The EU's response to food marketing to children: A complex, fragmented and ineffective regulatory framework

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Objective and structure of this document:

This document is intended to provide an overview of 1) the relevant EU rules applicable to food marketing to protect children from its harmful impact; and 2) how EU rules interact with national rules, considering specifically how these rules constrain the implementation by Member States of the WHO Guideline and related guidance, as well as the Convention on the Rights of the Child (CRC) and other human rights instruments.

It is structured as follows:

- The first section sets the scene and explains the extent to which the EU could regulate food marketing to children, and the WHO Guideline and related guidance provides on how food marketing should be regulated to protect child health and children's rights.
- The second section reviews the EU rules that, directly or indirectly, contribute to the regulation of food marketing at EU level to protect children from its harmful impact.
- The third and final section focuses on the discretion that EU Member States retain to protect children from unhealthy food marketing.

A few points of clarification before we start:

- As agreed, we have presented a particularly complex set of rules as simply and concisely as possible, without however oversimplifying the argument we have developed. Although we do not purport to be exhaustive, we are confident that we have covered the most important rules which apply and presented an assessment that is sufficiently complete to be accurate.
- We have focused on the marketing of unhealthy food to children, not on the marketing of food to carers who buy commercial milk formula and other baby food for infants and young children. Consequently, we do not consider the rules relating to the implementation in Europe of the UNICEF / WHO Code on the Marketing of Breastmilk Substitutes (as updated by subsequent World Health Assembly resolutions).
- We have not covered alcoholic beverages either, even if they fall within the definition of 'food' (see article 2 of the 2002 General Food Law Regulation).

I. Extensive EU powers to address harmful marketing

The EU has extensive – though not unlimited – powers to regulate food marketing. Nevertheless, it has not used these powers effectively to protect children from its harmful impact. As a result, it has not upheld its obligation to ensure a high level of public health, protection in all its policies, leaving children exposed to commercial practices that are known to harm them.

A. The EU internal market as a policy area of shared responsibility between the EU and its Member States

Under the EU Treaties, the EU has extensive powers to adopt legally binding measures to promote the free movement of goods (including food) and the free movement of services (e.g. audiovisual or digital services) within the EU internal market.[1] Moreover, when it adopts common rules for the establishment and the functioning of the internal market, the EU must ensure a high level of public health protection in all its policies,[2] including its internal market policy.[3]

Over the years, the EU has used its internal market powers, and Article 114 TFEU more specifically, to adopt many common marketing rules, including the rules discussed below which apply to food marketing. As food is traded and marketed extensively across EU borders, it is a cross-border issue that raises intra EU trade and public health concerns across all the Member States. This makes the EU best placed to regulate harmful marketing at EU level, rather than leave Member States act unilaterally at national level.

However, the EU's internal market powers are limited: they are not such that the EU can regulate all food marketing to protect children from harm. The Court of Justice of the European Union (CJEU) has ruled that Article 114 TFEU can only be used as an appropriate legal basis if three conditions are fulfilled:

- there must exist an 'internal market barrier' resulting from the disparities in the legal systems of the Member States;
- this market barrier must not consist of an 'abstract risk of obstacles', but should be 'such as to obstruct the fundamental freedoms' or create 'distortions of competition' within the internal market; and
- the intended harmonisation should 'genuinely have as its object the improvement of the conditions for the establishment and functioning of the internal market'.[4]

[1] Article 4(2)(a) and 114 TFEU. Article 26(2) TFEU defines the internal market as 'an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties'.
[2] Articles 9 and 168(1) TFEU. See also Article 35 EU Charter.
[3] Article 114(3) TFEU.
[4] Case C-58/08 *Vodafone Ltd.* [2010] ECR I-4999, at paragraph 32.

The CJEU has interpreted these conditions generously, as the Tobacco Advertising litigation[5] and subsequent cases[6] have demonstrated. However, a mere finding of disparities between national rules is not sufficient to justify recourse to Article 114: the differences between the laws, regulations or administrative provisions of the Member States must be such as to obstruct the fundamental freedoms and thus have a direct effect on the functioning of the internal market.[7]

For a carefully considered delineation of the powers that the EU derives under the EU Treaties to regulate food marketing to protect children from harm, please refer to the Blueprint Directive we drafted in 2021, and which covers: broadcasting media (television and radio), digital marketing, sponsorship with cross-border effects, and food packaging. However, advertising that does not have a cross-border impact will need to be regulated at national level by Member States – for example, spot advertising in cinemas, advertising in schools, local transports or local retail parks…

The petition that foodwatch is preparing to launch to call on the Commission to regulate food marketing to children must be cognisant of these limitations if it is to achieve the objective(s) it pursues. In effect, if the Commission were to exceed the limits on its attributed powers, the measure could be challenged in a judicial review action, running the risk of being annulled by the CJEU. Therefore, foodwatch can call on the Commission to do everything within the scope of its attributed powers to ensure that all children across the EU are protected from unhealthy food marketing.

B. Twenty years of EU policy statements on the need to regulate food marketing to protect children from its harmful impact

Most food marketing to children is for unhealthy food. This is particularly concerning, as systematic reviews undertaken over two decades have consistently established that food marketing:

- undermines food knowledge and confuses children as to what food is healthy and unhealthy;
- stimulates a preference for unhealthy food;
- encourages the purchase of, and pestering for, unhealthy food; and

[5] Case C-376/*98 Germany v Council and the European Parliament (Tobacco Advertising I*) [2000] ECR I-8419; Case C-380/03 *Germany v Council and the European Parliament (Tobacco Advertising II)* [2006] ECR I-11573.
[6] See, e.g., Joined Cases C-154 and 155/04 *Alliance for Natural Health* [2005] ECR I-6451; and Case C-547/14 *Philip Morris Brands and Others (Philip Morris)* [2016] ECLI:EU:C:2016:325.
[7] Case C-547/14 *Philip Morris Brands and Others (Philip Morris)* [2016] ECLI:EU:C:2016:325, at paragraph 58.

- makes children more likely to consume unhealthy food.[8]

Concerns are heightened in the digital environment as digital marketing, which is particularly engaging, immersive, invasive, and personalised, has led to the emergence of an entirely new and insidious marketing ecosystem,[9] thus magnifying public health, consumer and children's rights concerns.

Governments should be in the driving seat to ensure that laws and policies are suited to achieve their objective of protecting children from harmful marketing, as noted by the WHO and other international organisations. UNICEF has spearheaded a child rights-based approach to the issue of unhealthy food marketing. Such an approach recognises that children's have human rights, not least the right to health, the right to adequate, nutritious food and the right to privacy, that governments have a corresponding obligation to protect.[10] This approach now underpins the 2023 WHO Guideline on Policies to protect children from the harmful impact of food marketing which notes: 1) that State Parties to the Convention on the Rights of the Child (which include all EU Member States) have a legal obligation to ensure that marketing does not have adverse impact on children's rights; and 2) that they must uphold the best interests of the child as a primary consideration when regulating marketing that is addressed and accessible to children. To this effect, the 2023 WHO Guideline calls on States to adopt policies to protect children from unhealthy food marketing.[11] Such policies should:

- 'be mandatory;
- protect children of all ages;
- use a government-led nutrient profile model to classify foods to be restricted from marketing;
- be sufficiently comprehensive to minimise the risk of migration of marketing to other media, to other spaces within the same medium or to other age groups; and
- restrict the power of food marketing to persuade.'

[8] G Hastings et al., *Review of Research on the Effects of Food Promotion to Children (final report)*, University of Strathclyde, Glasgow, 22 September 2003; J McGinnis et al., *Food Marketing to Children and Youth: Threat or opportunity?*, Institute of Medicine, National Academies Press, Washington, D.C., 2006; G Cairns et al, *The Extent, Nature and Effects of Food Promotion to Children: A review of the evidence to December 2008*, WHO, December 2009; and E. Boyland et al., 'Systematic review of the effect of policies to restrict the marketing of foods and non-alcoholic beverages to which children are exposed', *Obesity Reviews* 2022 Aug;23(8):e13447.

[9] See, for example, *Understanding the digital media ecosystem: how the evolution of the digital marketing ecosystem impacts tobacco, alcohol and unhealthy food marketing* (WHO Regional Office for Europe, 2022).

[10] *A Child Rights-Based Approach to Food Marketing: A Guide for Policy Makers* (UNICEF, 2018).

[11] The WHO Guideline defines unhealthy food as food high in saturated fatty acids, trans-fatty acids, free sugars and/or salt. No reference is made in this Guideline to ultra-processed food (UPFs), although the WHO has convened an expert group entrusted with the development of a new guideline on UPFs. For its part, the European Commission published a scoping paper in July 2026 formally instructing the Group of Chief Scientific Advisors and the European Group on Ethics in Science and New Technologies to provide a comprehensive scientific and ethical assessment of UPFs.

Although the European Commission has acknowledged the problem of food marketing since 2005,[12] and most recently in the EU Safe Hearts Plan published on 16 December 2025,[13] several studies have shown that the exposure of children to unhealthy food marketing remains extremely high in the Europe.[14]

II. An ineffective EU response to the harm stemming from food marketing to children

The concerns that food marketing negatively affects child health have not been consistently reflected in the relevant laws that the EU has adopted, despite extensive advocacy to ensure that EU rules are aligned with existing evidence. This section first reviews the rules specifically intended to address the marketing of unhealthy food to children, as enshrined in the Audiovisual Media Services Directive (AVMSD). It shows that the AVMSD is largely ineffective to protect children from its harmful impact (A). It then identifies the consumer protection, data protection and digital services rules which also apply to food marketing (B). Although this section concludes that EU rules are far too narrow in scope to protect children effectively from unhealthy food marketing, it also notes that several reforms are ongoing which may have a bearing on how the EU regulates marketing to children, and food marketing more specifically (C).

A. The ineffectiveness and incomplete coverage of EU rules specifically intended to address food marketing to children

The EU has only partially regulated food marketing to children, and these rules are not effective to protect them from harm. Not only has the EU very narrowly defined what constitutes marketing to children, but it has also relied extensively on self-regulatory mechanisms that have not meaningfully reduced the exposure of children to unhealthy food marketing. Such an approach is at odds with the WHO Guideline.

First adopted in 2007, the Audiovisual Media Service Directive (AVMSD)[15] remains the only EU legislative instrument which explicitly addresses the issue of food marketing to children. However, even following its revision in 2018,[16] it is still woefully inadequate to protect children from harm.

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[12] Please see the timeline we have provided for more detail.
[13] EU Cardiovascular Health Plan.
[14] See in particular ECORYS et al, *Study on the exposure of children to linear; non-linear and online marketing of foods high in fat, salt or sugar* (European Commission, 2021). More recently, the SAFEFOOD study has demonstrated that children in Ireland see unhealthy food marketing every four minutes online which can impact their health and that most parents underestimate the scale and type of digital food marketing their children encounter: M Tatlow-Golden et al, *Our kids' exposure to unhealthy food marketing online* (SAFEFOOD, 2026).
[15] The Audiovisual Media Services Directive (AVMSD) was first adopted in 2007 to amend the Television Without Frontiers Directive (TVWFD) and extend its scope to non-linear media services: Directive 2007/65, OJ L 332, 18.12.2007, p. 27. It was consolidated in 2010 by Directive 2010/13, OJ L 95, 15.4.2010, p. 1.
[16] Directive 2018/1808 amending Directive 2010/13 on audiovisual media services in view of changing market realities.

Article 9(4) AVMSD provides that

> Member States shall encourage the use of co-regulation and the fostering of self-regulation through codes of conduct […] regarding inappropriate audiovisual commercial communications, accompanying or included in children's programmes, for [unhealthy food].[17]
>
> Those codes shall aim to effectively reduce the exposure of children to audiovisual commercial communications for such foods and beverages. They shall aim to provide that such audiovisual commercial communications do not emphasise the positive quality of the nutritional aspects of such foods and beverages.

This provision contains major gaps that the food industry, in its usual fashion, has been quick to exploit. The EU Pledge – the main EU-wide, self-regulatory initiative on food marketing to children – fails to meet all key aspects of the WHO Guideline.

- The EU has not defined the term 'children' and has therefore allowed the signatories of the Pledge to narrow down the scope of protection to younger children below 13 years of age, ignoring the growing research that shows that teenagers' diets are also negatively affected by unhealthy food marketing.[18]
- The EU has failed to adopt an EU-wide nutrient profiling system to identify the food that should not be marketed to children.[19]
- Article 9(4) AVMSD does not limit the risk of marketing investment shifts from regulated to unregulated programmes / media / spaces / settings. In particular, it places undue emphasis on marketing 'accompanying or included in children's programmes',[20] thereby ignoring the extensive evidence that focusing on 'children's programmes' excludes all mixed audience programmes to which children are exposed in high numbers (notwithstanding the audience percentages they make up).
- The scope of the AVMSD was admittedly extended in 2018 to video-sharing platforms featuring user-generated content (e.g. YouTube, Instagram and TikTok). Consequently, it applies to marketing featured in user-generated videos posted on video-sharing platforms. However, it still does not apply to marketing which is not defined as an audiovisual commercial communication accompanying a programme or a user-generated video. Therefore, marketing featuring on the websites of food businesses or

[17] We use 'unhealthy food', whilst the AVMSD uses 'foods and beverages containing nutrients and substances with a nutritional or physiological effect, in particular fat, trans-fatty acids, salt or sodium and sugars, of which excessive intakes in the overall diet are not recommended'. Both terms highlight the importance of adopting evidence-based food categorisation models that are driven by public health objectives and are free from industry undue interference.

[18] See *Taking action to protect children from the harmful impact of food marketing: a child rights-based approach* (WHO and Unicef: Geneva, 2023), and specifically References 24, 48, 101-103.

[19] The 2018 revised version AVMSD admittedly refers to the WHO Regional Office for Europe's nutrient profile model, it does so in Recital 28 of the Preamble, which is not legally binding, rather than in the main body of the Directive.

[20] The problem is compounded by the fact that Article 9(1) AVMSD only prohibits direct marketing to children – a requirement that is far too narrowly construed to protect children from exposure to unhealthy food or other harmful marketing.

on social media posts that do not include user-generated videos is therefore outside its scope.[21]

- The AVMSD does not address the persuasive power of food marketing. More specifically, it does not cover the marketing of unhealthy food by celebrities or social media influencers,[22] through the use of licensed or equity brand characters, or the offer of free toys with unhealthy food which all increase the appeal for children of such food. Only the use of nutrition and claims made on food is specifically regulated at EU level. In other words, of all the many techniques that the food industry uses to promote its products and brands, only one has led to the adoption of specific rules at EU level to curb the power of marketing, as discussed further below.

More fundamentally, Article 9(4) AVMSD rests on self-regulation, rather than a set of mandatory EU rules. Consequently, food businesses continue to operate outside legal constraints. It seems counter-intuitive that the food industry, which engages in extensive lobbying against the imposition of marketing restrictions, should be entrusted with the development, implementation and monitoring of policies that it opposes (as we discuss further below). Rather than try and avoid inherent conflicts of interest, the EU has relied on ineffective mechanisms which have arguably allowed such conflicts to flourish, with little reflection on what would constitute appropriate forms of engagement. Once again, industry pledges are riddled with loopholes,[23] and this is particularly true of the EU Pledge.[24] However, even though this has been known for years, the EU has not reviewed its approach when it was urged to do so as the AVMSD was being revised between 2016 and 2018.[25]

The AVMSD is now undergoing another review. Two consultations have already taken place. There are worrying signs that the EU is not planning to address the concerns that have been highlighted above, despite the extensive mobilisation of civil society and public health

[21] Case C-132/17 *Peugeot Deutschland GmbH v Deutschland Umwelthilfe*, eVECLI:EU:C:2018:85.

[22] The use of influencers to promote unhealthy food has given rise to specific concerns from consumer protection organizations and agencies, as noted by the Commission itself in its Staff Working Document *Fitness Check of EU Consumer Law on Digital Fairness*, (2024) 230 final, and particularly pages 169-176.

[23] See in particular S Galbraith-Emami and T Lobstein, 'The impact of initiatives to limit the advertising of food and beverage products to children: a systematic review' (2013) 14(12) *Obesity Review* 960; K Ronit and L Jensen, 'Obesity and industry self-regulation of food and beverage marketing: a literature review', Eur J Clin Nutr 68 (2014) 753–759.

[24] See in particular *Food marketing to children needs rules with teeth* (BEUC: Brussels, 2021). See also O Bartlett and A Garde, 'The EU Platform and the EU Forum: New Modes of Governance or a Smokescreen for the Promotion of Conflicts of Interest?', in A Alemanno and A Garde (eds), *The Emergence of an EU Lifestyle Policy: The Case of Alcohol, Tobacco and Unhealthy Diets* (Cambridge University Press, 2015); J Jensen and K Ronit, 'The EU pledge for responsible marketing of food and beverages to children: implementation in food companies' (2015) 69(8) *Eur J Clin Nutr* 896; and A Garde, B Jeffery and N Rigby, 'Implementing the WHO Recommendations whilst Avoiding Real, Perceived or Potential Conflicts of Interest' (2017) 8(2) *European Journal of Risk Regulation* 237.

[25] For example, *Evaluating the Implementation of the WHO Set of Recommendations on the Marketing of Foods and Non-alcoholic Beverages to Children: Progress, challenges and guidance for next steps in the WHO European Region* (WHO: Copenhagen, 2018).

advocates.[26] The petition that foodwatch is launching may help to ensure public scrutiny and increase the pressure on the Commission to align EU rules with evidence.

B. The impact of more general consumer protection, data and digital rules on food marketing regulation

Other rules in EU food law, EU consumer protection law, EU privacy, and EU digital law are relevant to harmful digital marketing. Although the articulation of these rules is complex and cannot be discussed extensively here, we will highlight three key points.

1. The information paradigm as a core tenet of EU consumer law and policy, and EU food law more specifically

EU law lays down as a general principle that the information provided to consumers should not mislead them. This principle is anchored in the 'consumer information paradigm' at the heart of EU consumer law and policy which presupposes that well informed consumers are in a better position to protect themselves from harm.[27]

This general principle of EU consumer law and policy is specifically applied in EU food law. Not only does EU food law mandate the disclosure of certain information (e.g. ingredients list, nutrition declaration), but it also prohibits the misleading labelling, presentation and advertising of food.[28] In particular, it regulates the use of nutrition and health claims made on food. The Food Claims Regulation has been particularly important to limit the number of claims that were not scientifically substantiated. Nevertheless, the Commission's failure to adopt an EU-wide nutrient profiling scheme as originally envisaged by Article 4 of the Food Claims Regulation has significantly reduced its positive impact, leaving the system of protection originally envisaged still incomplete two decades after its adoption.

Although the Food Claims Regulation and the Food Information Regulation do not focus specifically on children, they nonetheless need to be understood as they relate to food marketing more generally and must be complied with when considering the regulation of food marketing to children.

However, an increasing body of research challenge the premise on which the information paradigm rests that informed consumers are rational consumers that will behave rationally.

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[26] See also the submission by the European Board for Media Services to the consultation on the review of the AVMSD published on 30 July 2026.

[27] See in particular Directive 2005/29 on business-to-consumer unfair commercial practices [2005] OJ L 149/22 (the UCPD), currently under review as part of the Digital Fairness Check.

[28] These rules are found in Regulation 178/2002 Laying Down the General Principles and Requirements of Food Law, Establishing the European Food Safety Authority and Laying Down Procedures in Matters of Food Safety [2002] OJ L31/1 (the General Food Safety Regulation); Regulation 1924/2006 on nutrition and health claims made on foods [2007] OJ L 12/3 (the Food Claims Regulation); and Regulation1169/2011 on the provision of food information to consumers [2011] OJ L 304/18 (the Food Information Regulation).

informing consumers and ensuring that the information is sufficient, clear and non-misleading can only be one of the mechanisms deployed to address the harms stemming from food marketing. This is particularly so in the digital environment as digital marketing often happens 'beyond the cognitive radar', relying on dark patterns, immersive marketing (including through influencer marketing who mix content and marketing), addictive design, which all trigger responses that are first and foremost based on emotions rather than cognition. Concerns are particularly acute for children who are particularly vulnerable to such strategies. Information rules must therefore be complemented by marketing restrictions intended to limit exposure to such marketing.

2. The obligation to ensure that marketing is clearly identified

EU law bans surreptitious advertising and requires that marketing be clearly identified as such. The AVMSD, the UCPD and the Digital Services Act (DSA) all impose a transparency obligation on traders involved in marketing (food businesses, platforms, influencers…). In particular, this obligation applies to those who have been remunerated to promote a product in editorial content, including content generated by influencers or posted by them on social media platforms.

However, this disclosure requirement does not regulate the content of digital marketing, and social media posts more specifically. In effect, beyond the prohibitions it has imposed on the marketing of tobacco, vapes, and prescription medicines or treatments, EU law largely remains agnostic to the products or brands advertised.

Moreover, the obligation of disclosure is not always effectively enforced, particularly in the case of influencer marketing. As the Commission itself has noted:

> As shown by numerous studies and enforcement activities, a common concern with social media advertising and influencer marketing in particular is the non-compliance with the requirement in the UCPD (in addition to the AVMSD, e-Commerce Directive and DSA) to clearly disclose commercial communications. In the public consultation, 74% of consumers reported a lack of transparency about the paid promotions of products by social media influencers and 55% of respondents reported the same in the 2023 CCS. In the consumer survey for this Fitness Check, 45% consumers noticed that the content they were viewing seemed to be a paid promotion or advertisement, but the website or app did not make this clear. This was particularly high amongst those in the younger age groups (28% of 18-25 year-olds, and 29% of 26-35 year-olds, compared to 11% of 55-64 year olds, and 10% of those aged 65+).[29]

Controlling influencer marketing is particularly complex: marketing and content may be difficult to differentiate, influencer content may be so short-lived that it is difficult to evidence

[29] Commission Staff Working Document Fitness Check of EU consumer law on digital fairness, SWD(2024) 230 final, at page 170.

(the stories may be ephemeral), and the remuneration of the influencer to promote certain goods / services / brands may also be difficult to prove (as they may be remunerated in kind). Nevertheless, some influencers have been condemned. In particular, regarding food marketing, an influencer was fined EUR 3,500 by the French authorities for engaging in misleading commercial practices: he had unlawfully promoted restaurants without disclosure to his 433.000 followers on Instagram and his 135.000 followers on TikTok.[30] Since then France has introduced a new obligation, in force since 1st January 2026, to have a written contract between brands and influencers for partnerships exceeding EUR 1,000.[31]

3. The prohibition of child profiling

The DSA has strengthened the liability of online service providers. Not only must online platforms now explain why an ad is served to a consumer, but they are also prevented from using profiling to target advertising to children when they are 'aware with reasonable certainty' that the user is a child. Although this requirement is not specific to harmful digital marketing, it could help to reduce the personalisation and therefore the power of food marketing to which children are exposed. However, it will not protect children from exposure to such marketing. Moreover, it will not stop online providers from using contextual data which, even if not personal within the meaning of the law, can nonetheless draw on the circumstances affecting a child, as well as more general characteristics of children, their tastes and preferences, which in turn affect how a child is targeted and influenced by advertising.

C. What prospects could ongoing EU law reforms offer for the more effective protection of children from harmful marketing?

There are major ongoing legislative reforms that directly or indirectly relate to the regulation of food marketing to children. We briefly consider the ongoing AVMSD revision of the AVMSD (1), the ongoing revision of the UCPD and the introduction of a Digital Fairness Act (2), and the recent proposal for an EU KIDS Act (3).

1. The revision of the AVMSD

The Commission is in the process of revising the AVMSD. However, despite two consultations from 23 November to 21st December 2025[32] and from 10 February to 1st May 2026,[33] the signs are not encouraging that the provisions on food marketing to children will be reviewed to align with existing evidence and effectively protect children from the harmful impact that unhealthy food marketing has on their health and on their rights. We expect the Commission's legislative

[30] https://www.lefigaro.fr/secteur/high-tech/qui-est-l-influenceur-alexis-thiebaut-condamne-a-payer-3500-euros-d-amende-par-la-repression-de-fraudes-20240617.
[31] Decree 2025-1137 of 28 November 2025.
[32] https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/15752-Audiovisual-media-services-evaluation-and-update-of-EU-rules_en.
[33] https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/15752-Audiovisual-media-services-evaluation-and-update-of-EU-rules/public-consultation_en.

proposal and evaluation report to be published on 19 December 2026, as mandated under Article 33 of the AVMSD.

We circulated the responses we drafted to both consultations, which served as templates for the responses of several public health actors. We refer you to these responses for further detail of what we have called on the Commission to do.

2. The revision of the UCPD and the Digital Fairness Act

In her latest State of the Union address, the Commission President confirmed that the Commission would propose legislation – the Digital Fairness Act (DFA) – in the fourth quarter of 2026. It should be accompanied by an impact assessment, and we understand that its publication is expected on 11 November 2026.

The DFA is intended to complement the DSA in that it will focus on business-to-consumer commercial practices, subscription traps, and contract fairness, whereas the DSA focuses on platform liability and systemic risk.

Following the publication of its extensive (and very helpful) Staff Working Document in October 2024,[34] the Commission specifically noted the importance of updating EU consumer law and policy, so it is fit for the digital age. It highlighted that existing EU consumer rules had only partially achieved the objectives of providing consumers with a high level of consumer protection and a better functioning of the internal market. Consumers encounter several problems online such as deceptive or addictive interface design, personalised practices that exploit vulnerabilities, difficulties with the cancellation and renewal of digital subscriptions, and situations in which users are driven to accept unfair contract terms. According to the Commission, EU consumer protection is undermined by insufficient enforcement, legal uncertainty, an increasing risk of regulatory fragmentation across Member States' national approaches and the lack of incentives for traders to aim for the highest standard of consumer protection.[35]

The Commission is working specifically on the following issues: dark patterns, unfair pricing, misleading marketing by social media influencers, addictive design of digital products and unfair personalisation practices, especially where consumer vulnerabilities are exploited for commercial purposes. The DFA will also aim to streamline obligations for businesses, notably by reviewing certain consumer information requirements in certain types of contracts. All these issues have implications for marketing regulation, and food marketing more specifically. We

[34] Commission Staff Working Document Fitness Check of EU consumer law on digital fairness, SWD(2024) 230 final.
[35] For more information on the DFA initiative, see the Commission's dedicated webpage.

therefore advise that foodwatch keep a close eye on the DFA proposal once it has been published and support the excellent work that BEUC has done in this field.[36]

3. The proposal for an EU KIDS Act

On 17 September, the European Commission published its proposal for a regulation referred to as the EU KIDS Act – KIDS being the acronym for 'EU Keeping Internet Digital Spaces Accountable and Trustworthy'.[37]

The EU KIDS Act has two main components. Firstly, the Commission propose to **protect children from exposure to social media** by regulating children's access to social media. There are three categories depending on the age of a child:

- children below 13 would not have access to social media accounts;
- children of 13 and 14 could only have access to social media through parent-supervised accounts; and
- children of 15 and above could have independent accounts.

Secondly, the EU KIDS Act imposes **safety by design** on the digital services children use most, from social media and video platforms to games, AI chatbots and app stores. For examples, platforms could not hook children with addictive designs that lead to excessive use and exposure, there could be no contact from strangers, and there would be safe settings by default and no spending traps. If adopted, the new rules would therefore disactivate the functionalities of the digital networks and platforms that children use extensively and that present specific risk for their health.

As the Commission has noted, the two halves work together: children gain access to the online world gradually as they grow up, and the services they access must be safe for them. The Commission has launched a consultation which remains open until 3rd December 2026.[38]

Interestingly, the Commission noted the following rationale for the EU KIDS Act:

> Because the internet does not stop at borders. Countries are adopting their own age limits and rules, which would mean a patchwork of laws: a child protected in one country and not in the next. One EU regulation gives every child the same high level of protection enforced directly at European level for the largest platforms.

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[36] See BEUC's latest position paper *Towards the Digital Fairness Act* (2 December 2025), and the related *Consumer Checklist* (18 March 2026). On food marketing more specifically, see *Influencer Marketing Unboxed: Exposing how the fast fashion and food sectors hook consumers* (17 December 2025).

[37] COM/2026/681 final. For the text of the EU KIDS Act and some explanatory material, see the Commission's page on *Shaping Europe's Digital Future*.

[38] https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/19418-Child-online-safety-keeping-digital-spaces-accountable-and-trustworthy-EU-Kids-Act-_en. Over 2,000 responses have already been submitted since the consultation opened on 1st October.

The same rationale applies to the adoption of cross-border food marketing. This is something foodwatch could use in its advocacy.

It is difficult to anticipate what these legislative reforms will mean for food marketing regulation. The revision of the AVMSD will determine what the future holds on specific rules, whilst the DFA and the EU KIDS Act can promote an environment that is overall safer for children and, indirectly, limit their exposure to harmful marketing. To date, however, major gaps remain in what is, overall, a weak EU regulatory framework on the regulation of food marketing, and cross-border digital marketing more specifically. If EU law does not implement evidence-based international guidance and policies to which its Member States are committed, the next question arises whether Member States can, individually, regulate harmful digital marketing at national level so that child health is effectively protected within their borders.

III. The difficulties for Member States to regulate unhealthy food marketing at national level

By virtue of the principle of supremacy of EU law, EU law binds Member States and determines how much discretion they retain to regulate harmful digital marketing. This section therefore discusses the relationship between national and EU rules, with a view to determining the extent to which Member States can implement the WHO Guideline within their national borders.

Even though Member States retain some margin of discretion under the AVMSD, this section demonstrates that their ability to regulate is limited (A). Moreover, when Member States exercise their discretion, they risk facing significant legal challenges from other Member States (often influenced by industry actors) or by industry actors themselves. The complexity and fragmentation of food marketing rules applicable in the EU act as a further disincentive, which may explain why some Member States may not be prepared to act unilaterally (B).

A. The limited discretion of Member States to regulate food marketing under the AVMSD

1. The AVMSD as a measure of minimum harmonisation

The AVMSD is a measure of minimum harmonisation which only sets the minimum standard of protection that all Member States must ensure, without depriving them of the opportunity to increase the level of protection on their territories beyond this minimum. This method of harmonisation aims to strike a compromise. On one hand, the minimum requirements which the AVMSD set bind all Member States and establish an EU-wide level-playing field within which all business actors must operate. This, in turn, limits unfair competition by identifying certain commercial practices as unacceptable anywhere in the EU. On the other hand, a minimum harmonisation approach does not stifle national initiatives in the Member States with the required political will to adopt more ambitious food marketing restrictions. Nevertheless,

such an approach only makes sense if the level of minimum protection it achieves is sufficient to provide public health effectively. The health mainstreaming obligations resting on the EU mandates that *minimum* harmonisation shall not be envisaged as *minimal* harmonisation: the EU must ensure a high level of public health protection in all its policies. Unfortunately, however, the AVMSD has set far too low a standard of protection, to the detriment of the best interests of the child.

Some Member States have adopted stricter rules within their borders to protect children more effectively than Article 9(4) AVMSD does. This is particularly the case for Portugal or in Norway (who, as a Member State of the European Economic Area, is bound by the AVMSD).

- Portuguese Law 30/2019 restricts the marketing of unhealthy food aimed at children under 16 years old. The law covers schools, public playgrounds and a 100 meter-radius around these places; television, on-demand media services and radio, in the 30 minutes preceding and following children's programmes, as well as programmes with an audience of at least 25 % below 16 years; cinemas, in films with an age rating for children under 16; and also, websites, social networks and mobile applications where the contents are intended for children under 16 years of age. As for the marketing techniques, the Law covers, among others, product placement, licensed characters, and engagement prompts when the products advertised are products covered by the Portuguese Nutrient Profile Model.[39]

- In 2025, Norway adopted legally binding rules to limit the exposure of children to unhealthy food marketing. The foods covered by the ban are listed in an Annex to the regulation. Importantly, Norway has become the first country in the world to protect all children (up to 18 years of age) from the harmful impact of food marketing. Moreover, the Norwegian Directorate of Health has extensive powers to enforce these rules, including the imposition of fines. The Government nonetheless had to concede an exemption for 'the use of trademarks in connection with sponsorship, as long as it is not a trademark for specific products covered by the product list'. In other words, sponsorship arrangements with brands that manufacture and sell unhealthy food remains lawful, thus allowing brand marketing notwithstanding its harmful impact on public health.[40]

2. The AVMSD and the country-of-origin principle

Importantly, however, the country-of-origin (or state-of-establishment) principle, which is at the heart of the AVMSD, constrains the freedom that Member States have, insofar as it only

[39] https://bestremap.eu/wp-content/uploads/2022/08/M6.3-Regulation-and-legislation-mapping-report.pdf. For an analysis of the legislative process that led to the adoption of these restrictions, see M Figueira, P Graça, M Muc and M J Gregorio, 'Implementing a law restricting unhealthy food advertising in Portugal: a 13-year journey', 7 (2025) Frontiers Political Science.

[40] https://www.regjeringen.no/en/whats-new/norway-introduces-ban-on-marketing-of-unhealthy-food-and-drinks-towards-childrenbud/id3126894/.

allows them to regulate the audiovisual media service providers established on their territories, not those established in other jurisdictions (i.e. those originating from other Member States). This principle prevents stricter national rules from applying to audiovisual media service providers established on the territories of other Member State: these providers are regulated by their home State rather than the State where they provide their services.[41] This therefore leads to a situation where States wishing to implement the AVMSD and regulate food marketing in line with the WHO Guideline can only do so for audiovisual media service providers established within their jurisdiction.[42]

This ultimately creates barriers to the functioning of the EU internal market, as different sets of rules apply based on where a provider is established rather than on the impact a given commercial practice may have on service users. In turn, such a situation increases the regulatory burden on national service providers (a difficult political move) and leads to the fragmentation of the EU internal market, without ensuring that children are effectively protected from harmful marketing.

Ultimately, therefore, the absence of comprehensive regulation addressing cross-border food marketing within the EU has resulted in the complex co-existence of national and EU rules which are neither conducive to legal certainty nor to child health and children's rights protection.[43]

B. The significant risk of costly legal challenges for Member States

When Member States regulate at national level, they face the risk of legal challenges. These challenges can rest on the alleged incompatibility of their rules with the general EU free movement provisions of the EU Treaties and/or an alleged failure to respect the limits set by the country-of-origin principle as enshrined in the AVMSD.[44]

The Norwegian rules mentioned above are currently being challenged before the EEA Commission by the food industry that has argued that they violated EU law. The case could

[41] The country-of-origin principle was recently applied in the context of the E-Commerce Directive by the Grand Chamber of the CJEU in Joined Cases C-188/24 *WebGroup Czech Republic and NKL Associates* and C-190/24 *Coyote System,* ECLI:EU:C:2026:492.
[42] Commission decision of 31 January 2018 on the incompatibility of the measures notified by Sweden pursuant to Art. 4(5) of the AVMSD, COM(2018) 532 final.
[43] A Garde, 'Harmful commercial marketing and children's rights: For a better use of EU powers', EJRR 2020. See also E Brooks and K Lauber, 'Impact assessment as agenda-setting: Procedural politicking and the mobilization of bias in the European Union's Audiovisual Media Services Directive', (2025) *Regulation & governance*.
[44] The *De Agostini* case where Sweden was (unsuccessfully) challenged by a broadcaster for imposing rules restricting advertising to children below 12 years of age provided an early example of the extent to which Member States could regulate marketing to children, provided that they only regulated broadcasters established in Sweden rather than in other Member States (as per the AVMSD) and provided that the rules were proportionate to achieve a legitimate objective (as per the general Treaty provisions on the free movement of goods and the free movement of services).

end up before the EFTA Court that adjudicates on EU law disputes in EEA Member States (which include Norway).

In October 2025, FoodDrinkNorway field a formal complaint with the EFTA Surveillance Authority (ESA). The various arguments on which this challenge rests are familiar and boil down to the claim that the Norwegian food marketing restrictions are disproportionate and therefore violates EU free movement rules.[45] Although the challenge is ongoing, there are good reasons to think that the ban is not more restrictive than necessary to achieve its objective of protecting all Norwegian children from the harmful impact of food marketing (subject to the limits imposed by the AVMSD which binds Norway), particularly considering the extensive margin of discretion that Member States are given under EU law to protect public health. Nevertheless, when faced with such challenges, Member States are subject to scrutiny and end up having to invest in the justification of their measures, which is a resource-intensive process.[46] One should not lose sight of the fact that industry uses legal threats and legal challenges as part of their multifaceted lobbying strategies. They may not win the case, but they aim to delay the implementation of regulation and create regulatory chill in other Member States.[47]

The legal challenges that Member States are exposed to when they decide to regulate food marketing within their borders make the repeated calls that the European Commission has made to this effect even more unsustainable. It is one thing to promote the exchange of best practice, but it cannot alleviate the public health and internal market concerns that we have highlighted. Ultimately, delineating the scope of EU rules has become a complex and time-consuming exercise that opens avenues for food industry actors to challenge evidence-based laws and policies on the ground that they may be incompatible with EU law. It is far more logical for EU to act at regional level within the scope of its attributed powers. It is precisely what the principle of subsidiarity requires, notwithstanding its instrumentalisation by the Commission to refrain from adopting the proportionate, evidence-based food marketing rules that civil society, experts and some States have repeatedly called for.

CONCLUSION

Overall, the EU regulatory framework in place is complex, fragmented, incomplete, and largely ineffective to protect children from the harmful impact of unhealthy food marketing. Moreover, it is getting increasingly complex as the EU keeps adopting an ever-growing number of rules whose articulation often remains highly technical and at times also unclear. This is detrimental to the legal certainty that should underpin the law of the internal market. These concerns are

[45] The complaint is available here.
[46] To get a sense of the extent of food industry litigation against health-promoting measures see the Lighthouse investigative report *Big Food v The People* (Lighthouse, 2026). The report calculated that defending the 239 legal challenges they uncovered against governments in five countries between 2010 and 2025 amounted to 595 years in court. Dozens of cases are ongoing. Nine parent companies alone are responsible for over 38% of these lawsuits. Although 82% cases were lost, they tied up significant public resources.
[47] A Garde and G Messenger, *Public Health and International Economic Law Preventing Non-freely Communicable Diseases and Promoting Better Health for All* (BUP, 2025), available in open access.

further compounded by the fact that the EU grants little discretion overall to Member States to regulate the harmful commercial practices at national level which it has not itself regulated effectively at EU level, to the detriment of public health and children's rights across the EU.

It is now high time the Commission aligned existing EU food marketing rules with the WHO Guideline and closed the growing gap between the EU's rhetoric and its practice in this policy area. Only a specific instrument dedicated to the regulation of food marketing will bring the necessary clarity and promote a properly functioning internal market where children are, at long last, duly protected from harmful commercial practices.

In the meantime, foodwatch should meaningfully engage with the ongoing legislative reforms that the European Commission has initiated (on the AVMSD, the DFA, and EU KIDS Act) and use these opportunities to remind the Commission that sectoral rules are required to address food marketing as a specific concern that cannot be effectively addressed with horizontal, incomplete rules.