

We very much welcome this consultation and thank the European Commission for the opportunity to share our views on how the Audiovisual Media Services Directive (AVMSD) could be revised to better protect children and the European population more broadly from harmful marketing. The consultation is particularly timely, as the Commission has just published [the EU Cardiovascular Health Plan](#) as [the Digital Fairness Act Initiative](#) is ongoing.

After briefly presenting the Law & NCD Unit (I), we focus on the following issues:

- the extensive powers that the European Union derives from the EU Treaties to regulate cross-border marketing and address its harmful impact, and the rationale for using these powers (II);
- the limitations of the current wording of the AVMSD to effectively address harmful marketing, considering specifically tobacco and vapes, alcohol, and unhealthy food in light of international guidance (III);
- the importance of allowing Member States to regulate harmful marketing at national level if the EU fails to regulated cross-border harmful marketing at EU level (IV).

We conclude that the European Commission should disregard Option 1 (no change) that is unsuitable to achieve any of the objectives pursued and instead revise the AVMS to protect EU citizens, and children more specifically, from harmful marketing.

Considering the period of the year for this consultation (just before Christmas) and the short time available to engage with the extremely complex questions it raises, we are not in a position to discuss each set of rules as extensively as we would otherwise have done. For example, we have not considered gambling or fossil fuel marketing.¹ Similarly, we have been unable to discuss the issue of influencer marketing, which the EU and several Member States have rightly identified as a growing concern.² Finally, we have been unable to comment on the relationship between the AVMSD and other EU marketing rules, not least those contained in the Unfair Commercial Practices, the General Data Protection Regulation, the Digital Services Act, and the Food Claims Regulation, and the degree of fragmentation of EU marketing and the resulting uncertainty for traders along the digital chain (manufacturers and distributors, digital platforms, influencers...). We nonetheless hope that our contribution is

¹ On the regulation of fossil fuel advertising, see C. Kaupa ‘Promoting the Apocalypse? The Legality of a Ban on Advertising for Fossil Fuels and Other Carbon-Intensive Products under European Law’ (2024) 15 *European Journal of Risk Regulation*, at p. 321.

² The use of influencers and their extensive engagement with harmful marketing has given rise to specific concerns from consumer protection organizations and agencies, as well as by the European Commission: see in particular, *Young and exposed to unhealthy marketing: digital food marketing using influencers* (Forbrukerrådet: Oslo, 2019); *Food marketing to children needs rules with teeth* (BEUC: Brussels, 2021); *From influence to responsibility: Time to regulate influencer marketing* (BEUC: Brussels, 2022); F Michaelson, L Collini et al, *The impact of influencers on advertising and consumer protection in the Single Market*. Policy Department for Economic, Scientific and Quality of Life Policies Directorate-General for Internal Policies (Brussels, 2022); *Fitness Check of EU Consumer Law on Digital Fairness*, Commission Staff Working Document (2024) 230 final, and particularly pages 169-176; and *Influencer Marketing Unboxed: Exposing how the fast fashion and food sectors hook consumers* (BEUC, 2025).

helpful, particularly considering the references we have relied upon to form our views. We are available to provide further expert input to support the Commission's ongoing work on the revision of the AVMSD and its provisions on harmful marketing.

I. The Law & Non-Communicable Diseases Research Unit

This response is submitted by Amandine Garde on behalf of the Law & NCD Unit.

[Amandine Garde](#) is Professor of Law and Founding Director of [the Law & Non-Communicable Diseases Research Unit](#) at the University of Liverpool in the UK. For over a decade, the Law & NCD Unit has advised international organisations, governments, public agencies, and civil society organisations on the role that law as a discipline can play in promoting healthier environments and preventing NCDs. Amandine Garde is particularly interested in the legal strategies of the commercial determinants of health, not least the food, the alcohol and the tobacco industries as three major contributors to the growing burden of NCDs in Europe and beyond. More specifically, she has [published](#) extensively on the regulation of harmful marketing, specifically calling on the European Union and its Member States to better align their national regulatory frameworks with the evidence that food, alcohol and tobacco marketing not only harms child health but also children's rights. She can be contacted by email at agarde@liverpool.ac.uk.

Other Law & NCD Unit members that have worked on harmful marketing include: [Dr Andrea Gideon](#), [Juan Collado Perez](#) and [Jaydon Souter](#). Together with Amandine Garde and [Dr Marine Friant](#) from Nantes University, they are involved in the EU-funded project on harmful marketing and child health (focusing on food, alcohol, tobacco and vapes), which is part of the [three-year partnership](#) that Unicef and the European Commission have recently established to promote child health and equity across the European Union, to which the Cardiovascular Health Plan explicitly mentions.

We see this consultation as a major opportunity to reflect on how the revision of the AVMSD could better protect children from harmful marketing.

II. The EU's extensive powers to regulate harmful marketing and the multifaceted rationale to protect children from harmful marketing

This section argues that the EU not only has extensive powers to regulate harmful marketing practices (1), but also that it should use its powers to do so in light with its mandate to ensure a high level of health protection in the development and implementation of all its policies (2).

1. The EU Treaties recognise that the EU has extensive powers to regulate harmful marketing practices

This year marks the 25th anniversary of the seminal ruling of the Court of Justice of the European Union (CJEU) on tobacco advertising which clarified that the EU – although it

does not have unlimited powers to regulate harmful marketing at EU level –has extensive powers to do so under the EU Treaties.

The EU can regulate cross-border marketing and harmonise national rules to facilitate the establishment and proper functioning of the EU internal market, and in particular the free movement of goods and services. Moreover, the EU is mandated by the EU Treaties to ensure a high level of health and consumer protection in all its policies, including its internal market policy. This ‘health mainstreaming’ obligation³ has often been invoked by the CJEU to dismiss the challenges that the tobacco, the food and the alcohol industries have mounted against EU rules adopted with the dual objective of promoting free movement and protecting public health.⁴

2. The EU has a multitude of reasons to use its extensive powers to regulate harmful marketing practices

Harmful marketing has been a major health concern both for Member States and for the EU itself. As discussed in the next section, the growing interest of the EU for the regulation of harmful marketing reflects the growing evidence base that the marketing for tobacco, vapes, alcohol, and unhealthy food contributes to unhealthy environments that promotes the consumption of these products that are clearly implicated in the growing burden of NCDs. It is therefore necessary to restrict such harmful marketing as part of strategies intended to prevent NCDs, including obesity and diabetes, cardiovascular diseases, cancers, tooth decay, pulmonary diseases... Better prevention at societal level can also help to tackle the health inequalities that the Commission has identified and protect the most vulnerable.

The imperative to regulate harmful marketing effectively also stems from the fact that exposure to such marketing prevents the realisation of the right to health and a suite of other related human rights, which are all negatively affected by such marketing (right to adequate nutritious food, right to life, right to privacy and data protection, right to be free from economic exploitation, right to information and education...). In the last decade, Unicef has done extensive work to identify the added value of a child rights-based approach to the regulation of food marketing.⁵ A similar approach can apply to the marketing of tobacco⁶ or alcohol.⁷ Under the EU Treaties, the EU is bound to uphold human rights, and children’s rights more specifically. In particular, and echoing Article 3(1) of the UN Convention on the

³ See in particular Articles 9, 114(3) and 168(1) of the Treaty on the Functioning of the European Union, as well as Article 35 of the EU Charter on Fundamental Rights, as interpreted by the EU Court of Justice.

⁴ On the extent of EU powers to regulate harmful marketing, see A. Alemanno and A. Garde, ‘The Emergence of an EU Lifestyle Policy: The Case of Alcohol, Tobacco and Unhealthy Diets’, *Common Market Law Review* 50 (2013) 1745; and 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).

⁵ See in particular *A Child Rights-Based Approach to Food Marketing* (Unicef, 2018).

⁶ M. E. Gipsen and B. Toebes, *Human Rights and Tobacco Control* (Edward Elgar, 2020).

⁷ *Preventing Alcohol Harm through the Effective Use of Human Rights* (Movendi International, forthcoming, 2026).

Rights of the Child (which all EU Member States have ratified), the EU Charter of Fundamental Rights specifically requires that ‘in all actions relating to children, [...] the child's best interests must be a primary consideration’.⁸

Finally, NCD prevention makes strong economic sense: it is cheaper to prevent NCDs than to cure them.⁹ Therefore, at a time when health systems (and economies more broadly) find themselves under significant budgetary pressure, it is more important than ever to step up NCD prevention efforts, particularly as NCDs are eminently preventable. By providing a level playing field where economic actors are not allowed to engage in harmful marketing, the EU can genuinely provide the conditions required towards the fulfilment of SDG 3.4, whilst setting the parameters for healthy growth. It is a matter of both social justice and competitiveness to ensure that present and future generations are healthy and can fully contribute to the EU growth agenda.

Overall, whether the focus is on achieving a high level of public health, on protecting human rights from harmful commercial practices, or on promoting economic growth, we highlight that harmful marketing should be effectively regulated so that the EU internal market can function for businesses and citizens alike.

III. Ensuring that the AVMSD is revised to align with existing evidence that harmful marketing negatively affects consumer choice and preferences

In this section, we review the rules on tobacco and vaping (1), alcohol (2), and food marketing (3) with a view to suggesting how they could be strengthened. Our recommendations are based on existing evidence and authoritative international recommendations.

1. Tobacco and vaping

The EU first regulated tobacco advertising in 1989, when it adopted the Television Without Frontiers Directive. The restriction was further extended to other audiovisual media services when the EU adopted the 2007 AVMSD (subsequently codified in 2010), and again to video-sharing platforms and to vaping in 2018. We welcome the gradual extension of the scope of the AVMSD. Therefore, as it currently stands, Article 9(1)(d) AVMSD prohibits ‘all forms of audiovisual commercial communications for cigarettes and other tobacco products,

⁸ Article 24 EU Charter on the rights of the child also mandates that ‘children shall have the right to such protection and care as is necessary for their well-being’. The importance of the best interests of the child principle for the effective regulation of food marketing is specifically discussed in A. Garde and S. Byrne, ‘Combatting obesogenic commercial practices through the implementation of the best interests of the child principle’, in A. Garde, J. Curtis and O. De Schutter (eds), *Ending Childhood Obesity: A Challenge at the Crossroads of International Economic and Human Rights Law* (Elgar, 2020), at p. 251.

⁹ *Saving lives, spending less: the global investment case for noncommunicable diseases* (WHO, Geneva, 2025). See also the Country Health Profiles 2025 Data Explorer produced by the OECD: <https://www.oecd.org/en/data/dashboards/eu-country-health-profiles.html>.

as well as for electronic cigarettes and refill containers'. Furthermore, Article 10(2) specifies that 'audiovisual media services or programmes shall not be sponsored by undertakings whose principal activity is the manufacture or sale of cigarettes and other tobacco products, as well as electronic cigarettes and refill containers'. Similarly, Article 11(4) prohibits the product placements for cigarettes and other tobacco products, as well as electronic cigarettes and refill containers, as well as 'product placement from undertakings whose principal activity is the manufacture or sale of those products'. In other words, these two provisions on sponsorship and product placement prohibit tobacco brand marketing. As such, one can argue that the AVMSD is very much aligned with the Framework Convention on Tobacco Control, which the EU has strongly supported by being one of its early adopters and by implementing it through several measures that sit alongside the AVMSD, not least the 2003 Tobacco Advertising Directive and the 2014 Tobacco Products Directive currently under review.

As the Commission has recognised, most recently in the EU Cardiovascular Health Plan, novel tobacco and nicotine products, notably nicotine pouches, also need to be strongly regulated considering market trends and emerging evidence that such products are harmful, particularly to children. We share this concern and therefore call on the Commission to ensure that the relevant provisions of the AVMSD are revised to clarify that they also apply to these novel products. Similarly, we call on the Commission to include these novel products when reviewing the Tobacco Advertising Directive and the Tobacco Products Directive to ensure both regulatory coherence and a high level of health protection across all EU Member States.

2. Alcohol

The AVMSD contains a few provisions regulating alcohol marketing. However, these provisions are not aligned with existing evidence and fail to protect consumers from its harmful impact, despite the significant cross-border dimension of the trade in alcoholic beverages in Europe. This failure to effectively regulate alcohol marketing reflects the EU's failure to effectively regulate the alcohol industry.¹⁰

Article 9(1)(c) provides that 'audiovisual commercial communications for alcoholic beverages shall not be aimed specifically at minors and shall not encourage immoderate consumption of such beverages'. This provision therefore recognises that children are particularly vulnerable to the marketing of alcoholic beverages. However, the focus of the provision on whether alcohol marketing is 'aimed specifically at' children is far too narrow and fails to protect them from exposure to alcohol marketing. It also encourages investment shifts from narrowly regulated marketing ('aimed at minors') to all other unregulated marketing to which children are exposed. For example, any mixed audience marketing will fall foul of the narrowly construed provision on the basis that it is aimed at the public at large (which may include a very high number of children) rather than at children specifically. The concern is somewhat acknowledged in Article 9(3) that calls on Member States to 'encourage the use of co-regulation and the fostering of self-regulation through codes of conduct [...]

¹⁰ The EU alcohol policy is discussed in O. Bartlett and A. Garde, 'On the Rocks: A Few Sobering Thoughts on the Growing EU Alcohol Problem', in T. Hervey et al. (eds), *Research Handbook on EU Health Law and Policy* (Edward Elgar, 2017).

regarding inappropriate audiovisual commercial communications for alcoholic beverages. Those codes shall aim to effectively reduce the exposure of minors to audiovisual commercial communications for alcoholic beverages'. As we discussed below when considering the EU's approach to unhealthy food marketing, this approach based on the voluntary commitments of the industry is inherently flawed. Rather, the EU should revise the AVMSD to ensure that the protection of children from exposure to alcohol marketing is given the force of law through the effective implementation of an EU-wide prohibition of alcohol marketing.

It seems similarly inappropriate to focus exclusively on 'immoderate consumption', considering the evidence that alcohol consumption should not be encouraged at all. As the WHO Regional Office for Europe has made repeatedly clear: there is no safe level of alcohol consumption.¹¹ Therefore, this means, at the very least, that the wording of the AVMSD should be revised to focus on children's exposure to alcohol marketing (rather than on marketing specifically aimed at them) and on the promotion of all consumption (rather than 'immoderate consumption').

This approach is even more warranted if one considers that the 2010 WHO Global Strategy, the 2013 WHO NCD Global Action Plan, and the 2022-2030 WHO Alcohol Global Action Plan all call on the adoption of comprehensive alcohol marketing restrictions to protect everyone – and not only children – from its harmful impact. In particular, Action 3 of the WHO Alcohol Global Action Plan calls for 'comprehensive and robust restrictions or bans' on the advertising and marketing of alcoholic beverages 'across multiple types of media, including digital media'. Recent and extensive research from various expert working groups confirms that this approach is indeed the most suitable to protect both public health and human rights.¹²

Finally, the Commission should also regulate the marketing of 'alcopops', whose consumption has been identified as a growing concern in the EU Cardiovascular Health Plan, as well as NoLo products that are often used to promote alcoholic beverages through cross-promotion.

Overall, therefore, we conclude that the EU should revise the AVMSD by regulating alcohol marketing in the same way as it has regulated tobacco marketing: by prohibiting all audiovisual commercial communications for alcohol in all audiovisual media services and video-sharing platforms, including brand marketing (through sponsorship and product placement) by alcohol manufacturers and distributors.

¹¹ See in particular B. Anderson et al, 'Health and cancer risks associated with low levels of alcohol consumption', *The Lancet Public Health* Volume 8, Issue 1e6-e7 January 2023; and: <https://www.who.int/europe/news/item/04-01-2023-no-level-of-alcohol-consumption-is-safe-for-our-health>.

¹² See in particular the report produced by the Alcohol Marketing Expert Group convened by Alcohol Focus Scotland: *Realising Our Rights – How to protect people from alcohol marketing* (AFS, 2022); and most recently *IARC Handbooks of Cancer Prevention Volume 20B on the effects of alcohol policies on reducing alcoholic beverage consumption* (IARC, 2025).

3. Food

The EU has viewed **the marketing of unhealthy food to children** as an issue for over 20 years. However, despite concerted advocacy efforts and the establishment of coalitions supported by academic experts, the approach that the EU has trodden very timidly in this area. Having carefully considered the issue over this period, we have gone as far as characterising the EU's engagement with this issue as a 'resounding failure'. This is particularly so in light of the recently adopted WHO Guideline on food marketing and the accompanying policy guidance published jointly by Unicef and WHO.

The 2023 WHO Guideline, which is based on the latest evidence, calls on governments to protect children of all ages from the marketing of unhealthy food, specifically recommending the implementation of policies to restrict unhealthy food marketing to which children are exposed. Importantly, such policies should:

- o be mandatory;
- o protect children of all ages;
- o use a government-led nutrient profile model to classify foods to be restricted from marketing;
- o be sufficiently comprehensive to minimize the risk of migration of marketing to other media, to other spaces within the same medium or to other age groups; and
- o restrict the power of food marketing to persuade.¹³

Article 9(4) AVMSD fails to implement every single aspect of this evidence-based Guideline:

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].¹⁴

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.

¹³ The WHO Guideline refers to its accompanying WHO/Unicef policy guidance also published in 2023 which supplements the WHO Guideline by providing step-by-step, practical guidance through the four main stages of the policy cycle: 1) preparation; 2) development; 3) implementation; and 4) monitoring and evaluation: *Taking action to protect children from the harmful impact of food marketing: a child rights-based approach* (WHO and Unicef: Geneva, 2023).

¹⁴ 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'. Unhealthy food is often ultra-processed and nutritiously poor. The argument made here merely highlights the importance of adopting evidence-based food categorization models that are driven by public health objectives and are free from industry undue interference.

This provision contains significant loopholes that the food industry has been quick to exploit, as the EU Pledge – the main EU-wide self-regulatory initiative on food marketing to children – demonstrates.

- Firstly, it does not define the term ‘children’. Therefore, the signatories of the EU Pledge have defined a child as anyone below 13 years of age, ignoring the growing research that teenagers’ diets are also negatively affected by unhealthy food marketing.¹⁵
- Secondly, the EU has failed to adopt an EU-wide nutrient profiling system to classify foods and identify those that should not be marketed to children. Although the AVMSD now refers explicitly to the WHO Regional Office for Europe’s nutrient profile model,¹⁶ it does so in the Preamble (which is not legally binding), not in Article 9 or elsewhere in the main body of the Directive.
- Thirdly, the material scope of Article 9(4) AVMSD is too narrow to limit the risk that marketing investments will migrate from regulated to unregulated programmes / media / spaces / settings. In particular, it places undue emphasis on marketing ‘accompanying or included in children’s programmes’,¹⁷ thereby ignoring the extensive evidence that narrowly focusing on ‘children’s programmes’ is counterproductive: unhealthy food marketing restrictions need to extend to mixed, family-viewing programmes to which children are exposed in very high numbers (notwithstanding the audience percentages they make up). More generally, the scope of the AVMSD still contains important gaps. It is admittedly very helpful that, following its revision in 2018, the scope of the AVMSD was extended to video-sharing platforms featuring user-generated content, including YouTube, Instagram and TikTok. As a result, it now applies to influencer marketing when such marketing features in user-generated videos posted on video-sharing platforms. However, the AVMSD still does not apply to marketing which does not appear either in a programme or in a user-generated video posted on a video-sharing platform. This means that it does not regulate food marketing featuring on the websites of food businesses; or on social media posts that do not include user-generated videos.
- Fourthly, the AVMSD does not restrict the power of food marketing to persuade. More specifically, it does not regulate the marketing of unhealthy food by celebrities or social media influencers, 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.

¹⁵ See, in particular, *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.

¹⁶ Recital 28 of the Preamble of the AVMSD. Note that the WHO EURO nutrient profile model was recently revised: WHO Regional Office for Europe nutrient profile model: second edition (WHO: Copenhagen, 2023).

¹⁷ 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, alcohol or other harmful marketing.

Only the use of nutrition and claims made on food is specifically addressed at EU level, which means that of all the many techniques that the food industry use to promote their products and brands, only one has led to the adoption of specific rules at EU level to curb the power of marketing.¹⁸

- Fifthly, Article 9(4) AVMSD rests on self-regulation, not mandatory, government-led legislation. As a result, many food businesses that manufacture, distribute and promote unhealthy food operate outside the constraints of the law. More fundamentally, 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 systematically opposes. Notwithstanding the imperative of avoiding 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. Industry pledges are riddled with loopholes,¹⁹ and this is particularly true of the EU Pledge.²⁰ As such, they do not provide the effective protection that Member States and the EU should grant all children from harmful marketing. It is therefore regrettable that the EU failed to change its approach when given an opportunity to do so as the AVMSD was being revised in 2018, notwithstanding the many calls to this effect.²¹

Determining what falls within the scope of the AVMSD and what falls outside is complex in the absence of a specific set of rules dedicated to the regulation of unhealthy food marketing

¹⁸ For food information rules, and the regulation of food claims more specifically, see N. Gokani, 'Front-of-pack nutrition labelling: a tussle between EU food law and national measures' *European Law Review* 33(5) (2022) 751. See also M. Friant-Perrot and A. Garde, 'From BSE to obesity: EFSA's growing role in the EU's nutrition policy', in: A. Alemanno and S. Gabbi (eds), *Foundations of EU Food Law and Policy: Ten Years of the European Food Safety Authority* (Routledge, 2014), at p. 135.

¹⁹ 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.

²⁰ 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.

²¹ 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).

to which children are exposed.²² What is clear, however, is that Article 9(4) AVMSD as currently drafted will not effectively reduce the overall exposure of children to unhealthy food marketing and cannot therefore achieve the objective it pursues of protecting them from its harmful impact.

Considering the limitations of Article 9(4) AVMSD, a coalition of over 20 Brussels-based civil society organisations was set up in 2021 to call on the Commission to adopt legislation aligned with the Blueprint Directive on food marketing that we drafted to support their advocacy efforts. This Directive which predated the WHO Guideline nonetheless calls for very similar measures: mandatory regulation intended to protect all children from exposure to unhealthy food marketing, including brand marketing, in all cross-border media that the EU can lawfully regulate, not least audiovisual media series and video-sharing platforms which fall within the scope of the AVMSD. The Coalition has also advocated for the regulation of events sponsorship and packaging (which fall outside the scope of the AVMSD but should nonetheless be regulated at EU level, in a similar way to what the EU has done for the marketing of tobacco products). We refer the Commission to the dedicated webpage of the Coalition, which includes the draft of the Blueprint Directive on food marketing.²³

The EU should also amend the AVMSD to prohibit – at long last – the **marketing of breastmilk substitutes** to ensure that EU rules align with the International Code on the Marketing of Breastmilk Substitutes, as interpreted by relevant World Health Assembly resolutions, and specifically Resolution 69.9 (2016) on ending inappropriate promotion of food for infants and young children and Resolution 78.18 (2025) on regulating the digital marketing of breastmilk substitutes. The European Commission should also note the 2023 *Lancet* Series on Breastfeeding captures existing evidence stemming from the displacement of breastfeeding as a result of the extensive marketing strategies deployed by multinational corporations that manufacture, distribute and promote commercial milk formulas. The AVMSD should therefore acknowledge such evidence and address the harms stemming from such marketing both to child and mother’s health and to their human rights.²⁴ We therefore urge the EU to prohibit the marketing of commercial milk formula so that the International Code is effectively implemented throughout the EU. As regards the AVMSD specifically, we call on the EU to add a specific provision banning such marketing, including brand marketing

²² A. Garde, *EU Law and Obesity Prevention* (Kluwer Law International, 2010); O. Bartlett and A. Garde, ‘Time to Seize the (Red) Bull by the Horns: the EU’s Failure to Protect Children from Alcohol and Unhealthy Food Marketing’ (2013) 38(4) *European Law Review* 498; O. Bartlett and A. Garde, ‘The EU’s Failure to Support Member States in their Implementation of the WHO Recommendations: How to Ignore the Elephant in the Room?’ (2017) 8(2) *European Journal of Risk Regulation* 251; N. Feci and P. Valcke, ‘Between minimal standards and national variation: Minimum harmonization of advertising rules’, in H. Ranaivoson, S. Broughton Micova and T. Raats (eds), *European Audiovisual policy in transition* (Routledge, 2023), at p. 56.

²³ *Towards a childhood free from unhealthy food marketing* (2021): <https://epha.org/campaigns/regulate-food-marketing/>.

²⁴ This three-paper series is available at: <https://www.thelancet.com/infographics-do/2023-lancet-series-breastfeeding>.

(through sponsorship and product placement) in all audiovisual media services and video-sharing platforms.

IV. The importance of allowing Member States to regulate harmful marketing at national level should the EU fail to regulate effectively at regional level

The AVMSD is a measure of minimum harmonisation which only sets the minimum standard of protection that all Member States must ensure. This is why several Member States have been able to adopt stricter national rules on their territories to address harmful marketing and therefore promote public health, reduce health inequalities, and protect human rights. For example, Portugal²⁵ and Norway²⁶ have regulated food marketing to align their regulatory frameworks more closely with the WHO Guideline. Similarly, several EU Member States have regulated alcohol marketing (e.g. France, Ireland, Lithuania, Finland, Sweden, Norway).²⁷

Nevertheless, such an approach can only work 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. Unfortunately, however, and as we have discussed above, the AVMSD has set far too low a standard of protection, to the detriment of the best interests of the child in relation to alcohol and food marketing.

The problems are compounded by the fact that the AVMSD constrains the freedom that Member States have under the minimum harmonisation provision: the Country of Origin Principle (or the State of Establishment Principle) enshrined in the AVMSD²⁸ only allows them to regulate the audiovisual media service providers established on their territories, not those established in other Member States. This means that States wishing to implement the AVMSD and regulate harmful marketing in line with existing evidence and international guidance can only do so for audiovisual media service providers established within their jurisdiction.²⁹ This ultimately creates a two-tier set of rules based on where a provider is established, increasing the burden on national service providers, which is unavoidably a difficult political move. This in turn, leads to the fragmentation of the EU internal market, without ensuring that public health is adequately protected, nor that the best interest of the child is considered as a primary consideration. The absence of comprehensive regulation addressing cross-border alcohol and food (including breastmilk substitute) marketing within the EU has resulted in a complex

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<https://bestremap.eu/wp-content/uploads/2022/08/M6.3-Regulation-and-legislation-mapping-report.pdf>

²⁶

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

²⁷ These examples are documented in the report by Alcohol Focus Scotland mentioned above.

²⁸ A. Herold, 'Country of Origin Principle in the EU Market for Audiovisual Media Services: Consumer's Friend or Foe?' *Journal of Consumer Policy* (2008) 31:5–24.

²⁹ Commission decision of 31 January 2018 on the incompatibility of the measures notified by Sweden pursuant to Article 4(5) of the AVMSD, COM(2018) 532 final.

co-existence of national and EU rules. This is not conducive to legal certainty, nor is it to the child health and children's rights protection.³⁰

Consequently, and yet again, we urge the EU to address this unsatisfactory situation by firmly rejecting Option 1 and implementing the evidence-based recommendations that we have made in our consultation response. We are acutely aware that this will require political will. We also urge the Commission to ensure that it does not repeat the mistakes it has made in its recent past when it has failed to act transparently and has instead allowed industry interference, which has led to its failure to implement several of the flagship NCD prevention measures at the heart of the Europe's Beating Cancer Plan.³¹

Finally, we would like to refer the Commission to the consultation response that Dr Eleanor Brooks and Dr Kathrin Lauber from the School of Social and Political Science at the University of Edinburgh have submitted, with very useful references to their work,³² which complements our response.

³⁰ Hence the view that I have expressed that the failure of the EU to do more to protect child health and children's rights from harmful marketing is a 'resounding failure': A. Garde, 'Harmful commercial marketing and children's rights: For a better use of EU powers', *European Journal of Risk Regulation* Volume 11, *Special Issue 4: Beyond COVID-19: Towards a European Health Union*, December 2020, at p. 841.

³¹ A. Garde et al, 'Lobbying, Transparency and Trust: Power Imbalances and the Failure to Implement Europe's Beating Cancer Plan' (2025) 51 *The Lancet Regional Health Europe* 101238, which should be read in light of the *Lancet* Series on the Commercial Determinants of Health, 2023.

³² K. Lauber and E. Brooks, 'A missed opportunity for public health: How impact assessment shaped EU rules on the marketing of unhealthy commodities to children', (2024) *Social Science & Medicine, Qualitative Research in Health* 5:100369; and 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*.