% fat in Italy, 25% in Austria and 32.5% in Germany. In the UK, guidelines do not provide anything for “light” but state that “low fat” should mean that 100 grams of a particular product contains less than 3 grams of fat. Consequently, consumers do not exactly know what “low in”, “reduced” or “light” actually stand for.⁹⁴ Not only are these differences confusing for consumers, but they also make it more expensive for food operators to market their products in several Member States and give scope to some of them to engage in unfair

⁹² Taken to the extreme, here is the way a foodstuff could be labelled or advertised:

“BEUC Bio Good For You Crunchies

Are you feeling sad, tired and fat? Try our rejuvenating 85% fat free *BEUC Bio Good for You Crunchies!* They will inject energy and joy into your life, vitalise your body and soul and are recommended by Dr Spuntz. They contain 42% less fat, are convenient for seniors and are rich in fibres and Guacromulus B4. Fibres contribute to good digestion and Guacromulus B4 helps your body to fight against cholesterol. What it does for you inside will be seen from the outside.” (BEUC, “Tell me what I am eating – Food claims”, BEUC brochure X/055/2003, January 2004).

⁹³ Hawkes, “Nutrition labels and health claims: the global regulatory environment”, WHO report, 2004, at page vi.

⁹⁴ BEUC, paper of January 2004 cited above.

competition practices, thus affecting the proper functioning of the internal market. It is therefore not surprising that the food industry supports, to some extent at least, the harmonisation of the laws of the Member States on nutrition and health claims, which is intensifying at both international and Community levels.

4.2. The Codex Alimentarius

At an international level, nutrition and health claims are contained in the Codex Alimentarius.⁹⁵ The Codex Alimentarius develops food safety standards which serve as a reference for international food trade. It was set up in the 1960s as a joint instrument of the United Nations Food and Agriculture Organisation and the World Health Organisation. Its primary mission is to protect the health of consumers and to ensure fair practices in international food trade. Although the implementation of the Codex Alimentarius is voluntary, the World Trade Organisation Agreement on Sanitary and Phytosanitary Measures considers that WTO members applying the Codex Alimentarius standards meet their obligations under this Agreement.

The standards and guidelines of the Codex represent the consensus reached through discussion between its Members, among which are the European Community and its Member States. The Community and Member States attempt to present joint comments on issues discussed in Codex Committees, which are within the competence of Community legislation.⁹⁶ International Non-Governmental Organisations from industry and food/health/consumer associations may be permitted to attend as observers at the annual meetings of the committees.

The Codex Committee on Food Labelling develops guidelines on nutrition labelling and health claims. In 1979, the Codex Commission developed the General Guidelines on Claims which established general principles to ensure that no food was described or presented in a manner that was false, misleading or deceptive.⁹⁷ Specific claims were prohibited, notably those which:

- imply that any given food will provide an adequate source of all essential nutrients,
- imply that a balanced diet or ordinary foods cannot supply adequate amounts of all nutrients,
- cannot be substantiated, and
- imply the suitability of a food in the prevention, alleviation, treatment or cure of a disease, disorder or particular physiological condition, unless specifically allowed for by a Codex standard or guideline, or by national legislation.

In 1997, the general guidelines were supplemented by the Guidelines for Use of Nutrition Claims.⁹⁸ Nutrition claims had multiplied in volume and new regulations were needed to provide clear definitions and to prevent consumer deception or confusion. The Guidelines for

⁹⁵ For information on the Codex Alimentarius, see http://www.codexalimentarius.net/web/index_en.jsp

⁹⁶ The procedure is described in the Council Decision of 17 November 2003 on the accession of the European Community to the Codex Alimentarius Commission (OJ L 309 of 26 November 2003). These comments are presented in the EC position papers. The Directorate General for Consumer and Health Protection acts as the contact point and co-ordinates this work.

⁹⁷ CAC/GL 1-1979, Rev. 1-1991.

⁹⁸ CAC/GL 23-1997, Rev. 1-2004.

Use of Nutrition Claims define the instances in which nutrient, nutrient content and nutrient comparative claims are permitted. In particular:

- nutrient claims should be consistent with national nutrition policy and support that policy,
- foods can be claimed as being low in, free of, high in, or a source of specified nutrients only if in accordance with nutrient reference values defined in the Guidelines,
- foods should not be described as “healthy” or be represented in a manner that implies a food in and of itself will impart health, and
- any food with a nutrition claim should bear a nutrition labels.

Health claims are not as yet covered by a Codex standard or guideline;⁹⁹ discussions are ongoing.¹⁰⁰

At regional level, the European Commission published a proposal for a Regulation on nutrition and health claims on 16 July 2003, following a two-year consultation process which involved Member States and several other stakeholders.¹⁰¹ This proposal integrates, but goes beyond, the provisions existing under the Codex Alimentarius; it deals with both nutrition and health claims.

4.3. The Commission’s Proposed Regulation

The aims of the Proposed Regulation, which is based on Article 95 of the Treaty, are the following:

- “to achieve a high level of consumer protection by providing further voluntary information, beyond the mandatory information foreseen by EU legislation;
- to improve the free movement of goods within the internal market;
- to increase legal security for economic operators;
- to ensure fair competition in the area of foods; and
- to promote and protect innovation in the area of foods.”¹⁰²

⁹⁹ They were originally included in the scope of the Guidelines for Use of Nutrition Claims. However, disagreement among members of the Codex Committee on Food Labelling during discussion of the subject in 1996 led to the removal of health claims (except those concerning nutrient function) from the draft Guidelines for Use of Nutrition Claims and the deferral of discussion in order not to compromise the adoption of the draft. The disagreement centred on health claims referring to disease. There was consensus that disease/cure claims should be prohibited, but positions varied widely over permitting references to disease or disease reduction.

¹⁰⁰ In 1997, noting the wide variation in the terms of national legislation on health claims, and the concerns raised about health claims by many different parties, the Codex Committee on Food Labelling decided to continue its development of guidelines on health claims. After six years of further discussions, the Codex Committee on Food Labelling agreed, at its 31st Session in 2003, to forward draft guidelines on the use of health claims to the Codex Alimentarius Commission for official adoption. The draft guidelines would have defined and permitted nutrient function, other function and reduction of disease risk claims under certain conditions. However, the Commission did not accept the draft, which has been returned to the Food Labelling Committee for further consideration. The key area of disagreement was over the application of the guidelines to the use of health claims in food advertisements as well as on food labels. For more information, see the Commission’s discussion paper on food labelling and advertising, where it noted that advertising was an essential aspect when dealing with claims made on food as in some cases consumer deception was more likely to originate from advertising than from labelling itself. Available at: http://europa.eu.int/comm/food/fs/ifsi/eupositions/ccfl/ccfl_cl2005_item8_en.pdf

¹⁰¹ COM (2003) 424. The Commission referred in the Explanatory Memorandum of its proposal to the Codex Alimentarius guidelines (paragraphs 10 and 11)

¹⁰² Explanatory Memorandum, at paragraph 6, and Article 1 of the Proposed Regulation.

Under Article 1, the Proposed Regulation applies to nutrition and health claims in the labelling, presentation and advertising of foods to be delivered as such to the final consumer, as well as to foods intended for the supply of mass caterers such as restaurants, hospitals, schools, canteens and so on. However, it does not cover dealings between professionals. It does not apply either to foods on which other kinds of claims are made. For example, stating that “*Red Bull* gives you wing” or that “*Haribo* makes your children happy” will not be prohibited under the Regulation.¹⁰³

The overriding principle of the Proposed Regulation is that nutrition and health claims may only be used on foods placed on the Community market if they are not false or misleading¹⁰⁴ and if they can be supported by scientific evidence.¹⁰⁵ More specifically, Article 5 provides that nutrition or health claims can be made only if the presence, absence or reduced content of the substance in respect of which it is made has been shown to have a beneficial nutritional physiological effect. This requires, first, that the average consumer¹⁰⁶ can be expected to understand the beneficial effects as expressed in the claim and, secondly, that the quantity of the product that can reasonably be expected to be consumed provides a significant quantity of the substance to which the claim relates. The burden of proof that a nutrition or health claim is justified shall lie with the food business operator which may be required to produce the scientific work and the data establishing compliance with the Proposed Regulation.¹⁰⁷

Thus, claims such as “rich in Guacromulus B4” will no longer be permitted, as consumers cannot be expected to have detailed knowledge of technical scientific terms, even if such claims are based on scientifically well-founded evidence.¹⁰⁸ Similarly, claims that a product is “90% fat free” will no longer be allowed either on the ground that although perfectly correct, they are still misleading as they suggest that the products in question have a low fat content, whereas 10% fat is actually fairly high. It will be possible, however, that a product is marketed as “low in fat” if it complies with the requirements laid down in the Proposed Regulation. Finally, “Five a Day” claims¹⁰⁹ will also be prohibited if they are made on products that need to be eaten or drunk in huge quantities before the equivalent amount of vitamins or fibres as found in a piece of fruit is consumed.¹¹⁰ For example, *Sainsbury’s Blue Parrot Café Banana Flavoured Still Spring Water* contains 2% of reconstituted banana, but nonetheless makes a “Five a Day” claim despite the fact that one would need to drink between 9 and 10 bottles to consume the amount of juice equivalent to the juice of one single banana.

103 This is not to say that such claims may not need to be regulated at all. However, action would need to be taken on the basis of other Community instruments. See part II.2 below on the regulation of television advertising directed at children.

104 Article 3. The Proposed Regulation is without prejudice to the Misleading Advertising Directive (Directive 84/450, as amended).

105 Article 6.

106 The average consumer is defined in Article 2 as “the consumer who is reasonably well informed and reasonably observant and circumspect”. The Proposed Regulation expressly refers to the case law of the European Court of Justice at paragraph 17 of the Explanatory Memorandum.

107 Article 6.

108 Article 5(2).

109 Namely a claim that consuming the foodstuff in question contributes to the recommended daily intake of five portions of fruit and vegetable.

110 Article 5(1).

Other claims will be prohibited, as they do not, by nature, provide an adequate level of consumer protection. In particular, under Article 4(3), beverages containing more than 1.2% alcohol will no longer be able to bear nutrition or health claims, other than nutrition claims referring to a reduction in the alcohol or energy content. This provision is in keeping with the Community's strategy to fight alcohol abuse and alcohol related harm and relies on scientific evidence that high consumption of alcohol in the population substantially increases the risk of alcohol-related morbidity and of all-cause mortality.¹¹¹ It also reflects concerns about the way in which alcoholic beverages are designed and promoted to appeal in particular to children and adolescents, as emphasised in Council Recommendation of 5 June 2001 on the drinking of alcohol by young people.¹¹²

As regards health claims more specifically, they must indicate on the labels of the foodstuffs in question the importance of a balanced diet and healthy lifestyle, as well as the quantity of the food and pattern of consumption required to obtain the claimed beneficial effect.¹¹³ Moreover, a claim which implicitly makes reference to general, non-specific benefits of the nutrient or food for overall good health or well-being or to psychological and behavioural functions, will not be allowed.¹¹⁴ The proposed regulation will also ban reference to, and endorsement by, doctors or other health professionals, for the Commission considers that they might suggest to the consumer that not eating the particular food could damage one's health.¹¹⁵

In terms of procedures, nutrition claims will only be permitted if they comply with the Annex to the Regulation which lists various claims and lays down the conditions at which they are acceptable.¹¹⁶ For example, it will only be possible to claim that a food is low in fat where the product in question contains no more than 3g of fat per 100g or 1.5g per 100 ml. The Annex covers several other nutrition claims, such as light, low energy, fat-free, sugar-free, with no added sugars, low salt, high in fibre, source of protein, high in vitamins/minerals... Furthermore, health claims will have to be authorised by the European Food Safety Authority.¹¹⁷ The EFSA will, on the basis of the scientific data provided by the food business operator, forward an opinion to the Commission, to Member States and to the applicant, including a report describing its assessment of a given health claim and stating the reason for its opinion.¹¹⁸ The Authority shall make its opinion public, so that the interested parties may submit comments to the Commission within 30 days of the publication.¹¹⁹ The Commission will then decide whether the claim should be authorised.¹²⁰ The Commission will maintain a Community Register, which shall be accessible to the public, including all the nutrition and health claims which have been authorised and the conditions applying to them, as well as a

111 Council Conclusions of 5 June 2001 – OJ 2001 C 175/1 – referred to in the Explanatory Memorandum of the Proposed Regulation at paragraph 15.

112 OJ 2001 L 161/38.

113 Article 10.

114 Article 11(1)(a) and (b).

115 Article 11(1)(d).

116 Article 8(1).

117 Article 10(1).

118 Article 14.

119 Article 15.

120 Article 16.

list of rejected health claims.¹²¹ The Proposed Regulation therefore represents a move from a system of enforcement before courts, administrative authorities and regulatory or self-regulatory bodies to a system of prior approval, which will enable the Community to act in conformity with the precautionary principle, while facilitating the proper functioning of the Internal Market.

4.4. The controversial issue of nutrition profiling

The most debated article of the Proposed Regulation, which has delayed its adoption, is Article 4(1) on nutrition profiling. It provides as follows:

“Within 18 months from the adoption of this Regulation, the Commission shall [...] establish specific nutrient profiles which food or certain categories of foods must respect in order to bear nutrition or health claims.

The nutrient profiles shall be established, in particular, by reference to the amounts of the following nutrients present in the food:

(a) fat, saturated fatty acids, trans-fatty acids

(b) sugars

(c) salt/sodium

The nutrient profiles shall be based on scientific knowledge about diet, and nutrition, and their relationship to health and, in particular, on the role of nutrients and other substances with a nutritional or physiological effect on chronic diseases. In setting the nutritional profiles, the Commission shall seek the advice of the EFSA and carry out consultations with interested parties, in particular food business operators and consumer groups.”

Consequently, if a foodstuff is, say, low in fat but very high in sugar, it will not be able to bear the claim “low in fat”, as it would mislead the average consumer into thinking that the foodstuff should be included as part of a healthy diet.

National courts have had to deal on several occasions with the issue of the relationship between nutrition profiling and misleading advertising. It appears that they have adopted different stances on this question from one country to another. One example is particularly telling, as it involved the marketing of the same foodstuff in France and in the Netherlands. The question arose whether *Haribo* misled consumers by making the claim “Fat free lollypops!” on the packaging of its *Chupa Chups* fruit lollypops. In the Netherlands, the national court accepted the argument that the claim was misleading on the ground that if the lollypops were 0% fat, it was also because they were 100% sugar. *Chupa Chups* therefore gave the wrong impression that the lollypops were healthy products. By contrast, the Paris Court of Appeal held that similar food products did not only include fruit lollypops but also milk, caramel and chocolate lollypops and that the claim that the fruit lollypops were fat free enabled consumers to distinguish them from other kinds of lollypops. The claim was therefore lawful.¹²² This example shows that judges are not well equipped to deal with the issue on the basis of the general law on misleading advertising, which in turn deprives consumers from the prospect of consistent protection.¹²³

121 Article 18.

122 Decision of 1st August 2003.

123 Not only from one Member State to another but also within Member States. This becomes particularly

Article 4 of the Proposed Regulation would make it much more difficult for manufacturers to stress only one specific aspect of their foodstuffs if these foodstuffs are not overall healthy. It is therefore not surprising that the food industry has lobbied vigorously against the adoption of this article. Food business operators argue that banning nutrition and health claims on foodstuffs that do not have the required nutrition profile amounts to saying that there are “good” and “bad” foods, whereas there should only be “good” or “bad” diets. On this basis, the European Parliament voted against Article 4 at its first reading of the Proposed Regulation. However, the Commission, which has gained the support of the Council of Ministers, refuses to delete Article 4 from its Proposal.¹²⁴ A common position was finally adopted on 8 December 2005, which maintains the principle that only foods with a good nutrition profile can bear nutrition and health claims.¹²⁵

The Commission’s rationale in favour of Article 4 is that it does not ban any kind of food. It only limits the communication of nutritional or health benefits of certain foods with an undesirable nutrition profile. Such foods can be consumed in moderation as part of a healthy diet, but if they are advertised with health and nutrition claims many consumers that are currently eating them in moderation might consume them in greater quantities. The Proposed Regulation does not call them “bad” foods because they can produce a great amount of satisfaction.¹²⁶ Nobody suggests that measures aimed at obesity prevention should detract consumers from enjoying food. Rather, the Proposed Regulation prevents foods with an undesirable nutrition profile from being marketed as “good” food, with positive messages about their health and nutritional benefits. The Proposed Regulation is designed to eliminate not information but misinformation either on food products or in their promotion. As Commissioner Byrne said, it is hoped that the advertising industry does not need to rely on deception to be successful. The door is still open to creativity. Once adopted, the Proposed Regulation will enable individuals to better care for themselves and exercise their freewill as regards their diet with an adequate knowledge of what they are doing. It is therefore a manifestation of the Commission's intention to empower consumers, which is central to its consumer protection policy, while at the same time facilitating the proper functioning of the internal market by ensuring a better flow of foodstuffs.

When the Proposed Regulation is adopted, it can be expected that its Article 4 will provide a further incentive to the food industry to develop and market healthier products than it has done so far. The industry needs consumer confidence, and the best way to gain and retain this confidence is to develop foodstuffs which are not detrimental to consumers’ health.

obvious if one compares the two recent judgments delivered, on the same day, by the same jurisdiction - the Nanterre *Tribunal de Grande Instance* in France. In the first case, the court decided that Nestlé had engaged in misleading advertising by promoting a peach flavoured drink high in sugar next to its mineral waters and in similar bottles (*UFC Que Choisir v Nestlé Waters France*, judgment of 16 December 2005, RG 04/07391). By contrast, the court ruled that Harry's had not misled the consumer by stating that a bun was high in calcium while it was also full of sugar and fat (*UFC Que Choisir v Harry's France*, judgment of 16 December 2005, RG 04/07393). The *UFC Que Choisir*, the consumer association which issued legal proceedings against these two food companies as part of its obesity prevention campaign, has decided to appeal against this second judgment.

124 This stance is strongly supported by consumer and medical organisations.

125 The Proposal's legislative history is available from: http://europa.eu.int/prelex/detail_dossier_real.cfm?CL=en&DosId=184390

126 Regulating food marketing does not aim at denying the pleasure which consumers can derive from eating and drinking.

As Commissioner Byrne said, “the economic potential of 'healthy foods' is enormous. The industry should seize the moment – force the pace. The promotion of foods with less fat, less sugar and less fat could easily catch the public mood and gain a massive market.”¹²⁷ Some companies have already started to do so as part of their risk management strategies.¹²⁸

Determining whether a particular foodstuff has a good nutrient profile will nonetheless be a particularly difficult task. The Proposed Regulation provides that one factor which will enter into the equation is the content of a particular foodstuff in either fat, sugar or salt. However, some ingredients may be difficult to classify. What about nuts, for example? As a matter of fact, they are fat and should not be eaten in excess; but they tend to be regarded as very nutritious, as they also contain protein and many essential vitamins, such as A and E, minerals, such as phosphorous and potassium, and fibres. Will the degree of processing which a particular foodstuff has been through be taken into consideration? Moreover, whether a particular foodstuff has a good profile presumably depends as well on the physical and physiological condition, the lifestyle and the level of physical activity of each consumer or categories of consumers. It is obvious that an athlete, a pregnant woman, an elderly person or a child do not have the same nutritional needs. The Commission has acknowledged these difficulties in its Proposed Regulation: “more complicated schemes involving many more parameters [than simply the fat, sugar and salt content of a foodstuff] may be under study. But all these proposals are currently far from meeting with the required consensus. Therefore it would be appropriate that such criteria and any relevant exceptions that should apply in the Community be adopted after careful and adequate consideration of the matter but within reasonably short time limits.”¹²⁹ Furthermore, the Commission has used a very careful language: “when setting the nutritional profiles, the different categories of foods and the place and role of these foods in the overall diet shall be taken into account. Exemptions to respect established nutrient profiles may be necessary for certain foods or categories of foods depending on their role and importance in the diet of the population. These would be complex technical exercises and the adoption of the relevant measures should be entrusted to the Commission.”¹³⁰ This caution is reflected in Article 4(1) itself, which provides that the Commission shall seek the expert advice of the EFSA and carry out consultations with interested parties, in particular food business operators and consumer groups. The Commission has also given itself 18 months from the adoption of the Proposed Regulation to establish the specific nutrient profiles which foods would have to respect in order to bear nutrition and health claims and has reserved the possibility for exemptions and updates.

The practical difficulties which the Commission is bound to encounter in implementing the Proposed Regulation, once adopted, should not detract the Community legislature from intervening with a view to tackling food marketing as part of the EU's obesity prevention

¹²⁷ David Byrne, “The role of diet: How to inform consumers”, European Food Law Conference, Brussels, 29 June 2004, available at: <http://europa.eu.int/rapid/pressReleasesAction.do?reference=SPEECH/04/338&format=HTML&aged=0&language=EN&guiLanguage=en>

¹²⁸ This is how Nestlé, for example, has acknowledged that it has “a role to play in helping its consumers find their food balance at all ages and in all circumstances” and has consequently undertaken to reduce the fat and salt content of several of its products, as well as the protein content of infant formulas.

¹²⁹ Paragraph 14 of the Commission’s Explanatory Memorandum.

¹³⁰ Paragraph 7 of the Preamble.

strategy. However, these difficulties also confirm the need to educate consumers to make informed food choices and develop a critical attitude towards food labelling and advertising, so that they can adapt their food intake to their individual needs, and in particular their level of physical activity. After all, consumers bear the primary responsibility of what they eat. What they need to learn is to have a moderate and varied food intake. The Proposed Regulation may be a step in this direction.¹³¹

There is, however, a limitation to this approach, as the effectiveness of nutrition labelling and health claims in improving dietary patterns relies largely on a motivated and educated public to make healthy choices. Once again, if there is to be significant changes, action on nutrition labels and health claims need to be part of an integrated approach that tackles the increasing rates of diet-related non-communicable diseases at a population level, as well as targeting individuals.¹³²

V. THE REGULATION OF FOOD ADVERTISING TO CHILDREN

Regulating food marketing is even more difficult when it comes to children, as it cannot be argued in their respect that they bear the ultimate responsibility of what they eat. Moreover, claiming that parents are entirely responsible for what their children eat is too simplistic a response in light of the huge commercial pressure to which consumers, both adults and children, are subject.

Children are an important target for advertising and marketing professionals as they represent three growing markets. First, they are a primary market since they have more and more buying power with their own money to spend. Secondly, they play a major role in influencing what their parents buy. Finally, they are a future market, as it is likely that they stick to the dietary habits which they have acquired as children when they grow older.¹³³ Given the globally rising rates of obesity and diet-related non communicable diseases, some experts have suggested that the marketing of food to children contributed to an “obesogenic” environment that makes health food choices more difficult, especially for children.¹³⁴

It is therefore not surprising that the regulation of the marketing of food to children has been identified by the World Health Organisation as one area necessitating further attention in its obesity prevention strategy.¹³⁵ Similarly, to better guide its policy formation on the question of advertising to children, the European Commission has asked for contributions on this issue in its recent Green Paper.¹³⁶

131 For the situation in the United Kingdom, see the proposal to introduce a “traffic lights” food labelling system.

132 See also Hawkes, “Nutrition labels and health claims: the global regulatory environment”, WHO report, 2004, at page viii.

133 BEUC, “Children and advertising – Summary of the BEUC/CB survey”, X/001/2000.

134 Hawkes, “Marketing Food to Children : the Global Regulatory Environment”, WHO, 2004, at page 1.

135 The WHO commissioned a review of the regulatory environment that surrounds the marketing of food (including non-alcoholic beverages) to children Hawkes, “Marketing Food to Children : the Global Regulatory Environment”, WHO, 2004.

136 “As far as advertising and marketing is concerned, it has to be ensured that consumers are not misled, and

5.1.1. Food advertising and children's health: the terms of the debate and the evidence available

The concern over the regulation of advertising to children is particularly complex, as it raises overlapping questions of social science (the measurement of harm to children), political ideology (the relative role of parents and the state in regulating children's behaviour) and cultural assumptions about childhood and the values of consumer capitalism.¹³⁷

The major criticism of advertising to children is that it is inherently unfair for the powerful and pervasive media to exploit children's inexperience and credulity for commercial gain and to insinuate consumerist values into childhood. As a result of their perceptive limitations, children understand commercials very differently from adults. Research has established that most children do not develop the ability to distinguish between advertising and programmes until the age of 6-8 and that it is not normally until the age of 11 or 12 that children fully understand the purpose of advertising. However, children's understanding of advertising, which develops as they grow older, is essential for them to develop a critical, questioning attitude to advertising and distinguish between entertainment and commercial practices.¹³⁸

More specific criticisms of advertising to children also recur. First, as stated in section 3.2. above, there is a concern that most of the products advertised on children's television are high in fat, salt and sugar and may have a damaging effect on children's health.

Secondly, some objections have been voiced against particular marketing techniques such as host selling, character merchandising, the use of celebrities and the failure to clearly separate commercials from programming, making it even more difficult for children to understand the commercial intent of advertisements. These techniques are numerous,¹³⁹ but two examples will suffice here to illustrate the point. One is the involvement of sports celebrities in junk food advertisements. This is how, for example, England football captain David Beckham was made the star of both Coca-Cola's and Pepsi's World Cup advertising campaigns in 2002. Andrew Coker, of Coca-Cola, told the newspaper that it was "marvellous" to be able to feature Beckham on the special-edition bottle.¹⁴⁰ No doubt that it must have been "marvellous" from a marketing point of view; it may not have been so for public health. Character merchandising constitutes another fast developing marketing technique. It plays on children's fascination with a fantasy character, so as to induce them into buying or insisting

that especially the credulity and lacking media literacy of vulnerable consumers and, in particular children, are not exploited. This regards in particular advertising for foods high in fat, salt and sugars, such as energy-dense snacks and sugar-sweetened soft drinks, and the marketing of such products in schools."At paragraph V.1.2.

¹³⁷ Ramsay, *Advertising, Culture and the Law*, Sweet & Maxwell, 1996. See in particular the chapter on the limits of consumer culture? Capitalism, Advertising to Children and the First Amendment.

¹³⁸ As regards adolescents, the issue may be more one of self-control and peer identification. On self-control, see Cutler, Glaeser and Shapiro, paper cited above.

¹³⁹ For a more extensive review of the techniques used to promote food to children, see "Pestering Parents: How Food Companies Market Obesity to Children", Center for Science in the Public Interest (CSPI), November 2003, available at: <http://www.cspinet.org/pesteringparents>, see also Hawkes, "Marketing Food to Children: the Global Regulatory Environment", WHO, 2004.

¹⁴⁰ See the following BBC press release : <http://news.bbc.co.uk/1/hi/england/1863402.stm>

on their parents buying them the advertised good or service. For instance, a McDonald's Happy Meal comes wrapped in a special box with scenes of the promoted film on it and usually containing a model of one of the characters. As there are several models in one series which children can collect, they have an even stronger incentive to eat regularly at McDonald's.¹⁴¹ The problem with this advertising technique is that the use of cartoon characters is in no way related to the actual content of the box. Both these techniques rely on an exploitation of children's inexperience and credulity, by presenting a (generally unhealthy) foodstuff by referring to their familiar environment.

Finally, it is claimed that children should not be used as surrogate sales persons to pester their parents to buy advertised foodstuffs; especially as conflicts would further be exacerbated in lower income households where children see images of products which their parents cannot afford.¹⁴² Many surveys in the United Kingdom have shown that British parents are deeply concerned about the impact of advertising on their children. In particular, 75% of parents said that children saw too much advertising,¹⁴³ which led to demands putting them under pressure.¹⁴⁴ 80% of them wanted tighter control on advertising to children and 77% wanted a ban on the advertising of food to children.¹⁴⁵ At European level, the Advertising Education Forum conducted a survey which established that in 18 out of 21 countries, parents ranked television advertising within the top ten important influences on children.¹⁴⁶

Consumer associations and the medical professions argue in favour of a ban of food advertising directed at children, and at the very least its strict regulation. They consider that a ban would be a proportionate response to the obesity epidemic.

There is an increasing regulatory activity surrounding the regulation of food advertising, and in particular television advertising, to children.¹⁴⁷ There are several ways to regulate the marketing of food to children.¹⁴⁸ One possibility is to impose restrictions on food advertising in general, as France has recently done.¹⁴⁹ Another option is to impose restrictions during children's programmes, such as prohibiting television advertising to children, as Quebec has done since 1980, Sweden since 1991 and Norway since 1992.¹⁵⁰

The idea of a ban on junk food advertising is rejected by the food industry. The opponents of regulation argue that bans on advertising to children would violate the fundamental right to free speech, which includes commercial speech, and that regulating television advertising is a futile gesture, insofar as children are exposed to other commercial influences. The food and advertising industries have expressed doubts in relation to the

141 This technique is also frequently relied on for advertising of breakfast cereals.

142 Ramsay, cited above.

143 Chartered Institute of Marketing, 2003.

144 Welsh Consumer Council, 2003.

145 Cooperative Wholesalers' Society (2000).

146 AEF, "Parental Perceptions of Key Influences in Children's Lives", 2000.

147 For a comprehensive overview, see Hawkes, cited above.

148 Indeed, as stated above, non-child specific regulations on marketing have been used as the basis of recent litigation against food companies both in the United States and in Europe.

149 Article 29 of the Public Health Act of 9 August 2004. This provision is not yet in force as it needs to be implemented by a decree which is, to date, still to be adopted. Discussed below.

150 In all three cases, the ban is enforced by a government agency.

effectiveness of the Swedish ban on children advertising. In particular, they note that obesity has risen rapidly since the introduction of the ban in 1991.¹⁵¹ Furthermore, they claim that bans or severe limits on advertising to children would erode the economic base of children's television and prevent broadcasting of high quality programmes, insofar as several important food operators contribute to the financing of major media literacy programmes.¹⁵² It is true that advertising campaigns may play an important role in improving people's eating habits;¹⁵³ the Commission has recognised this positive role by launching, on 2 February 2006, the "European Health Information Platform" or "Health in Europe" project.¹⁵⁴ However, that the quality of programmes has declined in countries which ban television advertising directed at children is highly disputed.¹⁵⁵

5.2. The role of cultural considerations

Apart from the importance of the precautionary principle as a guiding principle to policy-making, as discussed above, the role of cultural considerations should not be underestimated. Tackling the obesity epidemic imposes that we reflect on the kind of society that we want to establish.

The example of Quebec is quite informative in this respect. The Canadian Supreme Court had to decide in the *Irwin Toy* case whether Quebec legislation, which was the first one to ban, as of 1980, all forms of advertising to children under 13, was compatible with the Canadian Constitution.¹⁵⁶ The Court confirmed that advertising, as commercial speech, was protected under the freedom of expression provision of the Canadian Charter. However, it held that the legislation in question could be saved under section 1 of the Charter if the government proved that the limitations on the rights were demonstrably justifiable as reasonable restrictions in a free and democratic society.

Under section 1, the government was required to show that the objective of the law related to a pressing and substantial objective and that the means chosen to achieve that objective were proportional to the objectives pursued. This required that the measures chosen were rationally connected to the objective and minimally impaired the guaranteed right. The judgment of the majority upheld the legislation primarily on a manipulation thesis. The concern addressed was "the protection of a group which is particularly vulnerable to the techniques of seduction and manipulation abundant in advertising" and "accords with a

151 However, as will be shown below, "cross border advertising" still is permitted, which has prevented the ban from entirely eliminating exposure to television advertising by Swedish children.

152 For an example of such programmes, see Mediasmart: <http://www.mediasmart.org.uk>

153 On the positive role of advertising in fighting the obesity epidemic, see Zywicki, Holt and Ohlhausen, "Obesity and Advertising Policy", George Mason University, School of Law, Working Paper Series (2004/3).

154 "Health in Europe" is a multimedia initiative based on an ongoing exchange of reports on health and medicine produced by television broadcasters for their theme magazines. Reports are offered free of rights to participating organisations and the bank of items is renewed continuously. It is co-financed with 1.4 million euros from the EU Public Health Programme, and managed by the European Broadcasting Union. More information is available at: http://europa.eu.int/comm/health/ph_projects/2004/action1/action1_2004_11_en.htm

155 Hawkes, "Marketing Food to Children: the Global Regulatory Environment", WHO, 2004, at page 20.

156 *Irwin Toy Ltd v Attorney General of Quebec* [1989] 1 SCR 927

general goal of consumer protection legislation or, in other words, to protect a group that is most vulnerable to commercial manipulation.” The judgment identified several concerns: “the particular susceptibility of young children to media manipulation, their inability to differentiate between reality and fiction and to grasp the persuasive intention behind the message, and the secondary effects of exterior influences on the family and parental authority.”

In order to establish a factual basis for this concern the court relied on the conclusions of the US Federal Trade Commission in relation to television advertising to children under seven years old which was issued in 1970, when a similar debate was taking place in the United States.¹⁵⁷ However, as Ramsay has observed, these findings did not in fact answer the question before the court since the US Federal Trade Commission's conclusions related to television advertising and to children under seven, whereas the Quebec legislation related to all forms of advertising and included children up to 13. The court cited no specific evidence to support these extensions. As discussed above, the issue of when children are able to “argue against” advertising is controversial. Perhaps sensing this lack of empirical support, the majority also argued that the court should show deference to a legislative decision in the area of balancing competing economic and social interests where there was incomplete scientific evidence. It also noted that, since the ban could be rationalised as only partial – advertisers were still able to direct advertising to adults, the means chosen was not disproportionate to the objective to be achieved. Ultimately, social science evidence played little role in the introduction of the Quebec legislation. Rather, the rise of opposition to advertising to children may have been viewed as “a partial response to the increasing colonisation of the family by commodity relations, with capitalistic values extending beyond work relations to those traditionally included within the private realm, including the worlds of leisure and the family.”¹⁵⁸

It is true that the *Irwin Toy* case dealt with a ban on all forms of advertising to children under 13, and not only on food advertising. However, if we accept that the regulation of advertising reflects cultural values, the surveys mentioned above on how parents view the advertising to which their children are exposed could add weight to the argument that there is widespread support in Europe for a reduction, if not an outright ban, of the exposure of children to junk food advertising. Do we really want our children to be tempted to snack all the day long on unhealthy foodstuffs?

5.3. The scheme set up by the Television Without Frontiers Directive

There are few EU law provisions dealing with the issue of advertising directed at children, and *a fortiori* even fewer dealing with the issue of food advertising directed at children. The main instrument of relevance in this respect is the so called “Television Without Frontiers Directive”, which was adopted in 1989 and revised in 1997 to cover teleshopping.¹⁵⁹ This Directive is currently under review; the Commission published a

157 On the US debate, see Ramsay, cited above.

158 Ramsay, cited above.

159 Directive 89/552/EEC, OJ 1989 L 298/23 as amended by Directive 97/36/EC, OJ 1997 L 202/61.

proposal for an amending directive on 13 December 2005.¹⁶⁰

The primary aim of the Television Directive is to ensure the free movement of television broadcasting services to facilitate the functioning of the internal market. This was confirmed on several occasions by the European Court of Justice, not least in *Leclerc-Siplec*¹⁶¹ and *De Agostini*.¹⁶² The Directive was adopted on the basis of ex-Articles 57 and 66 (now Articles 47 and 55) of the Treaty on the free movement of services and relies on the twin principles of “state of establishment” and “mutual recognition”.¹⁶³ The Commission’s Proposal for an Amending Directive confirms the importance of the free movement of broadcasting services.¹⁶⁴ However, the Directive also acknowledges that the abolition on all restrictions to provide broadcasting services within the Community must go hand in hand with a certain degree of coordination of the applicable national laws. The Directive therefore provides minimum rules in a number of defined areas, one of them being television advertising, sponsorship and teleshopping.¹⁶⁵

As far as obesity prevention is concerned, two sets of measures regulating television advertising may be relevant: the regulation of food advertising and/or the regulation of children's advertising. However, as demonstrated below, the existing provisions, as well as the scheme which the Television Directive has established, contain a number of significant gaps which restrict its potential to support effectively the Union's obesity prevention strategy.

As regards food advertising, Article 12(d) of the Directive provides that “television advertising and teleshopping shall not encourage behaviour prejudicial to health or to safety.” The Directive does not provide any definition of what is to be understood by “prejudicial to health or safety”. It would therefore be logical that Article 12 be relied on to argue that junk food advertising is prejudicial to health, and that it should consequently be limited, and even banned. This is precisely what several consumer and medical organisations called for in their submissions to the Commission during the consultation process which led to the publication of the proposal for a directive amending the Television Directive.¹⁶⁶ However, not only does the Proposal contain no change in the way current Article 12(d) is drafted, but it does not even mention the responsibility of the food industry in its Preamble. This abdication of responsibility arguably reflects the complexity of the issue.¹⁶⁷ It is nonetheless regrettable that the Commission has not taken up this opportunity to regulate food advertising at Community level, without even acknowledging

¹⁶⁰ COM (2005) 646 final.

¹⁶¹ Case C-412/93 *Leclerc-Siplec* [1995] ECR I-179, at paragraph 28.

¹⁶² Case C-34/95 *De Agostini* [1997] ECR I-3843, at paragraph 25.

¹⁶³ The “home country control” principle is also referred to, in the context of the Television Directive, as the “transmitting” or “broadcasting” State principle.

¹⁶⁴ Paragraph 2 of the Preamble.

¹⁶⁵ Articles 10 to 20 (Chapter IV).

¹⁶⁶ Several organisations have called on the Commission to take the opportunity of its review of the Directive to amend this article. See in particular the submissions of BEUC, EHN, NHF, Diabetes UK. However, the proposal which the Commission published on 13 December does not contain any reference to food advertising: COM (2005) 646 final.

¹⁶⁷ See the discussion above on nutrition profiling.

the existence of the problem.¹⁶⁸ This confirms that the Commission's proposal is marked by the clear willingness of the Director General on Audiovisual Services to deregulate broadcasting services even further.

As regards advertising directed at children, the Directive contains two specific and a more general provision regulating, to some extent at least, television advertising in children's programs. First, Article 11.5 states that "children's programs, when their scheduled duration is less than 30 minutes, shall not be interrupted by advertising or by teleshopping." However, if a programme lasts longer, it can be interrupted as any other programmes.¹⁶⁹ Secondly, Article 15(a) provides that "television advertising and teleshopping for alcoholic beverages may not be aimed specifically at minors or, in particular, depict minors consuming these beverages."¹⁷⁰ As stated above, no similar provision exists in relation to junk food advertising, and no such provision is likely to be introduced in the near future, despite the calls on the Commission to do so.

More generally, Article 16 provides as follows:

"1. Television advertising shall not cause moral or physical detriment to minors and shall therefore comply with the following criteria for their protection:

- (a) it shall not directly exhort minors to buy a product or a service by exploiting their inexperience or credulity;
- (b) it shall not directly encourage minors to persuade their parents or others to purchase the goods or services being advertised;
- (c) it shall not exploit the special trust minors place in parents, teachers or other persons;
- (d) it shall not unreasonably show minors in dangerous situations.

2. Teleshopping shall comply with the requirements referred to in paragraph 1 and, in addition, shall not exhort minors to contract for the sale or rental of goods and services."

The European Court of Justice has never been given the opportunity to define the scope of this article. This is not to say that its ambit is uncontroversial. In particular, the use of the word "directly" in paragraph 1(a) and (b) seems to suggest that it should be interpreted restrictively. There are in fact few examples of advertisements which directly call on children

¹⁶⁸ The attitude of the Commission to food advertising is in stark contrast to its attitude towards tobacco advertising which is banned under Article 13.

¹⁶⁹ Subject to the first four paragraphs of Article 11. New Article 11(2) of the Commission's proposal for an amending directive extends the 30 minutes requirement to 35 minutes.

¹⁷⁰ There is nonetheless no ban on alcohol advertising as such, which means that children could well be exposed to them. In this respect, see the submissions to the Commission of Eurocare, mentioned above, which argued, relying on a recent study of the impact of alcohol advertising on teenagers in Ireland found 1) that alcohol adverts were identified as their favourites by the majority of those surveyed; 2) that most of them believed that the majority of the alcohol advertisements were targeted at young people (because they depicted scenes such as dancing, clubbing, lively music, wild activities) identified with young people; and 3) that they interpreted alcohol advertisements as suggesting that alcohol was a gateway to social and sexual success and as having mood altering and therapeutic properties. Eurocare consequently calls for a strict enforcement of Article 15 of the Directive. However, the wording of Article 15 remains unchanged in the Commission's proposal for an amending directive. By contrast, the Directive bans all forms of television advertising and teleshopping for cigarettes and all other tobacco products (Article 13).

either to buy a specific product or to use their “pester power” so that their parents buy this product for them. Advertising to children is mainly covert: it attracts their attention in such a way that they will want a product. That has become even more so with the development of various new marketing techniques, of which character merchandising is one.¹⁷¹ McDonald’s advertises its Happy Meals by using cartoon characters. The problem, however, is that the use of these characters is not related to the actual content of the box. It can therefore be argued that this technique is an exploitation of children’s inexperience and credulity. The Market Court in Finland ruled, on the basis of the Finnish Consumer Protection Act, that a McDonald’s commercial violated the Act by presenting Happy Meal Toys as the “main message in sports, at the expense of the main product” (that is, the Happy Meal). In making the core of the commercial a toy and the main objective attracting children, McDonald’s, the court ruled, was deliberately taking consumer attention away from the advertised product (the meal) and the commercial was thus deemed an “inappropriate” form of advertising. The Market Court consequently ordered that the commercial be withdrawn.¹⁷² However, the wording of Article 16 is so restrictive that a commercial such as the one for McDonald’s Happy Meals may not be considered as a “direct” exploitation within its terms. Despite the calls of consumer and medical associations for a clearer, broader formulation, it appears that the Commission is not thinking about amending Article 16.

Furthermore, the Television Directive applies only to television broadcasting. It is true that the Commission’s Proposal for an amending Directive would extend its scope, and in particular its provisions on advertising, to other forms of broadcasting, so as to cover not only television but also other audiovisual media services, both scheduled and on demand.¹⁷³ However, it would still not cover all forms of advertising which may adversely affect children’s health.¹⁷⁴ These residual forms of advertising will have to be dealt with in compliance with the principle of attributed powers. In particular, in-school marketing, which has been identified as one of the fastest growing marketing techniques of the food industry aimed at children, should be dealt with at national level.¹⁷⁵

Another severe limitation to the effectiveness of the Television Directive to protect children from the harmful consequences of food advertising stems from the scheme it has set up, which combines the “state of establishment” principle with a minimum harmonisation approach.

The fact that the Directive only lays down minimum standards finds its expression in Article 3 which states that “Member States shall remain free to require television broadcasters under their jurisdiction to comply with more detailed or stricter rules in the areas covered by this Directive.” Consequently, it is open to Member States to adopt stricter requirements in the coordinated fields of the Directive, and in relation to advertising more specifically, either by imposing a ban on television advertising directed at children, as Sweden has done since 1991, or by regulating food advertising, as France has just done by requiring food companies wishing to advertise junk food to devote a percentage of their advertising budget to finance

171 See above.

172 Case cited in Hawkes, report cited above, at page 7.

173 Paragraphs 13 to 16 of the Preamble of the Proposed Directive.

174 Thus, paragraph 16 of the Preamble of the Proposal makes it clear that the term “audiovisual” does not cover audio transmission or radio.

175 On in-school marketing, see section 3.1 above.

obesity prevention campaigns.

However, this freedom is limited, insofar as the Directive also requires that Member States should comply with the twin principles of “the State of establishment” and “mutual recognition”. As Article 2a provides, “Member States shall ensure freedom of reception and shall not restrict retransmissions on their territory of television broadcasts from other Member States for reasons which fall within the fields coordinated by this Directive.” The Commission’s Proposal for an Amending Directive has made it clear that “the country of origin principle remains the core of this Directive, as it is essential for the creation of an internal market. This principle must therefore be applied to all audiovisual services in order to ensure legal certainty for media service providers as the necessary basis for new business models and the deployment of these services. It is also essential in order to ensure the free flow of information and audiovisual programmes in the internal market.”¹⁷⁶ Moreover, Article 3 states that “Member States shall, by appropriate measures, ensure, within the framework of their legislation, that television broadcasters under their jurisdiction effectively comply with the provisions of this Directive”, which should include “the appropriate procedures for third parties directly affected, including national of other Member States, to apply to the competent judicial or other authorities to seek effective compliance according to national provisions.” Consequently, Member States are bound to accept broadcasts from other Member States, without being able to apply the stricter national standards which they may impose on national broadcasts. The Court explicitly confirmed this point in its *De Agostini* judgment of 1997.¹⁷⁷

In this case, *De Agostini*, the subsidiary of an Italian publisher, advertised by satellite from the United Kingdom on Swedish television channels the children’s magazine “Everything about Dinosaurs!”. This magazine series contained information about dinosaurs, as well as a related plastic model dinosaur which could be assembled when purchasing several issues of the magazine. The Consumer Ombudsman applied to the Market Court for an order prohibiting *De Agostini* from marketing the magazine, in particular on the ground that the advertising in question was designed to attract the attention of children of less than twelve years of age and therefore infringed Article 11 of the Swedish Broadcasting Act. By contrast, *De Agostini* claimed that Swedish legislation was contrary to the Television Directive. The Market Court referred a question to the European Court of Justice as to whether the Directive was to be interpreted as “precluding application of Article 11 of the [Broadcasting Act] prohibiting advertisements directed at children”.¹⁷⁸ The Court held that Sweden could not prohibit the advertising of the children magazine from being broadcast from the United Kingdom on the Swedish territory, since the United Kingdom was the State of establishment, that advertising was an area coordinated by the Television Directive and that the United Kingdom had properly implemented its provisions. “If provisions of the receiving State regulating the content of television broadcasts for reasons relating to the protection of minors against advertising were applied to broadcasts from other Member States, this would add a secondary control to the control which the broadcasting Member State must exercise under the Directive.”¹⁷⁹ Sweden was thus prevented from applying to television broadcasts from the

¹⁷⁶ At paragraph 19 of the Preamble.

¹⁷⁷ Case C-34/95 *De Agostini* [1997] ECR I-3843. See also the earlier judgment of the EFTA Court in Joined Cases E-8 and 9/94 *Mattel and Lego*, OJ C 239 of 14 January 1995, which adopts a similar interpretation of the provisions of the Television Directive.

¹⁷⁸ At paragraph 22.

¹⁷⁹ At paragraph 61.

United Kingdom its domestic law provision which provides that advertisements broadcast in commercial breaks on television must not be designed to attract the attention of children under 12 years of age. On the other hand, the Court did not rule that Sweden could not enforce its ban on children advertising for broadcasts emanating from its own territory, insofar as “Article 3(1) does not contain any restriction as regards the interests which the Member States may take into consideration when laying down more strict rules for television broadcasters established in their territory”,¹⁸⁰ subject to their compliance with Articles 28 and 49 of the Treaty on the free movement of goods and services respectively.

The Television Directive offers hardly any opportunity to the receiving State to ensure that the State of establishment has complied with the minimum rules which the Directive contains, and Articles 12 and 16 in particular. It is true that Article 2a(2) contains a safeguard clause which enables Member States to provisionally derogate from their obligation to ensure freedom of reception from other Member States. However, this clause may only be of very limited use – if any use at all – in relation to junk food advertising to children. A derogation from the State of establishment principle is only possible if a television broadcast coming from another Member State manifestly, seriously and gravely infringes Article 22. It is true that Article 22 is aimed at the protection of minors. However, its material scope is very restricted, for it only covers “programmes which might seriously impair the physical, mental or moral development of minors, in particular programmes that involve pornography or gratuitous violence”. Article 22 does not appear to cover any form of harm to children, and certainly not the harm – however serious it might be – flowing from the repetitive consumption of foodstuffs advertised on television. The difficulty does not stop here. The procedural requirements which must be satisfied before Article 2a(2) may be invoked also put a particularly heavy burden on the receiving Member State, thus making it highly improbable that it may often be successfully invoked to limit advertising originating in other States.¹⁸¹

The scheme established by the Television Directive, as interpreted by the Court, throws serious doubts about the compatibility of the legislation recently adopted in France to limit junk food advertising with its provisions.

New Article L 2133-1 of the Public Health Code provides as follows:

“Television or radio advertising messages in favour of drinks containing added sugars, salt or artificial sweeteners and manufactured food products, broadcast in, transmitted from or received on the French territory must contain information of a

¹⁸⁰ At paragraph 56. The difference in treatment of domestic and foreign broadcasts raises the controversial question of reverse discrimination.

¹⁸¹ See Article 2a(b) to 2(a)(d) which provides as follows:

“(b) during the previous 12 months, the broadcaster has infringed [Article 22] on at least two prior occasions;

(c) the Member State concerned has notified the broadcaster and the Commission in writing of the alleged infringement and of the measures it intends to take should any such infringement occur again;

(d) consultations with the transmitting Member State and the Commission have not produced an amicable settlement within 15 days of the notification provided for in (c), and the alleged infringement persist.

The Commission shall, within two months following the notification of the measures taken by the Member State, take a decision on whether the measures are compatible with Community law. If it decides that they are not, the Member State will be required to put an end to the measures in question as a matter of urgency.”

sanitary nature. The promotion campaigns of these food products and drinks are subject to the same information requirements.

Advertisers can derogate from this obligation only if they make a financial contribution to the *Institut National de Prévention et d'Éducation pour la Santé* (the National Institute for Health Prevention and Education). This contribution is designed to finance the realisation and the transmission of campaigns on nutrition information and education, in particular through the media concerned as well as local actions.”¹⁸²

This article is to be implemented by decree once the *Agence Française de Sécurité des Aliments* (the Food Safety Agency) and the *Institut National de Prévention et d'Éducation pour la Santé* have given their opinions and the *Bureau de Vérification de la Publicité* (the Monitoring Advertising Bureau) has been consulted. No decree has yet been adopted. In any event, it is arguable, in light of Article 2 of the Television Directive as interpreted by the Court in *De Agostini*, that France cannot impose that junk food television advertisements broadcast on the French territory from other Member States contain information of a sanitary nature if such a requirement is not laid down in the legislation of the Member State where the advertising originates, as that would amount to imposing an extra burden on broadcasters from other Member States. It is only for television advertisements originating on the French territory that France could enforce its newly adopted legislation. Indeed, it is likely that the Court of Justice would accept such a restriction as compatible with Articles 28 and 49 of the Treaty: it would be a restriction, but it would be justified on grounds on public health without infringing the principle of proportionality.

As it currently stands, the Television Directive seriously limits the freedom of Member States to implement a coherent strategy aimed at curbing obesity levels on their territories. That reinforces the need for Community institutions to take public health considerations into better account in the amendment process of the Directive, bearing in mind the best interests of the child.

In light of the problems relating to the scope and scheme of the Directive, the BEUC called on EU institutions as early as 1996 to adopt a horizontal piece of legislation to protect children in relation to all forms of marketing practices, whatever the medium, and covering all products and services.¹⁸³ Recently, the Council and the European Parliament adopted the Unfair Commercial Practices Directive, which – even if its scope goes far beyond the regulation of television advertising directed at children – will have some impact on this question.

5.4. The relationship between the Television Directive and the Unfair Commercial Practices (UCP) Directive

The UCP Directive, which entered into force on 12 June 2005, introduces the first EU-wide ban on all unfair business-to-consumer commercial practices. Member States must adopt the

¹⁸² My translation.

¹⁸³ BEUC, “Children and advertising – Summary of the BEUC/CB survey”, X/001/2000. As stated above, the BEUC also called strongly on the Commission to review the Television Directive with a view to banning advertising of unhealthy food.

necessary implementing measures by 12 June 2007 and ensure that they are complied with by 12 December of the same year.¹⁸⁴

The aim of the UCP Directive, which is based on Article 95 of the Treaty,¹⁸⁵ is to harmonise the laws of the Member States on unfair commercial practices harming consumers' economic interests, so as to facilitate the free movement of goods and services by increasing legal certainty for both consumers and businesses, while ensuring a high level of consumer protection.¹⁸⁶

The key provision of the UCP Directive is Article 5, which prohibits all unfair business-to-consumer commercial practices. To be considered unfair, a practice must meet two criteria: it must be contrary to the rules of professional diligence and materially distort or be likely to materially distort the economic behaviour of an “average” consumer,¹⁸⁷ though there are also provisions aimed at preventing exploitation of particularly vulnerable consumers such as children. After laying down this general prohibition, the Directive identifies two main categories of unfair commercial practices: misleading and aggressive practices. A practice is misleading if it deceives or is likely to deceive the average consumer (for example, stating that a product can legally be sold when it cannot).¹⁸⁸ A practice is aggressive if, by harassment, coercion or undue influence, it significantly impairs or is likely to significantly impair the average consumer's freedom of choice (for example, explicitly informing a consumer that if he does not buy a particular product, the trader's job or livelihood will be in jeopardy).¹⁸⁹ Annex I of the Directive lists 31 commercial practices which are considered unfair in all circumstances. The list, which is applicable in all the Member States, is not exhaustive. However, if a consumer claims that his economic behaviour has been distorted as a result of a practice which is not listed, he will have to establish that the practice is unfair. The list therefore reverses the burden of proof by laying down a presumption of unfairness.¹⁹⁰

As regards advertising to children more specifically, Point 28 of the Annex provides that “including in an advertisement a direct exhortation to children to buy advertised products or persuade their parents or other adults to buy advertised products for them” is an aggressive commercial practice; it is therefore prohibited in all circumstances. The question therefore arises how this provision and Article 16 of the Television Directive fit together.

184 Directive 2005/29, OJ L 149 of 11 June 2005. For an extensive review of the UCP Directive, see Bakardjieva Engelbrekt, “EU and Marketing Practices Law in the Nordic Countries – Consequences of a Directive on Unfair Business-to-Consumer Commercial Practices”, report for the Nordic Council of Ministers Committee on Consumer Affairs, January 2005. Available at: <http://www.norden.org/pub/miljo/miljo/sk/US2005424.pdf>

185 A reference is also made to Article 153 of the Treaty on consumer protection in the First Recital of the Preamble.

186 Article 1 and Recitals 1 to 8 of the Preamble.

187 Article 2(e) defines “to materially distort the economic behaviour of consumers” as “using a commercial practice to appreciably impair the consumer's ability to make an informed decision, thereby causing the consumer to take a transactional decision that he would not have taken otherwise.”

188 Articles 6 and 7.

189 Articles 8 and 9.

190 The Commission believes that by defining only what should be prohibited the law left room for business to innovate in developing new, fair commercial practices.

The answer is partly contained within the wording of the UCP Directive. Article 3(4) provides that “in case of conflict between the provisions of this Directive and other Community rules regulating specific aspects of unfair commercial practices, the latter shall prevail and apply to those specific aspects.” The UCP Directive therefore is a horizontal directive which “complements the Community *acquis* on commercial practices harming consumers' economic interests” and “which provides protection for consumers where there is no specific sectoral legislation at Community level and prohibits traders from creating a false impression on the nature of products.”¹⁹¹ Point 28 itself applies this general provision to television advertising directed at children by specifying that it is without prejudice to Article 16 of the Television Directive.

However, what could appear as a relatively straightforward principle aimed at ensuring the coherence of Community law may give rise to a great deal of legal uncertainty in practice.

The starting point to assess the respective fields of application of the UCP and the Television Directives in relation to children advertising should be the aims of the directives. If it is true that the two directives have as their primary purpose the proper functioning of the Internal Market, they differ in respect of both the interests they aim to protect, as well as the means to do so.

As stated above, the UCP Directive is intended to protect consumers' economic interests; in other words, it aims to ensure that consumers' freedom of choice is not affected when they enter into commercial transactions with businesses. It focuses exclusively on consumers' economic interests even when the consumer is a child. As Recital 19 of the Preamble states, “where certain characteristics such as age [...] make consumers particularly susceptible to a commercial practice or to the underlying product and the economic behaviour only of such consumers is likely to be distorted by the practice in a way that the trader can reasonably foresee, it is appropriate to ensure that they are adequately protected by assessing the practice from the perspective of the average member of that group.”

By contrast, the Television Directive protects interests which are not all economic in nature. In particular, Article 16 prohibits advertising which causes “moral or physical detriment to minors”, which seems to suggest that health and safety concerns fall within its scope. This is confirmed by Article 12 on the prohibition of advertising prejudicial to health or safety, Article 13 on the prohibition of tobacco advertising, Article 14 on the prohibition of medicinal products and medical treatments advertising, Article 15 on the limitations imposed on alcoholic beverages advertising and Article 17 on the prohibition of sponsorship by companies involved in the manufacture or sale of tobacco or medicinal products or medical treatments. Conversely, health and safety matters are explicitly excluded from the scope of the UCP Directive, which states that it is “without prejudice to Community or national rules relating to the health and safety aspects of products.”¹⁹² In the original Commission proposal, it was not entirely clear whether this derogation related only to the rules concerning the products as such (for example, restrictions on the composition of products), which is obvious, or also to those regulating exclusively commercial practices relating to health and safety aspects of products (for example, restrictions on certain forms of marketing of products

191 Recital 10 of the Preamble.

192 Article 3(3).

considered to be prejudicial to human health, such as tobacco, alcohol or pharmaceuticals).¹⁹³ After certain Member States exerted political pressure, it is now clear that the Directive does not affect national restrictions and prohibitions of commercial practices on grounds of the protection of the health and safety of consumers on their territory.¹⁹⁴ Recital 9 of the UCP Directive provides that “the Member States will thus be able to retain or introduce restrictions on grounds of the protection of the health and safety of consumers in their territory wherever the trader is based, for example in relation to alcohol, tobacco or pharmaceuticals.”

Where does that leave us as regards obesity prevention?

If we accept that obesity is a health issue, Member States may introduce national legislation which would aim to reduce the scope of the epidemic. However, they could do so only for measures which do not fall within the coordinated fields of the Television Directive. Indeed, as Articles 12 to 16 suggest, the Television Directive coordinates the laws of the Member States on advertising, including the laws adopted on health and safety grounds and which affect television services – and audiovisual services more broadly defined once the amended directive enters into force. Consequently, in light of what has been explained above, Member States may not, as Community law currently stands, prevent the television adverts coming from other Member States on grounds that these broadcasts may be detrimental to children's health, and more specifically prejudicial to their diets. In light of the refusal of the Commission to integrate in its proposal for an amending directive the suggestions of consumer and medical associations to ban junk food advertising, it is unlikely that the Directive may be relied on to justify the legislation adopted by a Member State with this aim in mind. However, it must be recalled that the Court of Justice has never been asked to define the exact scope of Articles 12 and 16, and that the *Travaux Préparatoires* are one source only of judicial interpretation. The recent amendment of the Public Health Code in France, which was mentioned above, is a good illustration of the difficulties.

We could therefore be in the somewhat paradoxical situation that a measure such as the Television Directive, which purports to take into account health and safety interests, may be much less protective of these interests than the UCP Directive, which does not cover them but allows Member States to adopt national measures dealing with such interests. If there is a strong case to argue that the French Public Health legislation of 2004 is contrary to the Television Directive as interpreted by the Court of Justice, it is not contrary to any Community legislation in respect of advertising on the radio and other media which are prohibited neither by its provisions, nor by the UCP Directive. One should note, however, that this interpretation is subject to the Commission's assessment of whether national measures restricting advertising are compatible with Articles 28 and 49 of the Treaty and in particular the requirement of proportionality.¹⁹⁵

The issue of how the Television and UCP Directives relate to each other is further complicated by the Court's response to De Agostini's argument that children could get the model dinosaur for “6.50 Swedish crowns only” infringed Sweden's general law on unfair

¹⁹³ COM (2003) 356 final, at Recital 6.

¹⁹⁴ Bakardjieva-Engelbrekt, report cited above, at page 55.

¹⁹⁵ As indicated above, the Court in *De Agostini* left this question to the Swedish national court. However, the Television Directive which was then at stake is a minimum harmonisation directive, whereas the UCP Directive is a full harmonisation directive. It remains difficult at this stage to assess the relevance of this distinction.

commercial practices, as 6.50 crowns was the price of one issue of the magazine only and not of the dinosaur as such. In this case, apart from the lawfulness of the Swedish ban on television advertising, the question arose whether the Television Directive prevented Member States from prohibiting advertisements from other Member States on their territories on the ground that they misled consumers. De Agostini and the Commission argued that the principle that broadcasts were to be controlled by the State having jurisdiction over the broadcaster would be seriously undermined in both its purpose and effect if the Directive were held to be inapplicable to advertisers and that a restriction relating to advertising had an impact on television broadcasts, even if the restriction concerned only advertising. By contrast, the Consumer Ombudsman argued that the Television Directive did not address the issue of misleading advertising, thus leaving Member States free to apply their laws on misleading advertising to both domestic and foreign broadcasts alike.¹⁹⁶ Contrary to Advocate General Jacobs, the Court accepted the argument that the Television Directive did not harmonise the laws of the Member States on misleading advertising and held as follows:

“ [...] it is sufficient to observe that Council Directive 84/450/EEC of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising (OJ 1984 L 250, p. 17), which provides in particular in Article 4(1) that Member States are to ensure that adequate and effective means exist for the control of misleading advertising in the interests of consumers as well as competitors and the general public, could be robbed of its substance in the field of television advertising if the receiving Member State were deprived of all possibility of adopting measures against an advertiser and that this would be in contradiction with the express intention of the Community legislature [...]

It follows from the foregoing that the Directive does not preclude a Member State from taking, pursuant to general legislation on protection of consumers against misleading advertising, measures against an advertiser in relation to television advertising broadcast from another Member State, provided that those measures do not prevent the retransmission, as such, in its territory of television broadcasts coming from that other Member State.”¹⁹⁷

This judgment remains relevant in the wake of the UCP Directive, which integrates a large part of the Misleading Advertising Directive within its scope.¹⁹⁸

Consequently, as regards misleading commercial practices, the Television Directive does not apply, even if the advertising is transmitted on television. Misleading advertising therefore falls within the scope of the UCP Directive and any other relevant sectoral legislation.

For misleading food advertising, Directive 2000/13 regulating the presentation, labelling and advertising of foodstuffs¹⁹⁹ should be preferred over the UCP Directive. First of all, it is a

¹⁹⁶ Which should implement the Misleading Advertising Directive. Directive 84/450, as amended.

¹⁹⁷ At paragraphs 37 and 38.

¹⁹⁸ The Misleading Advertising Directive will continue to cover business-to-business relations, as the UCP Directive only deals with unfair business-to-consumer commercial practices. As discussed above, the regulation of misleading advertising is very relevant in relation to food advertising (question of nutrition profiling). However, one gained advantage, from the point of view of children's protection from unfair commercial practices, of the UCP Directive over the Misleading Advertising Directive is the refinement of the definition of the concept of “consumer”, which takes better account of the needs of vulnerable groups, and children in particular.

¹⁹⁹ OJ L 109 of 6 May 2000.

more specific piece of legislation, which takes precedence under Article 3(4) of the UCP Directive. Moreover, the Court considered in its *Sterbenz* judgment the relationship between Directive 79/112 (repealed by Directive 2000/13) and Directive 84/450 (which the UCP Directive has replaced in relation to business to consumer misleading advertising); it held:

“[...] it must be noted that Articles 2 and 15 of Directive 79/112 prohibit statements liable to mislead the purchaser. This is a specific provision intended to prevent fraud which must consequently be interpreted as a special rule in relation to the general provisions on protection against misleading advertising laid down in Directive 84/450 [...]”²⁰⁰

This judgment may be transposed to the hypothesis under review, as Article 2 of Directive 2000/13 provides that

“the labelling and methods used must not:

(a) be such as could mislead the purchaser to a material degree, particularly:

(i) as to the characteristics of the foodstuff and, in particular, as to its nature, identity, properties, composition, quantity, durability, origin or provenance, method of manufacture or production;

(ii) by attributing to the foodstuff effects or properties which it does not possess;

(iii) by suggesting that the foodstuff possesses special characteristics when in fact all similar foodstuffs possess such characteristics;

(b) subject to Community provisions applicable to natural mineral waters and foodstuffs for particular nutritional uses, attribute to any foodstuff the property of preventing, treating or curing a human disease, or refer to such properties.”

However, as discussed in section 4.4 above, national courts have found it difficult to decide, on the basis of their national implementing laws whether specific advertising methods of a particular foodstuff are “such as could mislead the purchaser to a material degree”, particularly in the event of the use of nutrition and health claims in the marketing of foods with unhealthy nutrition profiles. This confirms the need for specific Community legislation in this field, and it is hoped that the Commission's Proposed Regulation on Nutrition and Health Claims will soon be adopted.

It therefore appears that, following the adoption of the UCP Directive, food advertising directed at children is subject to various texts of Community and national law depending on the factual situation at stake, thus making the legal landscape very difficult to understand. A misleading food advertisement should be assessed on the basis of Directive 2000/13 and national implementing legislation, at least until the Commission's Proposed Regulation on Nutrition and Health Claims is adopted. As regards other aspects of advertising directed at children, they fall either within the scope of the Television Directive, if the advert is broadcast on television, or within the scope of the UCP Directive if other media are being used and the advert may be regarded as constituting an aggressive commercial practice. However, all these texts appear to consider each advert separately, despite the fact that when it comes to

²⁰⁰ Joined Cases C-421/00, 426/00 and 16/01, *Sterbenz and Haug* [2003] ECR I-1065, at paragraph 25. See also Case C-221/00 *Commission v Austria* [2003] ECR I-1007, at paragraph 43, and Case 99/01 *Linhart and Biffl* [2002] ECR I-9375, at paragraphs 19 and 20.

unhealthy food advertising, the detrimental effect on children's health comes above all from the repetitive exposure to junk food adverts, rather than from the exposure to one isolated advert. This is why both the UCP and the Television Directives appear to have missed, so far, an ideal opportunity to tackle adequately one aspect of the public health issue of childhood obesity at European Union level.

Finally, it should be borne in mind that the UCP and the Television Directives do not rely on the same harmonisation techniques. As stated above, the Television Directive is a measure of minimum harmonisation which allows Member States to adopt more protective measures in the area of television advertising directed at children (at least in relation to domestic broadcasts). By contrast, the UCP Directive is a measure of full harmonisation, which does not grant any discretion to Member States to adopt requirements going beyond its provisions. The primary aim of the UCP Directive clearly is market integration; it is therefore not surprising that it departs from the method of minimum harmonisation generally relied on in the field of consumer protection and does not allow for regulatory diversity within the internal market. The Preamble states, in Recitals 11 to 15, that the UCP Directive aims at a “high level of convergence” that will “considerably increase legal certainty” so that “businesses and consumers are able to rely on a single regulatory framework based on clearly defined legal concepts regulating all aspects of unfair commercial practices across the EU.” Furthermore, the only reference to minimum harmonisation in the UCP Directive is in Article 3(5) which allows for a derogation from the rule of full harmonisation in certain circumstances:

“For a period of six years from 12 June 2007, Member States shall be able to continue to apply national provisions within the field approximated by this Directive which are more restrictive or prescriptive than this Directive and which implement directives containing minimum harmonisation clauses. These measures must be essential to ensure that consumers are adequately protected against unfair commercial practices and must be proportionate to the attainment of this objective.”

Member States are therefore entitled to maintain existing clauses of minimum harmonisation previously adopted until 2012, by way of derogation to the requirement that the Directive must be fully implemented by 12 December 2007. Only measures relating to financial services and immovable property are not subject to a full harmonisation requirement.²⁰¹ The *Travaux Préparatoires* confirm that the Commission wanted to eliminate as far as possible the currently existing fragmentation of national rules.

However, Article 3(5) raises two issues which are far from straightforward: firstly, what is meant by “approximated field” (there is no list, and the question whether a field has been “approximated” is contentious) and secondly the assessment of whether a measure is “essential” and “proportionate”.

As regards advertising directed at children, it appears, at least at first sight, that the method relied on will differ depending on whether the advertising is television broadcast or not. In the first case, it could be argued that it is still open to Member States to lay down stricter requirements, subject, as explained above, to the mutual recognition and State of establishment principles. Sweden should therefore be able, on this basis, to maintain its ban on all television advertising directed at children of less than twelve years old if the adverts are

²⁰¹ Article 3(9) provides as follows: “In relation to financial services, as defined in Directive 2002/65/EC, and immovable property, Member States may impose requirements which are more restrictive or prescriptive than this Directive in the field which it approximates.”

transmitted by a broadcaster established in Sweden, provided that the requirement of proportionality is assessed. However, Sweden or any other Member State is not entitled to ban all children advertising on the ground that children advertising is an aggressive commercial practice *per se*. Indeed, this falls within the scope of the UCP Directive which, if it acknowledges that the special needs of vulnerable consumers such as children should be taken into account, also provides in Recital 18 that there should be no outright ban on advertising directed at children. This is likely to exacerbate the controversy whether such a ban may stand following the entry into force of the UCP Directive in Sweden. One might argue that the ban is neither “essential” nor “proportionate” to the objective of protecting children’s commercial interests – one of the requirements of Article 3(5). However, one could counterargue, first, that the UCP Directive is without prejudice to Community or national rules relating to the health and safety aspects of products and, secondly, that it is without prejudice to Article 16 of the Television Directive. In any event, the ambiguous wording of Article 3(5) of the UCP Directive, combined with Recital 18 of the Preamble and Point 28 of Annex I, is likely to give rise to severe difficulties for Member States, as well as for the European Court of Justice. The extent to which Community institutions have succeeded in simplifying the legislative framework for unfair commercial practices is not uncontroversial.

In any event, the rationale for divergent approaches depending on the State of establishment of a broadcaster is difficult to establish from the point of view of child protection. It is therefore all the more regrettable that the Commission's proposal for an amending Television Directive does not contain anything new in relation to either children or junk food advertising. The Commission's prospect for a uniform concept of unfair commercial practices within the European Union is consequently made all the more uncertain.

As the Commission itself has acknowledged in its Green Paper, the coordination of the work of all stakeholders involved is a *sine qua non* condition for an adequate response to the obesity epidemic. It may be that the Directorate General on Audiovisual Services and the Directorate General on Health and Consumer Protection may need to think about working more closely together. And when doing so, they should remember Article 24 of the EU Charter of Fundamental Rights which provides, in its second paragraph, that:

“In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.”