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The Marketing and Advertising of Food in the European Union- Regulatory Measures, Remedies for Consumers and an Analysis of Best Practices

Report for the United Nations Special Rapporteur on the Right to Food

November 2011

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In addition to the above, the research co-ordinators would like to acknowledge the assistance of and thank the following individuals:

- **Professor Timothy Endicott**, Dean of the Oxford Law Faculty, and **Professor John Cartwright,** Acting Dean for their support of the project;
- Executive Members of the Oxford Pro Bono Publico Committee (2010 and 2011), **Dr Liora Lazarus**, **Dr Jeff King**, **Dr Tarunabh Khaitan, Dr Jane Donoghue, Ms Laura Hilly, Ms Anne Carter, Mr Lawrence Hill-Cawthorne**, **Ms Nabiha Syed**, **Mr Chris McConnachie**, **Ms Alecia Johns** and **Ms Emma Dunlop** for their support and assistance with the project.

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The Marketing and Advertising of Food in the European Union- Regulatory Measures, Remedies for Consumers and an Analysis of Best Practices

Terms of Reference

This report has been prepared as a contribution to the work of the United Nations Special Rapporteur on the Right to Food, particularly to complement his report on the aspect of 'nutrition' and his specific concern about the 'overconsumption of energy-rich, nutrient poor foods, which advertising and marketing towards children in particular might have encouraged.' This report concentrates on the advertising and marketing practices of the food industry and their regulation across the European Union (EU) and addresses the following three aspects:

(a) EU-wide measures applicable to the marketing and advertising practices of the food sector, especially those governing health claims made by the food industry and regulating information provided to consumers through labelling and packaging. These measures include binding Regulations and Directives, as well as soft law in the form of Communications on the subject from the European Commission.

(b) Remedies set out in the above-mentioned Regulations and Directives that allow consumers to challenge those practices of the food industry that might have a negative impact on health. This section also notes the relative lack of litigation in relation to marketing and advertising practices, comments on provisions of the Treaty on the EU that potentially present barriers to regulation in this sphere, also sets out the position on 'standing' for consumer organizations at the European Court of Justice and finally discusses reforms proposed by the European Commission to facilitate collective redress for consumers.

(c) Best practices and codes of conduct adopted by the private sector as a form of self-regulation and an assessment of the manner in which they have been implemented and their effectiveness.

A. EU MEASURES GOVERNING THE ADVERTISING, LABELLING AND PACKAGING OF FOOD

Introduction to the Legal Scheme

The justificatory regime of the European Union for Regulation (EC) No 1924/2006 (nutrition and health claims made on foods) and subsequent similar and amending Regulations (the provisions of which are discussed later on in this section) is the dual concern for consumer protection and public health. Primarily focused on ensuring adequate, understandable and accurate information for consumers in order for them to make an informed decision on the health and nutritional aspects of products, this regulation claims no foundation in any fundamental human right, but may more clearly be understood as pursuing a solely economic function, focusing on the citizen as a consumer.

A similar pattern can be seen for the various Directives identified as being of relevance to the question. The primary focus is on the labelling of food products to protect the citizen as a consumer, rather than explicitly focusing on health concerns. While the Audiovisual Media Services Directive refers to the availability of harmful content in audiovisual media services being a source of concern for various groups, including parents, and explains the necessity of 'protecting the physical mental and moral development of minors as well as human dignity', the directive only provides a minimum level of protection for minors, encouraging media service providers to develop their own codes of conduct.

The Communications of the EU Commission contained within this report concern the link between health and food. The Commission tackles the issue mainly through soft policies and the Communications seldom refer to food regulation or advertising. When there is a reference to hard law, this is often to the Regulation on Health and Nutrition Claims about food labelling or to the Audiovisual Media Services Directive. In particular, Article 9 of the latter emerges as a key source of regulation, exhorting Member States to encourage media service providers to develop codes of conduct regarding inappropriate advertising of unhealthy food accompanying or included in children's programmes.

Legislating on grounds of consumer protection and common safety concerns in public health matters are beyond the remit of exclusive competence of the EU, and are instead enumerated in the domain of shared competence between the Union and Member States. This shared competence leaves scope for Member States to enact a higher standard of protection on condition that standing Union obligations are respected.

Health and food is certainly an area where new governance mechanisms using guidelines, policy objectives and qualitative and quantitative indicators play a major role. As often happens in EU social policies the effectiveness of the EU action can be assessed only by

evaluating if such soft mechanisms are producing some kind of effect in Member States. The impression, however, is that promotion of restrictions on advertising is not a priority of the EU health strategy. The focus is more on consumer education so that consumers are able to defend themselves making the right choice when they act in the market.

1. Regulatory Measures on Nutritional and Health Claims

(i) Regulation (EC) No 1924/2006 of the European Parliament and of the Council of 20 December 2006 on nutrition and health claims made on foods

The following summary was obtained from the Europa summaries of legislation[1]

Nutrition and health claims of the type 'WITH NO ADDED SUGAR', 'FAT-FREE' and 'LIGHT/LITE', etc are harmonised at the European level in order to guarantee the functioning of the internal market, whilst ensuring a high level of consumer protection.

Scope

This Regulation applies to all nutrition and health claims including:

- commercial communications (labelling, presentation and promotional campaigns);
- trade marks and other brand names which may be construed as nutrition or health claims.

It applies to claims relating to all types of food intended for final consumers, including foods intended for supply to hospitals, canteens etc.

The Regulation does not apply to claims relating to the adverse effects of a product.

Consumer protection

The legislation on nutrition and health claims protects consumers by prohibiting any information which:

- is false, difficult to understand or misleading (e.g. which attributes medicinal properties to food wrongly or without scientific evidence);
- casts doubt on the safety or nutritional adequacy of other foods;
- encourages or condones excessive consumption of a food;
- encourages consumption of a food by stating or suggesting directly or indirectly that a balanced diet does not provide all the nutrients that are needed;

[1] http://europa.eu/legislation_summaries/consumers/product_labelling_and_packaging/l21306_en.htm, accessed on 31 October 2011.

- attempts to scare consumers by mentioning changes in bodily functions.

This Regulation supplements Directive 2000/13/EC relating to food labelling and Directive 2006/114/EC on misleading and comparative advertising. (These Directives are discussed in the next sub-section).

General conditions of use

Nutritional and health claims must meet the following conditions:

- the presence, absence or reduced content of a nutrient or other substance in respect of which the claim is made must have a beneficial nutritional or physiological effect, and be scientifically proven;
- the nutrient or substance in respect of which the claim is made is present in significant quantities in order to produce the nutritional or physiological effect claimed. Its absence or presence in a reduced quantity should also produce the expected nutritional or physiological effect;
- the nutrient or substance in respect of which the claim is made is in an immediately consumable form;
- the specific conditions of use must be complied with, for example, the active substance (e.g. vitamins, fibres, etc.) must be present in sufficient quantity in the food to have beneficial effects. Furthermore, if it is claimed that a food is energy-reduced, the energy value must be reduced by at least 30% of the total energy content of the food (25% in the case of salt).

Nutritional and health claims relating to beverages containing more than 1.2% of alcohol by volume are prohibited, with the exception of those which refer to a reduction in the alcohol or energy content of an alcoholic beverage.

Specific conditions of use

Only the nutritional claims listed in the Annex to this Regulation are authorised. Comparative nutritional claims are possible for foods in the same category whose composition does not allow a claim. They must relate to an identical quantity of food and indicate the difference in the nutrient content and/or energy value.

Health claims are subject to specific requirements. The labelling, presentation and publicity related to them must provide certain obligatory information:

- a statement indicating the importance of a varied and balanced diet and a healthy lifestyle;
- the quantity of the food and pattern of consumption which will ensure the claimed beneficial effect;
- a statement addressed to persons who should avoid the substance concerned;
- a warning of the health risks caused by excessive consumption.

The Regulation prohibits health claims which refer to the rate or amount of weight loss or suggest it is detrimental to health not to consume a certain type of food, references to an individual doctor or health professional or to associations other than national medical associations and health-related charities, and claims which suggest that health could be affected by not consuming the food.

However, by way of derogation from Directive 2000/13/EC on labelling (which prohibits any reference to properties for the prevention, treatment or cure of a human disease), the Regulation authorises claims concerning the reduction of the risk of a disease, provided that an application for authorisation has been approved.

Application for authorisation

To obtain authorisation for a new claim or amend the existing list, the manufacturer must submit an application to the Member State concerned, which will forward it to the European Food Safety Authority (EFSA). The Commission then makes a decision on the use of the claim on the basis of EFSA's opinion.

The successive amendments to this Regulation may be found in consolidated form (reference only) at:

http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:2006R1924:20100302:EN:PDF

Pertinent additions by subsequent amending Regulations may be summed up as following:

- identification of conditions for establishing and withdrawing an application for authorisation of health claims
- determination that each application may deal with only one relationship between a nutrient or other substance, or food or category of food, and a single claimed effect
- specification of scientific support needed to make the claim

The following Regulations amend or refer to Regulation (EC) No 1924/2006:

(EU) No 1161/2010	Refusing to authorise a health claim made on foods, other than those referring to the reduction of disease risk and to children's development and health
(EU) No 957/2010	Authorisation and refusal of authorisation of certain health claims made on foods and referring to the reduction of disease risk and to children's development and health
(EC) No 1168/2009	Refusing to authorise a health claim made on foods, other than those referring to the reduction of disease risk and to children's development and health

(EC) No 1167/2009 Refusing to authorise certain health claims made on foods and referring to the reduction of disease risk and to children's development and health

(EC) NO. 984/2009 Refusing to authorise certain health claims made on food, other than those referring to the reduction of disease risk and to children's development and health

(EC) NO. 983/2009: Authorisation and refusal of authorisation of certain health claims made on food and referring to the reduction of disease risk and to children's development and health

(EC) NO. 109/2008: Amending (EC) NO. 1924/2006 on nutrition and health claims made on foods

(EC) NO. 107/2008: Amending (EC) NO. 1924/2006 on nutrition and health claims made on foods as regards the implementing powers conferred on the Commission

(EC) NO. 116/2010: Amending Regulation (EC) No 1924/2006 with regard to the list of nutrition claims

2. Directive Measures

(i) Audiovisual Media Services Directive 2010/13/EU

Treaty Foundation: *Articles 53(1) and 62 of TFEU*

- This Directive applies to all audiovisual media (both traditional TV broadcasts and on-demand services). It is designed to provide a minimum set of common rules covering issues such as advertising and protection of minors (further regulation by Member States is permitted). Under Article 9 (2), Member States and the Commission must encourage media service providers to develop their own codes of conduct regarding 'inappropriate audio visual communications' which accompany or are included in children's programmes and promote 'foods and beverages containing nutrients and substances with a nutritional or physiological effect, in particular those such as fat, trans-fatty acids, salt/sodium and sugars, excessive intakes of which in the overall diet are not recommended'.
- Article 10 (4) also permits Member States to prohibit showing of a sponsorship logo during children's programmes.

(ii) Misleading and comparative advertising Directive 2006/114/EC

Treaty Foundation: *Article 95 TEC*

- Despite the title, misleading advertising between businesses and consumers is now regulated by the Unfair Commercial Practices Directive (see below). Directive 2006/114/EC remains applicable, but its scope is limited to business-to-business misleading advertising and comparative advertising which may harm a competitor but where there is no direct consumer detriment.

(iii) The Unfair Commercial Practices Directive (UCP) 2005/29/EC

Treaty Foundation: *Article 95 TEC*

- The Unfair Commercial Practices Directive (UCP) was adopted on 11 May 2005. It is a 'full harmonisation' measure; that is to say, further action by Member States going beyond the protection of this directive is not permitted. The directive regulates commercial practices between business and consumers (B2C). Within the directive, there is a general ban on 'unfair commercial practices'. There are then more specific provisions prohibiting 'misleading' and 'aggressive' practices; in particular the provisions relating to 'misleading' advertising might be relevant to the marketing of foodstuffs. The booklet prepared for the general public on the directive by the Health and Consumer Protection DG of the European Commission explains that the focus of the Directive is to protect the economic interest of the consumer and not the protection of other interests such as health or safety. It also explains that the directive does not liberalise national restrictions on advertising food high in fat, salt or sugar to children.
- However, the directive does touch on advertising to children, which could include advertising of foodstuffs. Attached to the directive, in Annex 1, there is a list of practices which are considered unfair in all circumstances (otherwise known as the 'blacklist'). Practice 28 within the black list is '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'.

(iv) Council Directive 90/496/EEC of 24 September 1990 on nutrition labelling for foodstuffs as amended by Commission Directives 2003/120/EC and 2008/100/EC

Treaty Foundation: *Article 100a EEC*

- This directive regulates the practice of nutrition labelling. It restricts nutrition labelling to information relating to calorific value, or a set list of nutrients: protein, carbohydrate, fat, fibre, sodium, vitamins and minerals. It is subject to ongoing technical revision. An amendment of note is the Commission Directive 2008/100/EC of 28 October 2008 amending Council Directive 90/496/EEC on nutrition labelling for foodstuffs as regards recommended daily allowances, energy conversion factors and definitions. Annexes to this directive contain recommended daily allowances (RDAs) of vitamins and minerals, and the definition of fibre.

(v) Directive 2000/13/EC of the European Parliament and of the Council of 20 March 2000 on the labelling, presentation and the advertising of foodstuffs

Treaty Foundation: *Article 95 TEC*

- This directive is based upon the principle of functional labelling. Its aim is to ensure that the consumer gets all the essential information as regards the composition of the product,

the manufacturer, methods of storage and preparation, etc. Producers and manufacturers are free to provide whatever additional information they wish, provided that it is accurate and does not mislead the consumer. Furthermore, this directive prohibits the attribution to any foodstuff of the property of preventing, treating or curing a human disease.

(vi) Directive 2002/46/EC of the European Parliament and of the Council of 10 June 2002 on the approximation of the laws of the Member States relating to food supplements

Treaty Foundation: *Article 95 TEC*

- This directive relates to the approximation of Member State regulation of food supplements. It establishes harmonised rules on the labelling of supplements, and introduces special rules on vitamins and minerals.

(vii) Commission Directive 2008/5/EC of 30 January 2008 concerning the compulsory indication on the labelling of certain foodstuffs of particulars other than those provided for in Directive 2000/13/EC of the European Parliament and of the Council

- This provides for compulsory labelling of certain foodstuffs of particulars other than those detailed in Directive 2000/13/EC. In particular, it covers the labelling of foodstuffs where gases have been used for preservation purposes, and labelling of foodstuffs which contain sweeteners. These have been added to the annex of Directive 2000/13/EC.

(viii) Directive 2009/39/EC of the European Parliament and of the Council of 6 May 2009 on foodstuffs intended for particular nutritional uses

Treaty Foundation: *Article 95 TEC*

- This is essentially a codification directive, which codifies 89/398/EEC on foodstuffs intended for particular nutritional uses ("parnuts") and its subsequent amendments. The only significant change is the introduction of a regulatory procedure with scrutiny. The directive does contain some labelling provisions; in particular Article 2 forbids the use of the words 'dietary' or 'dietic' on the labelling of foodstuffs for normal consumption.

3. Commission Communications

(i) European Commission, 'Together for health: a strategic approach for the EU 2008-2013' COM(2007) 630 final

- This White Paper on EU health strategy is a broad document discussing varied types of health problems facing Europe's population. Of relevance to the issues addressed in this report, it identifies illnesses due to unhealthy lifestyles as a growing health challenge. The focus of the Paper is however on food safety, consumer protection and the prevention of illness, rather than on facilitating the consumption of healthy food. There is no explicit mention of the role that regulation of advertising and marketing by the food industry could play in the promotion of the health of EU citizens.

(ii) European Commission, 'A Strategy for Europe on Nutrition, Overweight and Obesity related health issues' (Communication), COM(2007) 279/F final

- The purpose of this White Paper is to set out an integrated EU approach to contribute to reducing ill health due to poor nutrition, overweight and obesity. The Paper builds on recent initiatives undertaken by the Commission, in particular the EU Platform for Action on Diet, Physical Activity and Health and the Green Paper 'Promoting healthy diets and physical activity: a European dimension for the prevention of overweight obesity and chronic diseases.' The paper acknowledges that the role of the EU is limited because most of the competences fall on Member Countries. However, the EU can contribute through the regulation of the internal market (labelling requirements, health claims authorisation and food controls procedures), structural funds, EU funded campaigns and the common agricultural policy. The Communication proposes the involvement of both Member States and private actors in a soft governance mechanism comprising shared principles and the monitoring of achieved results. Of relevance to this report is the fact that one of the objectives of the Strategy is improving the access of consumers to information on nutrition, overweight and obesity related health issues. The rationale behind this is that well-informed consumers will prefer food and activities which are the most beneficial for their health. To this end, the instruments proposed are nutrition labelling and the soft regulation of advertising and marketing practices. On advertising, the Communication states that:

  'Between October 2005 and March 2006 the Commission conducted an Advertising Round Table to explore self regulatory approaches and the way that law and self regulation can interact and complement each other. As a result, a best practice model (or standards of governance) for self-regulation was set out in the Round Table report. These standards should apply to the specific area of the advertising of food to children. In doing so, voluntary efforts should complement the existing and different approaches being taken in Member States, such as Spain's PAOS code and the recent Office of Communication initiative in the UK. In such a context the request of the European Parliament, regarding the introduction of a code of conduct for advertising of food high in fat or sugars aimed at children during the debate on a modification of the "Audiovisual Media Services" (AVMS) Directive, has to be underlined.

  The new AVMS Directive foresees that media service providers should be encouraged by the Member States, and by the Commission, to develop codes of conduct regarding commercial communication on food and beverages targeted at children. The Commission's preference, at this stage, is to keep the existing voluntary approach at EU level due to the fact that it can potentially act quickly and effectively to tackle rising overweight and obesity rates. The Commission will assess this approach and the various measures taken by industry, in 2010 and determine whether other approaches are also required.'

- The Communication also states that private companies should keep consumers informed and should fully contribute to voluntary initiatives. The Commission

believes that the private sector could also contribute by making healthy options available and affordable, as demonstrated by the following passage:

'Making the healthy option available and affordable: The food industry (from producers to retailers) could make demonstrable improvements in areas such as the reformulation of foods in terms of salt, fats, particularly saturated and trans fats, and sugars for consumers across the EU and to consider ways to promote consumer acceptance of reformulated products. There is also evidence that good practices of retailers in Member States, promoting healthy products such as fruits and vegetables at cheap prices on a regular basis, have led to a positive impact on diets.'

- Clearly, the Commission seems to place great faith in a soft approach to the regulation of the food industry, encouraging the voluntary adoption of codes of conduct, and thus displaying a free-market idealism that perhaps unrealistically expects private corporations to voluntarily prioritize health concerns over profit margins.
- In contrast, some of the documents accompanying the White Paper such as the Commission staff working document [COM (2007) 279 final] acknowledge that the food industry in Europe is dominated by a handful of corporations and that a hard law approach at the EU level would be more beneficial than soft regulation.
- The Commission staff working document that accompanies the White Paper [COM(2007) 279 final] assesses various policy options ranging from no action at the EU level at all to a purely regulatory approach which will strengthen the legislative framework rather than relying on stakeholder action. Ultimately, it concludes that the most preferred option would be to pursue a 'comprehensive EU-wide strategy' which would focus on voluntary mechanisms, but only as a complement to existing legislative frameworks.

(iii) European Commission, 'Promoting Healthy Diets and Physical Activity: a European Dimension for the Prevention of Overweight, Obesity and Chronic Diseases' (Green Paper) COM(2005) 637/F final

- This paper reiterates the connection between the promotion of health and the provision of accurate information to consumers. The proposals suggested in the section on consumer information, advertising and marketing evidently formed the basis for Regulation 1924/2006 on nutritional and health claims discussed above. As regards advertising and marketing, the paper notes the credulity and lack of media literacy of vulnerable consumers, including children, but considers industry self-regulation to be the preferred choice because of its advantages in terms of speed and flexibility. It does however note that other options ought to be considered if satisfactory results are not produced by self-regulation, thus highlighting the importance not just of adopting codes of conduct, but also monitoring their implementation and effectiveness.

(iv) European Commission, 'Healthier, Safer, More Confident Citizens: a Health and Consumer Protection Strategy' (Communication) SEC (2005) 425

- Although not directly addressing questions of obesity and nutrition, this paper also highlights the integral link between improved levels of health and heightened consumer awareness, and contains several general proposals to strengthen the latter. For example, Annex 3 entitled 'Consumer Policy - Actions and Support Measures' lists the following four objectives : better understanding of consumers and markets, better consumer protection regulation, better enforcement, monitoring and redress and better informed and educated and responsible consumers. The fourth objective includes consumer education and actions targeted to young consumers and the development of interactive consumer education tools. Advertising, however, is not explicitly mentioned.
- In its attempt to mainstream health considerations in consumer protection policies, the communication lists several 'soft law' mechanisms at the EU level to supplement legislative action taken by the Member States. Examples include awareness raising campaigns, the promotion and strengthening of Community level consumer and health organisations, the networking of health organisations, exchange of best practices, impact studies, encouraging dialogue between health and consumer organisations, and the harmonisation of risk assessment methodologies.

4. Analysis

Neither the Charter of Fundamental Rights of the EU nor the EU Treaty sets out an explicit right to food. Concerns about the nutritional aspects of this right are instead addressed at the EU level through the competences of the EU in the spheres of health and consumer protection. This has resulted in a series of fairly patchy Regulations and Directives governing the labelling, packaging and advertising of food, with different instruments addressing different types of food products or different types of nutritional and health claims. These are supplemented by soft law instruments in the form of Green Papers and White Papers published by the Commission that often go on to inform the content of the Regulations and the Directives. Ultimately, however, most legislative and regulatory action is left to be undertaken at the Member State level. The most prominent EU-wide measures that exist promote voluntary self-regulation by the private sector, besides suggesting a host of 'soft law' governance mechanisms such as co-operation measures and the promotion of dialogue between relevant stakeholders. The economic principle of the free movement of goods and services and the creation of an internal market upon which the EU was originally founded might possibly have discouraged stronger regulation of the advertising and marketing practices of the food industry, and the next section will discuss whether there are any particular Treaty provisions that potentially present barriers to strengthened legislation on an EU-wide level.

B. REMEDIES IN EU REGULATIONS AND DIRECTIVES

1. General framework

The Treaty on European Union, the founding document of the EU (as amended), establishes the general framework for judicial remedies under EU law. It provides that the European Court of Justice (ECJ) has the task of ensuring the observance of Union law through the interpretation and application of the Treaties, with the power to rule on claims brought by Member States, institutions and individuals. Each member state is individually obliged to 'provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.'[2]

2. Protection of consumers in respect of the food industry

Specific provision for the protection of consumers in respect of advertising and marketing in the food industry is to be found in the EU Regulations and Directives as set out in the previous section. A number of these restrict the labelling, advertising and content of food products and require generally that Member States take the necessary measures to ensure compliance.[3] EU law also makes specific provision for remedies before courts or non-judicial bodies to be provided, allowing challenges to be made to marketing policies within the food industry. These are set out below:

(i) The Unfair Commercial Practices Directive (UCP) 2005/29/EC

Member States are to ensure that 'adequate and effective means' are available to enforce compliance with the requirements of the Directive. They are to adopt legal provisions under which those with a legitimate interest in combating unfair practices may take legal action against them, or bring the issue before an administrative body.[4] Depending on the wording of the respective legislation, states may, in implementing this obligation, give consumers and consumer organisations standing to obtain judicial and non-judicial remedies. Courts or administrative bodies are to have the power to order the cessation or prohibition of unfair practices.[5] States are also to ensure effective penalties exist.[6]

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[2] Article 19, *Treaty on European Union*, 2010/C 83/01, 53 OJ 1.

[3] See, for instance, Regulation (EC) NO. 834/2007:Labelling of organic products with regard to organic production, labelling and control which restricts, inter alia, the use of labelling and advertising indicating that a product is organic to those meeting the requirements contained therein and requires Member States to take the necessary measures to ensure compliance (article 23); Regulation (EC) NO. 2991/94: Standards for spreadable fats which lays down certain sales requirements for spreadable fats and requires Member States to establish effective penalties and ensure enforcement (article 10); Directive 2000/13/EC of the European Parliament and of the Council of 20 March 2000 on the labelling, presentation and the advertising of foodstuffs (consolidating Directive 79/112/EEC of 1979 and amendments into a single text) which requires Member States to prohibit the sale of foodstuffs where the relevant particulars are not provided (article 16).

[4] Article 11(1).

[5] Article 11(2).

[6] Article 13.

(ii) Misleading and comparative advertising Directive 2006/114/EC [7]

Similar provisions exist in this Directive, the purpose of which is to protect *traders* against misleading advertising and its unfair consequences.[8] Member States are to ensure that adequate and effective means exist to combat misleading advertising. The focus is not on consumers, but Member States are to adopt legal provisions under which persons with a legitimate interest can take legal action against misleading advertising or bring such advertising to the attention of an administrative body able to decide complaints or bring its own legal proceedings.[9] Courts or administrative bodies are to have the power to order the cessation or prohibition of such advertising.[10] Any control by self-regulatory bodies must be provided in addition to such remedies.[11]

(iii) Regulation (EC) No 1924/2006 of the European Parliament and of the Council of 20 December 2006 on nutrition and health claims made on foods

As set out in the previous section, this Regulation aims to protect consumers and facilitate their choices by ensuring food products are safe and properly labelled.[12] It prohibits the use of nutrition and health claims that are false or misleading, as well as enumerated other claims that may adversely affect consumers' health.[13] Nutrition and health claims are to be substantiated by scientific evidence and meet certain conditions.[14] Certain health claims must be authorised by the EFSA.[15] Importantly, the Authority will review authorisations on its own initiative or at the request of the user, a member state or the Commission and the user, as well as a member of the public, is entitled to make comments which are reviewed by the Commission.[16] The Regulation is expressed to be directly applicable in the Member States; in addition, implementing legislation may provide remedies for misleading advertising.[17]

(iv) Regulation (EC) No. 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

This Regulation aims to protect consumers' interests by enabling informed choices in relation to food and preventing fraudulent, deceptive and misleading practices and the adulteration of

[7] This version consolidates Directive 84/450/EEC of 1984 and all amendments thereto: see recital 1.
[8] Article 1.
[9] Article 5.
[10] Article 5(3).
[11] Article 6.
[12] See recital 1.
[13] Article 3.
[14] Article 6; article 4ff.
[15] See article 15.
[16] Article 19.
[17] See Andreas Meisterernst, 'A Learning Process? – Three Years of Regulation (EC) No. 1924/2006 on Nutrition and Health Claims Made on Foods' (2010) 2 *EFFL* 59 at 59, discussing the German Act Against Unfair Competition implementing the Regulation and providing civil remedies as between competitors.

food.[18] The placing of unsafe food on the market is prohibited, with regard to be had to the information provided to the consumer concerning the avoidance of adverse health effects in determining whether a particular food is unsafe.[19]

Responsibility for ensuring compliance with the food law rests with food and feed business operators, with Member States to enforce the law and monitor and verify that its requirements are met. In particular, penalties are to be applied for breaches of food law.[20]

The Regulation also establishes the EFSA[21] which is able to provide independent scientific advice on food-related issues on its own motion and at the request of European institutions and the Member States.[22] Importantly, the Authority is intended to be open to contact with consumers, which may provide a mechanism through which consumers are able to make their views known.[23]

(v) Audiovisual Media Services Directive 2010/13/EU

This Directive requires that Member States ensure that audiovisual media services comply with the law in that state regulating such services intended for the public[24] and, through legislation in the state, that media services providers within their jurisdiction comply with the requirements of the Directive.[25] Relevantly, audiovisual commercial communications are not to encourage 'behaviour prejudicial to health or safety,'[26] immoderate consumption of alcohol,[27] or to directly target minors in particular ways.[28] Member States and the Commission are to encourage the development of codes of conduct regarding inappropriate commercials promoting foods high in fat, sugar and salt content to children.[29]

Without prejudice to other remedies, a person whose legitimate interests have been affected by incorrect facts being asserted in a television programme is entitled to a right of reply or equivalent.[30]

3. Analysis

The above paragraphs demonstrate that the implementation and enforcement of the

[18] Article 8. Article 16 specifically prohibits the misleading of consumers through the labelling, advertising and presentation of food.
[19] Article 14.
[20] Article 17.
[21] See Chapter III.
[22] See recitals 47 and 48; article 29.
[23] Recital 56; article 42.
[24] Article 2.
[25] Article 4(6).
[26] Article 9(1)(c)(iii).
[27] Article 9(1)(e).
[28] Article 9(1)(g).
[29] Article 9(2).
[30] Article 28.

Directives and Regulations is left to the Member States. Apart from the general requirement that remedies be 'adequate and effective', there is no prescribed minimum standard of protection; instead, some of the legislation suggests that Member States encourage industry to adopt voluntary, self-regulating codes of conduct and best practices. Failure to uniformly require states to extend more specific remedies might make it difficult for consumer organizations to challenge marketing and advertising practices, given the different, and often restrictive rules on standing that exist in different Member States. The absence of a guarantee of a minimum level of protection at the member state level might well be compounded by the restrictive provisions on standing for organizations to challenge EU legislative and administrative measures in the public interest. The next section provides a background note on standing at the EU level, besides discussing potential barriers to litigation within Member States and the Commission's suggestions for reform.

C. BARRIERS TO LITIGATION

1. Standing for Individuals and Organisations at the EU

(i) Judicial Redress under EU Law

Art 47 of the EU Charter of Fundamental Rights[31] provides that everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this article.

While EU law provides for several avenues by which individuals affected by its application can obtain redress (both judicial and non-judicial), this section focuses on direct challenges to EU legislative and administrative measures via actions for annulment and looks specifically at the criterion of standing which has proved the most significant barrier to litigation at EU level. Post-Lisbon, the term 'Court of Justice of the European Union' is used as an umbrella term for all the judicial bodies set up by the Treaties. This consists of the Court of Justice, the General Court (formerly known as the 'Court of First Instance') and specialised courts.[32]

For completeness, a short overview of the mechanism for indirect challenge through national courts has been included.[33] With regard to the specific context of this report and the possibility of NGOs and interest groups pursuing claims, there is a sub-section on the ability of such groups to directly challenge EU measures at the European level.

(ii) Remedies in national courts

Art 19 TEU (ex Art 220 EC) states that Member States shall provide remedies sufficient to ensure effective legal protection in the fields governed by Union law.
It is possible for the validity of EU acts to be questioned *indirectly* in proceedings arising before national courts. Here, the preliminary reference procedure under Art 267 TFEU (ex 234 EC) seeks to connect national courts to the Court of Justice. It must be noted that this procedure does not constitute an appeal and the decision to refer depends solely on the national court, with the Court of Justice itself having some discretion to accept.[34] However, national courts against whose decisions there is no judicial remedy under national law are obliged to make such references where the question raised (for example, about validity) is

[31] [2000] OJ C364/01; [2010] OJ C83/389
[32] Hartley, TC 'The Foundations of European Union Law,' 7th edition (OUP, 2010) Chapter 2.
[33] For a more detailed analysis see Craig and de Burca, *EU Law: Text, Cases and Materials* (OUP, 2011), Chapter 13.
[34] See Case 104/79 *Pasquale Foglia v Mariella Novello* [1980] ECR 745. Craig and de Burca, p.467 argue that the ECJ began to exercise this discretion with greater fervour from the 1990s onward and may decline to give a ruling on a reference where hypothetical questions are referred, where the question is not relevant to the substance of the dispute, where the question is not formulated with sufficient clarity for any meaningful legal response and where the Court does not have before it sufficient facts for the application of legal rules.

necessary to enable judgment to be given.[35] The acts which can be challenged are those of the institutions, bodies, offices or agencies of the EU.[36]

Art 256(3) TFEU accords the General Court jurisdiction to give rulings in certain areas laid down by the Statute of the Court of Justice,[37] but the majority of these rulings still continue to be decided by the Court of Justice.

(iii) Actions for annulment

EU acts may be the subject of judicial review in actions commenced *directly* before the Court of Justice of the European Union.

The principal treaty provision in this area is Art 263 TFEU (ex Art 230 EC).

Five (5) conditions must be satisfied before an act can be successfully challenged:

(i) The relevant body must be amenable to judicial review
(ii) The act has to be of a kind which is open to challenge
(iii) The institution or person making the challenge must have standing to do so
(iv) There must be illegality of a type mentioned in Art 263(2) TFEU
(v) The challenge must be brought within the time limit stipulated in Art 263(6) TFEU.

Criterion (iii) (standing) has been one of the most contested areas of EU law to date and has been heavily criticised as confining too narrowly the ability of private parties (non-privileged applicants) to challenge legislative and administrative acts.[38]
Jurisdiction with regard to actions by non-privileged applicants was transferred to the General Court in the early 1990s and now such cases only come before the Court of Justice on appeal.[39]

(a) Privileged and quasi-privileged applicants

Art 263 (2) TFEU states that actions may be brought by a Member State, the European Parliament, the Council or the Commission. These applicants are always allowed to bring an action, even where the decision is addressed to some other person or body. The justifications proffered in this regard are that every Union act concerns privileged applicants and so it follows that they should be granted unlimited standing.[40]

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[35] Art 267(3) TFEU
[36] Art 267(1)(b) TFEU
[37] Art 62 of the Statute of the Court of Justice of the European Union.
[38] See Craig and de Burca, above n 2, Chapter 14; Hartley, above n 1, Chapter 12; Wyatt and Dashwood, *European Union Law* (Sweet and Maxwell, 2011), Chapter 6.
[39] Hartley, above n 1, p. 379
[40] See Hartley, TC 'The Foundations of European Union Law,' 7th edition (OUP, 2010) Chapter 12.

In addition, Art 263 (3) TFEU provides that the Court of Auditors, the European Central Bank and the Committee of the Regions may bring proceedings only to protect their prerogatives and so are deemed to be quasi-privileged applicants.

(b) Non-privileged applicants

The Lisbon Treaty now makes the particular form in which the act was adopted (ie as a regulation, directive or decision) irrelevant and therefore removes one of the previous hurdles which existed for non-privileged applicants in establishing standing under Art 230 EC.

Article 263(4) TFEU provides that a natural or legal person may bring an action in three types of cases.

(i) Where the act is addressed to him/her/them;

(ii) Where the act is of direct and individual concern to him/her/them;

(iii) Where the act is a regulatory act which is of direct concern to him/her/them and does not entail implementing measures.

Since the first category is relatively straightforward, this report looks at the second and third types in turn. The second category is the one which has proved most controversial in practice and the third is the most recent change implemented by the Treaty of Lisbon.

(c) Acts which are not addressed to the natural or legal person(s)

Direct concern

The ECJ has ruled that a measure will be of direct concern where it leaves no discretion to those who are entrusted with its implementation and directly affects the legal situation of the applicant. The implementation must result from EU rules without the application of other intermediate rules and thus there must be an unbroken link of causation from the act and the effect on the applicant.[41] Direct concern has also been found where at the time a measure was adopted, there was no real doubt about the manner in which any discretion left to a third party would be exercised.[42]

Individual concern

The crucial test in this area was laid down by the ECJ in the case of *Plaumann & Co v Commission*[43] and it still remains the leading authority after the Treaty of Lisbon. In essence, an applicant can only establish individual concern for a decision addressed to another if

[41] See Cases 41 – 44/ 70 *NV International Fruit Company v Commission* [1971] ECR 411; Case 294/83 *Les Verts v Parliament* [1986] ECR 1339, para 31; Wyatt and Dashwood, above n 7, p.165.
[42] See Case 11/82 *Piraiki-Patraiki v Commission* [1985] ECR 207.
[43] Case 25/62, *Plaumann & Co v Commission* [1963] ECR 95.

he/she is in some way differentiated from all other persons, and by reason of these distinguishing features singled out in the same way as an initial addressee would be.[44]

The test in *Plaumann* has been refined and developed by the ECJ in its subsequent case law, and the ECJ has arguably adopted a more liberal approach to standing in certain areas of EU law – those concerning anti-dumping, competition and state aids.[45]

This test has been fiercely criticised by academics and practitioners alike, as being both practically infeasible and conceptually impossible[46] and makes it incredibly difficult for an applicant to succeed except in a very limited category of retrospective cases.[47]

Notably however, the Court of Justice in *UPA,*[48] rejected Advocate General Jacobs' opinion that the test of individual concern in respect of non-privileged applicants should be revised to include circumstances where the EU measure has or is liable to have a 'substantial effect on his interests' and upheld the test in *Plaumann.* In the Court's opinion, effective redress for individuals could be achieved through national courts via Art 267 TFEU and if this was not possible, the onus was on Member States to provide an effective remedy.

It is noteworthy however, that the Court in 1995 proposed to Member States that the Treaty should be amended to increase the rights of non-privileged applicants.[49] The Member States failed to act on this suggestion and reflects the Court's approach in *UPA* that any amendment to its rules on standing is to be effected by Treaty. The Treaty of Lisbon failed to bring about any such change and instead added a third category of case in which individuals may directly challenge the acts of EU institutions (see below).

Commentators remain optimistic however and view the regime implemented by the Treaty of Lisbon as an opportunity to rectify the inconsistencies in the Court's case law which exist to date.[50]

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[44] Ibid at 107.
[45] See Craig and de Burca, above n 2, pp. 499 – 502; Hartley, above n 1, chapter 12.
[46] See Craig and de Burca above n 2, p. 494; Advocate General Jacobs in Case C-50/00 P, *Unión de Pequeños Agricultores v Council*[2002] ECR I-6677 arguing that the Court's existing case law on standing was incompatible with the principle of effective judicial protection.
[47] See, for example, Cases 106-7/63 *Toepfer v Commission* [1965] ECR 405 where the applicants were a group of German grain dealers who had applied for import licences between 1 October and 4 October 1963 and were affected by a subsequent ban on their applications. The ECJ held that the dealers who had applied on 1 October were affected differently from the others and so were individually concerned.; Case 11/82 *Piraiki-Patraiki v Commission* [1985] ECR 207 where the ECJ held that Greek manufacturers of cotton yarn who had entered into contracts to export cotton to France which had not been carried out were individually concerned by a Commission decision which permitted France to impose restrictions on imports of cotton yarn from Greece.
[48] Case C-50/00 P, *Unión de Pequeños Agricultores v Council*[2002] ECR I-6677
[49] See *Report of the Court of Justice on Certain Aspects of the Application of the Treay on European Union,* Luxembourg, May 1995.
[50] See Hartley p 387 who suggests that a liberal approach should be adopted with respect to standing in order to clarify the law and obtain a jurisprudence which is more consistent with a fair system of judicial review.

(d) A regulatory act which is of direct concern and does not entail implementing measures

The rationale behind this amendment in the Treaty of Lisbon lies in the right of an individual to challenge an act by one means or another if it affects him. Where no measure has been adopted to put the relevant act into effect, he will not be able to challenge the act indirectly (ie via the preliminary reference mechanism under Art 267 TFEU) and so should have the right to bring a direct challenge.

The difficulty with this provision is that the terms 'regulatory act' and 'implementing measure' remain undefined in the Treaty and have not been attributed any specific meaning. With regard to the former, commentators have suggested that it is consistent with 'non-legislative acts of general application,'[51] making Commission regulations which are adopted to implement legislative acts the most common example. In a similar fashion, uncertainty surrounds the inclusion of the term 'implementing measure' and commentators have illustrated that its interpretation and application is by no means straightforward, and may even vary by Member State.[52]

(iv) The ability of representative bodies to bring actions for annulment

NGOs and interest groups are not accorded any special classification with respect to actions for annulment in EU law and so are subject to the same rules as non-privileged applicants. One of the most well-known cases is that of *Greenpeace v Commission*[53] where the ECJ held that Greenpeace together with local individuals and groups lacked standing to challenge a Commission decision to grant funding to Spain for the construction of power stations, on the basis that none of the members it claimed to represent was individually concerned by the measure and neither was Greenpeace itself since it only sought to represent the public interest in the matter which is by its nature diffuse.[54]

Notably however, the utility of the preliminary reference procedure under Art 267 TFEU remains for such bodies. Most recently the Court of Justice in May 2011 ruled that it should be possible for environmental NGOs, such as the German branch of the NGO Friends of the Earth, to challenge decisions which are 'likely to have significant effects on the environment' within the meaning of EU law in the courts of Member States.[55] It is arguable however that a

[51] Ibid. Hartley relies on the intention of those involved in drafting the failed Constitution of the EU – see Doc. CIG 4/04 of 6 October 2003, pp. 428 -9 (Legal Experts Group at the Inter-Governmental Conference that adopted the Constitution of the EU) to draw this conclusion

[52] See Craig and de Burca, above n 2, p. 509.

[53] Case T-585/93 *Stichting Greenpeace Council (Greenpeace International) v. Commission* [1995] ECR II-2205. Appealed to and upheld by the European Court of Justice; see *Stichting Greenpeace Council (Greenpeace International) v. Commission*, Case C-321/95, [1998] ECR I-1651.

[54] Similar outcomes have been reached in Case C-355/08 P *WWF-UK v Council* [2009] ECR I-73.

[55] Case C-115/09 *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV v. Bezirksregierung Arnsberg (Trianel Kohlekraftwerk Lünen intervening)*

decisive factor in this decision was the Aarhus Convention 1998,[56] signed on 25 June 1998 and approved on behalf of the European Community by Council Decision 2005/370/EC of 17 February 2005[57] which applies solely in the environmental context.

For the purposes of this report, it must be noted that there is no equivalent Convention which applies to consumer health or protection and which seeks to ensure access to effective judicial remedies. NGOs and interest groups who are therefore seeking to challenge EU measures in relation to the marketing and advertising of food may therefore encounter difficulties in mounting national challenges in Member States which have strict rules on standing as well as at the level of the Court of Justice where the strict rules on direct and individual concern continue to apply.

(v) Analysis

It can therefore be concluded that the current rules on standing at the ECJ remain a significant barrier to achieving judicial redress for individuals and NGOs/interest groups. While the Art 267 TFEU preliminary reference procedure remains an avenue for indirect challenge to the validity of EU measures, national rules on standing may pose additional barriers in the case of NGOs and the procedure itself fails to subject EU legislative and administrative measures to rigorous scrutiny. Since the Court of Justice seems to have resigned itself on the issue of liberalising the current rules, it seems that any amendments will have to be effected by political will in the form of amendments to the EU Treaty itself.

2. Barriers to Collective Redress for Consumers within Member States and Proposals for Reform

(i) Introduction

It is reasonable to assume that one of the reasons why there is a dearth of food advertising litigation lies in the fact that consumers and consumer groups face considerable difficulties in bringing claims against food producers. The ability of the European Commission to bring and maintain enforcement proceedings is quite limited, and thus places the onus on individuals to pursue the enforcement of their rights through both their relevant domestic legal system and at a European level. The fact that individuals are necessarily required to pursue claims for the enforcement of European Community (EC**)** law is unfortunate, if merely for the fact that the time and money involved in legal proceedings will often discourage individuals from pursuing legitimate and meritorious claims. It is evident that a system that relies on private enforcement of both private and public rights will often operate to the disadvantage of the individual.

[56] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters
[57] See OJ 2005 L 124, p. 1

In recognition of this fact, the Commission has commenced investigating the possibility of introducing a collective redress scheme (also known as a 'class action') at a European level to allow consumers from across Member States to pursue enforcement of EC law against both private and public actors. This would ostensibly include food producers. However, at present, no such system exists. It is apparent that while this deficiency persists, the ability of consumers and consumer groups to bring and maintain claims against food producers will remain severely impaired. This section of the report considers these issues in greater detail.

(ii) Private enforcement of European Community law

It is evident that enforcement litigation brought by the Commission forms only a part of litigation at a European level.[58] Acknowledging that the Commission has a limited capacity to bring such actions, the Commission, European Council and the European Parliament have necessarily encouraged individuals to pursue the enforcement of EC law through national courts.[59] As Kelemen notes, the emphasis placed by these institutions on the individual enforcement of rights has been coupled with steps taken by the ECJ to aid the ability of individuals to pursue the enforcement of their rights through national courts, most notably through the introduction of supremacy, direct effect and state liability and its development of remedial options available to litigants.[60] However, while these developments appear to make it easier for individuals to enforce their rights, it is evident that, as a matter of reality, individuals continue to face considerable hurdles in pursuing their claims through domestic courts.

In its Green Paper,[61] the Commission notes that individuals pursuing claims 'face barriers in terms of access, effectiveness and affordability.'[62] The barriers impeding individuals from pursuing their claims include 'high litigation costs and [the] complex and lengthy procedures'[63] involved in such proceedings. Coupled with the risk inherent in litigation, consumers are often discouraged from pursuing claims particularly where any remedy which they may receive may be outweighed by the cost of pursuing the claim in the first place.[64] These factors have a clear impact on the attitudes of individuals towards judicial enforcement of their rights, with the Commission finding that only 30% of consumers perceive that it is easy to solve disputes through use of the domestic court system.[65]

[58] R. Daniel Kelemen, 'Suing for Europe: Adversarial Legalism and European Governance (2006) 39(1) *Comparative Political Studies* 101, 109.
[59] ibid.
[60] ibid, 109-112.
[61] Commission, 'Green Paper on Consumer Collective Redress' COM (2008) 794 final.
[62] ibid, p 4.
[63] ibid.
[64] ibid.
[65] ibid.

These findings have been confirmed by further studies undertaken by research groups. A 2008 report into consumer attitudes towards available means of redress[66] found that the general barriers to individuals bringing claims to enforce EC law and their rights included: the cost of taking action (including the fact that such costs were often unknown and unquantifiable at the outset of proceedings); a lack of legal knowledge about their rights and methods of enforcement; the time and complexity involved in resolving their case; the risk that they would not receive adequate compensation; and the imbalance of power between the individual and the actor at whom their claim is levelled.[67]

Further, as Schmit notes,[68] there are features specific to the European system that by their nature discourage an individual from pursuing enforcement of his or her rights under EC law through the court system. These include the 'loser pays' rule; the unavailability of flexible lawyer fee arrangements and the limit on forms of compensatory damages available to individuals. The 'loser pays' rule essentially requires the loser in a case to pay both its own and the other party's legal costs in addition to any compensation awarded.[69] This may be contrasted with the United States and other jurisdictions, which allow a court to make more flexible costs orders.[70] While the purpose of this rule is to deter frivolous litigation, the risk of adverse costs consequences will often deter individuals from litigating from the outset regardless of the merits of their claim. Compounding this problem is the fact that in many Member States, legal representatives are 'compensated according to a set process regardless of case outcome.'[71] While 'no win-no fee' arrangements may incentivise frivolous litigation, it is clear that the absence of such costs arrangements may significantly discourage individuals from pursuing claims. Finally, the concept of damages within EC law is more limited than in other jurisdictions and 'punitive damages are virtually absent.'[72] Thus the risk of adverse cost implications for individuals is increased, and it is understandable why individuals, in light of this paradigm, often elect to abandon their claims.

(iii) Collective redress schemes

Individuals suffer adverse economic consequences as a result of their inability to pursue enforcement of their rights under EC law. These adverse consequences include being subjected to uncompensated loss and the distortion of an individual's economic behaviour.[73]

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[66] Civic Consulting of the Consumer Policy Evaluation Consortium, 'Study regarding the problems faced by consumers in obtaining redress for infringements of consumer protection legislation, and the economic consequences of such problems: Consumer attitudes towards available means of redress' (2008) *Framework Contract Lot 2*, DG SANCO.

[67] ibid, p 4.

[68] Joan T. Schmit, 'Factors Likely to Influence Tort Litigation in the European Union' (2006) 31(2) *The Geneva Papers* 304.

[69] ibid, 307.

[70] ibid.

[71] ibid, 308.

[72] ibid, 310.

[73] Civic Consulting of the Consumer Policy Evaluation Consortium, 'Study regarding the problems faced by consumers in obtaining redress for infringements of consumer protection legislation, and the economic consequences of such problems: Main Report' (2008) *Framework Contract Lot 2*, DG SANCO, pp 3-4.

These losses are compounded by the fact that private actors have little incentive to alter their behaviour given that it is unlikely that they will be held accountable.[74] To the extent that these problems persist, it is clear that reform is necessary to ensure that individuals have a greater ability to pursue enforcement of their rights under EC law.

Recognising that a system that relies on private enforcement of EC law is unsatisfactory in that the practicalities of such a system deter individuals from pursuing their claims, the Community is now considering the introduction of a collective redress scheme at a European level. The obvious benefit of such a scheme is that it would allow the bundling of individual claims, reducing the financial risk to the individual, spreading the risk of failure and encouraging both private and public actors against whom such claims are brought to negotiate satisfactory outcomes with the claimant group.

No such scheme currently exists. Rather, there is a patchwork of schemes in various Member States. Currently, thirteen Member States have collective redress schemes. The Commission has assessed the effectiveness of these schemes, and its conclusions were as follows: the majority of the schemes contain elements that are effective and elements that are not; collective redress schemes add value in comparison to systems relying on individual claims or alternative dispute resolution schemes; and the efficiency and efficacy of the schemes could be improved.[75] The conclusions to be drawn from these findings are necessarily limited, given that these schemes have been employed in only a small number of cases.[76]

While there is no collective redress scheme currently in place at a European level, there are two Commission Recommendations[77] that have been introduced to help facilitate alternative dispute resolution procedures between individuals and private actors. Further, there are two relatively recent instruments introduced to increase the accountability of private actors and increase the extent to which EC law is enforced. The *Injunctions Directive*[78] sets out a procedure for consumer associations and public authorities to seek urgent relief to prevent infringements in other Member States. The *Regulation on Consumer Protection Cooperation*[79] allows named national authorities to request that another Member State authority act on an infringement. Neither of these instruments confers a right of compensation on individuals.

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[74] ibid, p 4.

[75] Supra (n 61).

[76] Ibid.

[77] Commission Recommendation 98/257/EC on the principles applicable to the bodies responsible for the out-of-court settlement of consumer disputes, (1998) OJ L 115, p 31 and Commission Recommendation 2001/310/EC on the principles for out-of-court bodies involved in the consensual resolution of consumer ADR,(2001) OJ L 109, p 56.

[78] Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests, (1998) OJ L 166, p 51.

[79] Regulation (EC) No 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws, (2004) OJ L 364, p 1.

The Commission notes that all of these instruments are unsatisfactory.[80] Cross-border enforcement is not yet effective,[81] and only two cross-border cases have been brought under the *Injunctions Directive* due to the 'financial risk for the entity bringing the claim…[and] the complexity and diversity of national injunctive proceedings.[82] Further, alternative dispute resolution mechanisms are not available to consumers in all Member States.[83]

In the Commission's view, the fact that commercial malpractice often goes unpunished means that collective redress may provide an effective alternative for the individual enforcement of rights under EC law.[84] The Commission notes that this is supported by the fact that 76% of European consumers indicated that they would be more willing to pursue enforcement of their rights through the court system if their claim could be bundled with those of other consumers.[85] Therefore, while noting that it is important to avoid introducing a system that rewards unmeritorious claims, introduces the concept of punitive damages or is excessively costly, the Commission notes that there is a strong case for introduction of a collective redress scheme.[86]

Nonetheless, the Commission is currently considering four different options to determine which will improve the ability of consumers to enforce their rights under EC law. The first involves taking no action. However, the Commission notes that this option:

> has the disadvantage of leaving different means of redress available to consumers, depending on their place of residence or on the Member State where the transaction took place or the damage occurred. This fragmented situation could lead to distortions of competition and give consumers across the EU a different level of redress. This option would possibly not provide satisfactory redress to a number of consumers concerned or remedy obstacles to the Single Market.[87]

Therefore, this option will likely just maintain the status quo, which, for the reasons outlined in the previous section, is unsatisfactory and merely reinforces the inability of individuals to pursue enforcement of their rights under EC law.

The second option involves co-operation between Member States. This option effectively rests on the idea that a Member State that has its own domestic collective redress scheme should allow individuals from other Member States to participate in that scheme where they have been affected by a breach or infringement committed by a private actor subject to the relevant scheme. The Commission notes that this option also has a number of problems. The

[80] supra (n 61) p 6.
[81] ibid.
[82] ibid.
[83] ibid.
[84] ibid.
[85] ibid.
[86] ibid.
[87] ibid, p 8.

first is that Member States with collective redress schemes may 'be hesitant to grant resources to their entities for bringing collective redress actions on behalf of or assisting consumers from other Member States before their courts when entities in Member States without collective redress mechanisms do not have such an obligation.'[88] Further, an equitable mechanism for the allocation and burden of costs associated with proceedings brought under these schemes would need to be introduced, which may be difficult to negotiate.[89]

The third option involves a mix of policy instruments. These involve: improving alternative dispute resolution mechanisms; extending the scope of national small claims procedures to mass claims; extending the scope of the Consumer Protection Cooperation Regulation; encouraging businesses to improve their complaint handling schemes; and taking actions to raise consumers' awareness of existing means of redress.[90] The extent to which these policy instruments would ameliorate the ability of individuals to enforce their rights under EC law is unclear, particularly given that the Commission notes that this option will comprise both binding and non-binding instruments.[91]

The fourth option involves a judicial collective redress procedure. The Commission explains this option in the following terms:

> This option proposes a non-binding or binding EU measure to ensure that a collective redress judicial mechanism exists in all Member States. Such a procedure would ensure that every consumer throughout the EU would be able to obtain adequate redress in mass cases through representative actions, group actions or test cases.[92]

The Commission states that such a system needs to avoid encouraging a litigation culture.[93] Further, issues of financing, standing, ensuring the relative meritorious nature of claims, opt-in and opt-out procedures all require resolution before such a scheme could be introduced.

In respect of financing, the Commission notes that costs may prevent individuals from participating in a collective action.[94] Possible solutions canvassed by the Commission include cutting down the costs of such actions (by exempting them from court fees, or capping legal fees), allowing banks or litigation funders to fund such actions, allocating a share of compensation to the representative body bringing the action on the individuals' behalf or Member State funding.[95] The Commission suggests that the use of judicial

[88] ibid, p 9.
[89] ibid.
[90] Ibid.
[91] ibid.
[92] ibid, p 14.
[93] ibid.
[94] ibid.
[95] ibid.

certificates may be useful in ensuring that claims have merit before they are heard.[96] The issue of standing could possibly be resolved through the conferral of legal standing on a range of entities, such as consumer groups or ombudsmen, deemed to be suitable for bringing claims on behalf of a group of individuals.[97] In addition to these issues, questions of whether such a scheme should be opt-in or opt-out and what law should apply to a claim involving individuals across a number of Member States are yet to be resolved.[98]

These four options are currently under review. A hearing on collective redress was held on 5 April 2011 and the outcome of that hearing is yet to be released. The release of this information will provide a clearer picture of the likely path to be taken by the Commission. The extent to which a collective redress scheme will improve the ability of individuals to pursue enforcement of their rights under EC law remains unclear. A recent report echoed, in a far more emphatic manner, the Commission's conclusion that the collective redress schemes currently employed in Member States are imperfect and fail to achieve their objectives.[99] However, the same report found that a collective redress scheme has much to commend to it. These benefits include the fact that: the length of proceedings is mostly reasonable; the cost to the individual is not significant, although they may be high for representative bodies bringing such actions; collective redress schemes alleviate the burden of litigation costs for the individual; private actors are unlikely to be subject to unreasonable costs; a private actor is unlikely to be subject to a penalty that is disproportionate to the harm it has done; no private actor has ever become insolvent as a result of such an action; there is no evidence indicating that the introduction of such a scheme would adversely affect competition within the European Union.[100]

[96] ibid.

[97] ibid.

[98] ibid. One of the possible solutions mentioned is that it is the law of the Member State where the private actor is incorporated that should apply to such cases.

[99] Civic Consulting and Oxford Economics, 'Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union' (2007) *Tender No. SANCO/2007/B4/004,* DG SANCO, p 2.

[100] ibid, p 10-11.

D. THE FREE MOVEMENT OF GOODS VERSUS UNILATERAL ACTION BY MEMBER STATES

Although the EU requires consumer protection requirements to be integrated into all its policies and activities (Article 12 TFEU, ex Article 153 (2)), the creation of an internal market and the principle of the free movement of goods remains its founding objective, leading to clashes between Community directives and regulations that attempt to harmonize laws across the EU on the one hand and more stringent measures adopted by Member States, usually in the interests of public health or consumer protection, on the other.

The relevant Treaty provisions that facilitate the functioning of a common internal market are Article 35 (ex Article 28) which states that 'quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States', and Article 114 (ex Article 95), paragraph 1, which encourages the adoption of EU-wide measures that approximate those laws of the Member States that 'have as their object the establishment and functioning of the internal market.' In contrast to these, there is Article 36 (ex Article 30), which permits prohibitions and restrictions on imports by Member States in the interests of, *inter alia*, public health; and also Article 114, paragraphs 4-10, which set out the procedure to be adopted by Member States should they wish to retain national measures to protect public health and the environment, even after the adoption of harmonization measures at the European level.

The appropriate balance to be struck between these provisions has been fashioned by the ECJ through a body of case law which is sympathetic, on the whole to enabling the free circulation of goods throughout the EU and demands fairly strict justifications from Member States for the imposition of more restrictive measures. Some of these cases deal with additional requirements imposed by Member States on the presentation, marketing and labelling of foodstuffs, nutritional supplements, cosmetics and genetically modified organisms and are therefore of relevance to this report. Some of these cases are summarized below to given an idea of the salient principles set down by the ECJ.

- *Case 120/78*

The impugned law in this case was a German marketing provision prescribing a minimum alcoholic strength for various categories of alcoholic products, and which had the effect of prohibiting the marketing, within German territory, of fruit liqueurs (cassis de Dijon) which had an alcohol content of only between 15-20 percent as opposed to 25 percent required by the German law. The question before the ECJ was whether this provision constituted a measure having an effect equivalent to quantitative restrictions on imports. The Court answered the question in the affirmative stating that the German law promoted beverages having higher alcoholic content in Germany, excluding products lawfully marketed in other Member States and thus constituted an obstacle to trade. Of relevance to this report is the fact that the Court rejected the German government's justification of the provision on the grounds

of public health and consumer protection,[101] indicating that the Court is unwilling to allow wide discretion to Member States to determine what is necessary to protect the health of their citizens, especially when the effect is the prohibition of marketing of certain products. The Court reasoned that beverages with high alcoholic content could be consumed in a diluted form. Importantly for the purposes of this report, it also held that Germany's concerns about the fairness of commercial transactions and consumer protection could be remedied by stricter labeling and packaging requirements. This suggests that the Court is more amenable to restrictive measures applied to the presentation of foodstuffs as opposed to outright bans on marketing.

- *Case 216/84*

In this case, the French government sought to prohibit the importation and sale of substitutes for milk powder and concentrated milk, under any name whatsoever on the grounds of public health and consumer protection. France sought to justify its prohibition on the grounds that (a) there were several problems with informing consumers that they were being offered substitutes (b) there was a risk of confusion on the part of the consumers regarding the characteristics of the product and (c) there was a possibility that cheaper substitutes would supplant milk products and ultimately deprive consumers of choice. The Court considered that adequate labelling requirements were sufficient to prevent consumers from being misled and that the case law of the ECJ clearly established that national measures to ensure that products were accurately described could be adopted without infringing the principle of free movement of goods. As far as the argument about substitutes supplanting milk products goes, the Court stated that a member state may not plead consumer protection to shield a product from the effects of price competition. Importantly, the Court also made some pronouncements about the risks to public health posed by the availability of food products of low nutritional content, which present an obstacle to efforts made by Member States to ensure that their citizens have healthier options available. It stated that Member States could not invoke public health grounds to prevent the import of a product by arguing that its nutritional value was lower or its fat content higher than other products already available on the market.[102] Clearly, the Court looks upon blanket bans on the import of products unfavourably, but is keen to promote more comprehensive labelling requirements as an indirect method of facilitating healthier choices by consumers about food.

- *Case 90/86*

The case concerned the prohibition by Italy of the sale of pasta made from common wheat or from a mixture of common and durum wheat in order to protect consumers by ensuring the superior quality of pasta. Once again, the ECJ struck down the prohibition which it found to

[101] It argued that 'the purpose of the fixing of minimum alcohol contents by national legislation is to avoid the proliferation of alcoholic beverages on the national market, in particular alcoholic beverages with a low alcohol content, since, in its view, such products may more easily induce a tolerance towards alcohol than more highly alcoholic beverages.' (para 10).

[102] *'The mere fact that an imported product has a lower nutritional value does not pose a real threat to human health.'* (para 15).

be disproportionate to the aim of consumer protection. It stated that the latter could be 'satisfied by *less restrictive means* such as the compulsory indication of the precise composition of the products marketed or the introduction of a special description confined to pasta made exclusively from durum wheat.' (emphasis supplied) Thus, the availability of stricter measures in the form of labelling requirements allows the Court to strike down prohibitions on the marketing of foodstuff and thus, uphold the guiding principle of the free movement of goods.

A similar ruling was made by the ECJ in C-383/97, where a German law on foodstuffs had the effect of prohibiting the marketing of a particular type of ham. The Court held that it was 'contrary to Article 30 (now Article 36) of the Treaty for national rules to prohibit, for reasons of consumer protection, the marketing of foodstuffs lawfully manufactured and marketed in another Member State, where consumers are protected by means of labelling in accordance with the provisions of Directive 79/112 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs, in particular those concerning the name of the product and the list of ingredients.'[103]

- *Case 298/87*

The Court held that Article 36 (ex Article 30) precluded a member state from applying, to products imported from another member state where they were lawfully manufactured and marketed, national rules which reserved the right to use the name 'yoghurt' solely to fresh yoghurt, to the exclusion of deep-frozen yoghurt, when the characteristics of the latter product were not substantially different from those of the fresh product, and when appropriate labelling, together with an indication of the date by which the product should be sold or consumed, was sufficient to ensure that consumers are properly informed.

It also held that 'the provisions of Directive 79/112/EEC relating to the labelling and presentation of foodstuffs, in particular Article 5,[104] must be interpreted as precluding the application of national rules which refuse to allow imported or domestic products which have been deep-frozen to bear the name 'yoghurt' where those products, for the rest, comply with the requirements laid down by the national rules for fresh products to bear that name.'

Although the Court acknowledged that it was legitimate for Member States to ensure that consumers were adequately informed about the products offered to them, it also stated that such regulations had to proportionate to the aim, and when faced with various options, Member States were obliged to choose the least restrictive the means that least restricted free

[103] para 43.
[104] Article 5 states that the name under which a foodstuff is sold should be the name prescribed by applicable laws, or in their absence, the customary name in the member state where the product is sold to the ultimate consumer, or 'a description of the foodstuff and, if necessary, of its use, that is sufficiently precise to inform the purchaser of its true nature and to enable it to be distinguished from products with which it could be confused.'

trade. In this light, the Court considered it sufficient to require the compulsory inclusion of 'deep-frozen' rather than forbidding the use of the name 'yoghurt' altogether.

- *C-12/00*

Similar to the French yoghurt case, this case concerned a Spanish decree which prohibited the marketing of cocoa and chocolate products to which vegetable fats other than cocoa butter had been added from being marketed as 'chocolate', requiring them to be sold as 'chocolate substitutes' instead. This requirement was imposed in spite of the fact that such products were lawfully manufactured and marketed as 'chocolate' in other Member States. The ECJ held that this law violated the principle of the free movement of goods and stated that it was disproportionate to the needs of consumer protection. Instead, it held that 'the inclusion in the label of a neutral and objective statement informing consumers of the presence in the product of vegetable fats other than cocoa butter is sufficient to ensure that consumers are given correct information.'[105] The ECJ was also influenced by the fact that there was some degree of harmonization between Member States through Council Directive 73/241/EEC of 24 July 1973 on the approximation of the laws of the Member States relating to cocoa and chocolate products intended for human consumption.

In a more recent case (C-47/09) concerning a similar directive, the Court held that an Italian law which permitted the addition of 'pure' or the phrase 'pure chocolate' to the labelling of chocolate products which do not contain vegetable fats other than cocoa butter violated the provisions of Directive 2006//36/EC relating to cocoa and chocolate products intended for human consumption, read in conjunction with Directive 2000/13/EC on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs. Although the Court agreed with the Italian republic that consumers were entitled to the correct information, it considered the alteration of sales names not to be an appropriate method for achieving the objective, even though the use of the adjective 'pure' was not made compulsory by the Italian legislation. The Court considered this adjective not to constitute a 'neutral and objective' description and held that the mere authorization to use this sales name (which was different from those contained in the harmonizing Community law) suggested the 'existence of a difference between the essential characteristics of the product concerned.' The Court went so far as to hold that by permitting the co-existence of two categories of sales names for essentially the same product, the Italian law was likely to mislead consumers and deprive them of 'neutral and objective' information. This case suggests that the ECJ is likely to submit even labelling authorizations (leaving aside labelling requirements) independently introduced by Member States to great scrutiny when they derogate from harmonizing Community measures.

- *C-192/01*

In this case, the Commission challenged a Danish administrative practice that permitted enriched foodstuffs lawfully produced or marketed in Member States to be marketed in

[105] para 93.

Denmark only if it could be shown that such enrichment with nutrients met the needs of the Danish population. This case gives an idea of the discretion that is vested in an individual member state to safeguard the health of its citizens in the absence of harmonising Community legislation.[106] In default of harmonisation, the Court held that in principle, it was for Member States to decide on 'their intended level of protection of human health and life.' However, applying the principle of proportionality, a fairly high burden was placed on national authorities to demonstrate 'in each case, in the light of national nutritional habits and in the light of the results of international scientific research, that their rules are necessary for the protection of public health and, in particular, that the marketing of the products in question poses a real risk thereto.'

In this case, the Court held that the systematic prohibition by Danish law of enriched foodstuffs prevented the detailed case-by-case identification and assessment of real risks to the public health, which was required by the principle of free movement of goods. The ECJ laid down similar rules in joined cases C-211/03, C-299/03, C-316/03-C-318/03 and C-154 and 155/04.

The above cases have all discussed the validity of more stringent measures introduced by individual states. In the *Tobacco Advertising* case,[107] Germany challenged the ban of the European Parliament on tobacco advertisement. The measure was struck down by the ECJ, as it did not provide for an approximation of laws such that it would foster the free movement of goods in the internal market, nor did it eliminate distortions of competition. This case demonstrates that the ECJ is unlikely to uphold outright bans on the advertisement of foodstuffs. Legislation which allows only certain products to make health claims ought to allow for an accessible procedure which permits producers to obtain a 'license' to market their products in a particular way.[108]

[106] At the time of the case, there was no Community legislation laying down the conditions under which nutrients, such as vitamins and minerals, could be added to foodstuffs for daily consumption.
[107] Case C-376/98 *Germany v Commission* [2000] ECJ I-08419.
[108] Joined Cases C-154/04 and C-155/04 *The Queen, on the application of Alliance for Natural Health and Others V Secretary of State for Health and National Assembly for Wales.*

E. THE PRIVATE SECTOR- BEST PRACTICES, THEIR IMPLEMENTATION AND EFFECTIVENESS

This section sets out pledges, commitments and codes of conduct adopted by various associations and corporations within the food industry. Where literature is available, their implementation and effectiveness is also discussed. The Appendix in particular, sets out key points from initial sources and identifies relevant EU-wide or country-wide pledges, commitments and similar responses.

National and European-wide pledges are part of a patchwork of overlapping voluntary commitments that range from international trade association initiatives to internal company guidelines. These are not necessarily coherent in standards and thresholds[109]. Participation in all pledges or commitments is entirely voluntary and it is open to companies to choose whether to sign-up to commitments at any level- national, regional or international- or to produce a separate internal policy. Pledges may vary in the way they define a child (under 12 is minimum age in those examined), in defining when marketing is directed at children (Often only where children ≥ 50% of the whole audience), and, in nutrient criteria and standards that exempt products from marketing restrictions.

There is some information available on implementation of pledges. For example, the number of participating companies and their market coverage may be reported along with some of the steps taken to implement standards. However, the question of effectiveness is more complex and requires long-term studies that assess both marketing practices and any changes in consumer behaviour. Even then, it is very difficult to disentangle potential causal factors and conclude that one particular factor is responsible for a change. Another observation is that many companies seem to employ voluntary commitments on advertising as a strategic tool to preserve or enhance their image amongst consumers.
As a general trend, it appears that industry is given a chance at self-regulation, with governments assessing its effectiveness and then implementing legislation on finding self-regulation insufficient. This is particularly the case with respect to regulating advertisements towards children. The major problem preventing efficient self-regulation is that the industry has no enforcement mechanism.

UNESDA (Union of European Soft Drinks Associations) Pledge – Contribution by UNESDA and its corporate members to the EU Platform for Action on Diet, Physical Activity and Health.

[109] *An analysis of the content of food industry pledges on marketing to children.* C. Hawkes & J.L. Harris, Public Health Nutrition. 2011 Aug; 14(8), 1403-1414. Available at http://www.yaleruddcenter.org/resources/upload/docs/what/advertising/MarketingPledgesAnalysis_PHN_5.11.pdf

UNESDA is the European non-alcoholic beverages association. Its members are soft drinks companies who conduct their business in at least five EU Member States and also national associations from across the EU27 and beyond.

Commitments to the EU Platform for Action on Diet, Physical Activity and Health
Commitments to act responsibly in the area of marketing and communications were taken in January 2006 and comprise:

- No advertising on TV, in print or online to children under 12
- Not offering our products for sale in primary schools across the EU
- Ensure that in secondary schools, where our products are offered for sale, that there is a variety of drinks formats including water, juices and no- and low-sugar varieties
- Ensure a variety and choice of beverage formats and compositions is available in the marketplace.
- In 2008 UNESDA made the commitment to extend its policy to not advertise to children under the age of 12 to cinemas.

Digital Marketing Communications Guidelines 2010

1. UNESDA members will ensure that internet sites, content and related technologies are designed for visitors over the age of 12; as such UNESDA members will ensure creative development and agency briefings are designed to predominantly appeal to children over the age of 12.
2. UNESDA members will apply the minimum 50% over-12 audience threshold to all placements of marketing communications on-line and will only advertise on third party sites accordingly.
3. UNESDA will leverage trusted 3rd party audited site traffic data to confirm that less than 50% of site audience is children less than 12 years of age. Content re-adaptation or additional action will be required to ensure viewer age is in line with our policies and principles.
4. Age reaffirmation and/or equivalent technology will be always used if the site captures Personally Identifiable Information (PII).
5. UNESDA members will apply the 50% over-12 audience profile threshold based on available technology to ensure it is in line with our digital marketing communications principles and commitments.

UNESDA has also launched a Code of Conduct for sales and marketing of Energy Shots- 15th June 2011-11-01, available at http://www.unesda.org/blog/code-conduct-energy-shots

Corporate signatories to the original UNESDA commitments are C & C (Ireland), the Coca-Cola Company, Coca-Cola Enterprises, the Coca-Cola Hellenic Bottling Company, GlaxoSmithKline, the Orangina Group (formerly Cadbury Schweppes European Beverages), Pepsi Beverages Europe and Unilever.

Implementation

UNESDA mentions the following activities as part of the implementation of their 'commitments':

- Extensive staff training
- Systematic removal of products from vending machines in primary schools
- Change of panels to unbranded in vending machines in secondary schools across the EU
- Briefing of all marketing agencies on the letter and spirit of the commitments

Compliance

This can be gauged from the 2007 Monitoring Report, available at http://www.unesda.org/independent-auditing-unesda-commitments :
This is the only monitoring report available on the UNESDA website, or that could be readily found in an Internet search. It is now out of date but at the time, they felt there were pleasing levels of compliance across Europe. Monitoring is by independent consultants. The following are some details of compliance across different aspects:

Schools (monitored by PriceWaterhouse Coopers)

- No vending in primary schools- compliance rate of 93.9% (sample size unknown)
- Unbranded vending machines in Secondary Schools- compliance rate of 69% (sample size unknown)
- Parents and educators involved in selection of drinks offered in Secondary Schools- compliance rate of 53.5% (sample size unknown)

Advertising (monitored by Xtreme)

- No advertising in programmes with children as 50% or more of viewers- 99.79% compliance (two of 975 spots non-compliant)
- Print publications (from signatories)- all compliant
- Internet publications all compliant

Products, choice and portion size in the market

- 40% of no/low calorie products on the market were introduced after 2000
- Kcal per litre sold- reduction from 36 kcal/litre in 2000 to 34 kcal/litre in 2005

Effectiveness

It is no surprise that the advertising monitoring found high levels of compliance when only two from 975 advertising spots were considered to be adjacent to programmes with a child audience (only under 12s) above 50%. Such a narrow definition of marketing to children is unlikely to have made a significant change to advertising practice as noted in this criticism:

Bruce Silverglade, legal director of the Center for Science in the Public Interest (CSPI) said that stricter curbs on current carbonated beverage advertising should have been employed.
'Coke and Pepsi never did heavy-duty direct advertising to kids under 12 in the US, but instead marketed to American children through other means such as advertising on TV programs viewed by families,' he said.
'The results have been disastrous for childhood obesity rates in the US, Instead of mimicking the country's policy worldwide, the companies should have agreed to the stricter curbs demanded by the British government.'[110]

Dr Corrina Hawkes also notes that commitments are generally only concerned with direct marketing to children and not family oriented marketing strategies. The audience proportion required for a programme to be considered direct to children is much higher than regulatory standards in certain Member States. For example, the UK prohibits marketing of certain foods where just 20% or more of the audience are under *sixteen*. Seen in this light, the UNESDA commitments are very much minimum standards.[111]

The lower rates of compliance with commitments to unbranded vending machines in Secondary Schools and very little change in the average kcal/litre sold suggest that it is not possible to say that the commitments have had an effect on industry or consumer behaviour in the short period measured.

[110] See http://www.beveragedaily.com/Markets/Soft-drink-behemoths-attacked-over-global-ad-pledges

[111] *An analysis of the content of food industry pledges on marketing to children.* C. Hawkes & J.L. Harris, Public Health Nutrition. 2011 Aug; 14(8), 1403-1414. Available at http://www.yaleruddcenter.org/resources/upload/docs/what/advertising/MarketingPledgesAnalysis_PHN_5.11.pdf]

Internet Advertising Bureau (IAB): **Good Practice Principles for Online Behavioural Advertising (2009)**
These are available at http://www.youronlinechoices.com/wp-content/uploads/2010/11/IAB-UK-Good-Practice-Principles-for-Online-Behavioural-Advertising.pdf

This is not specific to the food and drink industry but is an example of online marketing principles developed by the online marketing industry regardless of product. IAB Members represent some of the leading industry service suppliers in online marketing in the UK, covering everything from creative agencies to portals, media owners to auditors.

Summary

The Principles complement and, in some cases, supplement the UK legal framework. For the avoidance of doubt, Members based in the EU and subject to UK law remain subject to the application of the Data Protection Act 1998 (as amended) and Privacy and Electronic Communications Regulations 2000

What is Online Behavioural Advertising?

Online Behavioural Advertising (OBA) is intended to make online display advertising more relevant to users' likely interests. Providers of OBA create audience segments based on web sites visited over a period of time with a particular browser. These audience segments are then used to provide relevant advertising to users within that segment. For example, a user may visit sports sites often and thus be categorised in the 'sports fan' segment. They would then be served advertisements that are relevant to the interests of a sports fan.

Relevant principles:

- No Member shall create OBA segments intended for the sole purpose of targeting children under the age of 13 years
- Each Member shall provide information on how to decline OBA with respect to that Member and ensure that this information is prominently displayed and easily accessible on its website.
- Each Member shall make information available to educate users about OBA and ensure that this information is easily accessible.

Principles for Compliance

- These Principles are self-regulatory and prospectively binding on each Member in respect of their UK operations.

- Within six months of signing these Principles, each Member shall self-certify that the relevant portions of their business meet these principles in accordance with processes and procedures to be set out by the OBA Board.
- Each Member shall explicitly acknowledge its commitment to these Principles.
- This acknowledgement shall involve a statement on the Member's own website or in its privacy policy.

Implementation

The only information publically available on UK implementation and compliance is from IAB themselves, available at http://www.youronlinechoices.com/good-practice-principles The following media companies are complying with the IAB Good Practice Principles and this has been independently reviewed by auditors, ABCe: (Although these are not exclusively associated with the food industry, they have been included as a wider example of market self-regulation).

- 24/7 Real Media
- AOL / AOL Advertising
- Audience Science Inc
- Crimson Tangerine Ltd
- Google UK Ltd
- MSN / Microsoft Advertising
- Specific Media UK
- Tribal Fusion
- ValueClick Media
- Yahoo! SARL

Signatories and are complying with the IAB Good Practice Principles

- Adconion Media Group
- Blinkx
- Unanimis

Signatories and committed to the IAB Good Practice Principles

- Addvantage Media
- Jemm Media
- nugg.ad
- Phorm

Effectiveness

The Audit involves varying levels of scrutiny from completion of a self-certification questionnaire to actual evidence that the signatory does not offer targeting of under-13s.

The EU Pledge Programme

Summary

In December 2007, eleven major food and beverage companies[112] pledged their commitment to change the way in which they advertise to children ('EU Pledge Programme'). The EU Pledge Programme is a voluntary commitment made to the EU Platform for action on Diet, Physical Activity and Health, a forum comprising European-level organizations, which was established to contain and reverse unhealthy consumption patterns in the European Union.

The participating undertakings were expected to publish company-specific voluntary measures on advertising and implement them by the end of 2008. All company commitments were expected to meet the following minimum standards:

Food and beverage products were not to be advertised to children under the age of 12 years on television, through print media or on the internet, barring products which fulfilled specific nutrition criteria based on accepted scientific evidence and/or applicable national and international dietary guidelines.

Participating companies were not to engage in any commercial communications related to food and beverage products in primary schools, except where specifically requested for by or agreed upon with, the school administration for educational purposes.

Participating companies are required to monitor and report on the implementation of their commitments. They have committed to carry out independent, third party compliance monitoring on annual basis.

The European Snacks Association and some of its leading corporate members (Intersnack, Lorenz Snack- World, Procter & Gamble, Unichips, Zweifel Pomy-Chip and Estrella Maarud) subsequently joined the EU Pledge Programme. Participation in the Programme remains open to all food and beverage companies active in Europe.

Implementation

So far, two monitoring reports (for the years 2009 and 2010) have been published.

[112] The eleven participating companies are Burger King, Coca-Cola, Groupe Danone, Ferrero, General Mills, Kellogg, Kraft, Mars, Nestlé, PepsiCo and Unilever.

Monitoring Report 2010

The overall compliance rate for television advertising, which was based on 586,809 advertising spots promoting products of signatories of the EU Pledge Programme in six countries, was 98.87%. The compliance rate for print advertising was 100%, as ascertained from 100 children's publications across four sample markets. The compliance rate for online advertising was nearly 100%, with only one instance of non-compliance found about 50 websites sampled. With regards to communications in primary schools, pledge member companies achieved a slightly lower overall compliance rate of 92% amongst the sample size of 400 schools across four countries. The report also reflected a decrease of 83% (over a five-year period) in the exposure of children to television advertising for EU Pledge members' products that do not meet companies' nutritional criteria.[113]

Monitoring Report: 2009

The overall compliance rate for television advertising, which was based on 414, 553 advertising spots promoting products of signatories of the EU Pledge Programme in six markets, was 99.8%. The compliance rate for both print (with two instances of non-compliant advertising across six markets) and online advertising (with one instance of non-compliant advertising) was close to 100%. As regards communications in primary schools, participating companies achieved an overall compliance rate of 93% amongst schools in four countries. The report reflected a decrease of 92% (over a four-year period) in the exposure of children to television advertising for EU Pledge members' products that do not meet companies' nutritional criteria.[114]

Effectiveness

The companies participating in the EU Pledge Programme represent over two-thirds of the food and beverage advertising expenditure in the EU. When this is read together with the high level of compliance by participating businesses with their company-specific commitments on advertising, it is safe to infer that the EU Pledge Programme has had a marked impact on the trends of food and beverage advertising to children in the EU. At the same time, the absence of certain important players (such as McDonalds) in the EU Pledge Programme highlights the need to garner a wider participation base.

[113] This figure corresponds to programmes with a majority of children under 12 in the audience.
[114] This figure corresponds to programmes with a majority of children under 12 in the audience.

CIAA - Principles of Food and Beverage Advertising

Summary

The Confederation of the Food and Drink Industries of the EU ('CIAA') (now, FoodDrinkEurope) issued Principles of Food and Beverage Product Advertising in 2004.[115] The principles have a two-fold objective: to act as a recommendation to companies to guide the development, execution, placement and monitoring of their advertisements and to strengthen national self-regulatory mechanisms in food and beverage advertising.

The key principles concerning advertising include the following:

- Presentation of food products should accurately represent all material characteristics advertised - including size, and content, nutrition and health benefits and should not mislead consumers.
- Advertisements should not encourage or condone excess consumption and portion sizes should be appropriate to the setting portrayed.
- Where a food or drink product is presented in the context of a meal, a reasonable variety of foods should be shown, to reflect generally accepted good dietary practice.
- Advertisements should not undermine the promotion of healthy, balanced diets.
- Advertisements should not undermine the promotion of a healthy, active lifestyle.

The CIAA also included an additional set of principles on food and beverage advertising to children, intended to supplement the aforementioned principles:

- Advertisements should not mislead about potential benefits of the consumption of a product.
- Advertisements should not undermine the role of parents and other appropriate adult role models in providing valuable dietary guidance.
- Advertisements should not include any direct appeal to children to persuade their parents or other adults to buy advertised products for them.
- Advertisements directed toward children should not create a sense of urgency.
- While fantasy, including animation, is appropriate in communication with younger as well as older children, care should be taken not to exploit a child's imagination in a way that can encourage poor dietary habits.
- Products derived from or associated with television program content primarily directed to children should not be advertised during or adjacent to that program.
- Broadcast or print media personalities (whether live or animated) should not be used to sell products, premiums or services in a way that obscures the distinction between program or editorial content and commercial promotion. For example, commercials or advertisements featuring characters from programs or publications primarily directed

[115] These principles were revised by CIAA in 2006.

to children should not be adjacent to programs or articles in which the same personality or character appears.

Implementation

As of July 2010, fifteen countries had codes implemented by self-regulatory organisations for advertising, advertising associations or food industry trade associations that provided guidance on marketing of food to children, based on the principles advanced by the CIAA.[116] The principles also formed the basis for the Framework for Responsible Food and Beverage Communications, adopted by the International Chamber of Commerce in 2004. Several companies have not only adopted the principles laid down by the CIAA, but gone beyond by applying a stricter set of principles.[117]

The European Snacks Association (www.esa.org.uk)

The ESA 'pledges to change our food advertising to children and join the EU Pledge Initiative.' It foresees that this will involve recommending member companies (including Pepsi and Kraft) do not directly advertise to children under 12 on TV, print and internet except for products which fulfill specific nutrition criteria (based on accepted scientific evidence or dietary guidelines). Additionally it will recommend to member companies not to engage in any commercial communications related to savoury snack products in primary schools unless specifically requested by the school administration.

In a variety of documents on their website under the heading of 'industry issues' the ESA undertakes a variety of health related initiatives. Generally, it promises to create a consumer friendly website on healthy lifestyles and encourages members to look at the site, to perform healthy lifestyle audits on its members and promote investment in this area.

With respect to labelling, they only promise to engage and encourage their members. They will engage stakeholders and research bodies on how to improve labelling with the goal of providing consumers with necessary tools to choose a balanced diet and stay abreast of current research. They encourage members to provide full nutrition information on their packs even where this is not legally necessary and encourage members to put on labels that will indicate the number of portion sizes in a pack that the snack is intended for sharing or whether it is to be used over several occasions. They would like to increase the number of products they offer that are reduced in calories, fat, saturated fats or salt and a wider selection of different packaging sizes. They indicated they would accomplish this by 2006. Nowhere on the site does is there any follow up information on if this was achieved.

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[116] The PolMark Project: Final Project Report (July 2010), available at http://www.iaso.org/site_media/uploads/The_PolMark_Project_Executive_Report_FINALJuly_2010.pdf.

[117] For instance, Coca-cola, Danone, Kelloggs and Masterfoods: see http://www.fooddrinkeurope.eu/documents/brochures/CIAA_Commitments_EU_Platform_Diet_Physical_Activity_Health.pdf.

They expressed concerns about calls for mandatory country of origin labelling because it does not acknowledge the complex supply chains involved in the production of processed foods, arguing that this would increase costs without benefits of value for consumers.

With respect to advertising, they support self-regulatory measures and identify a comprehensive set of principles they will encourage their members to follow:

- Should not undermine the promotion of healthy lifestyles
- Their foods should not be presented as a substitute for meals
- Should not undermine the role of parents
- No direct appeal to children to persuade their parents
- No direct advertising to children under 6
- No commercial activities in primary schools
- In vending machines will encourage the responsible bodies to provide healthier options

But again, no information is provided on any compliance or enforcement mechanisms.

Key points from initial sources

Initial Sources
http://www.iaso.org/policy/euprojects/stanmarkproject/
http://www.polmarkproject.net/--
http://www.heartforum.org.uk/our-work/policy/nutrition/marketing-food-and-drink-to-children/

These are authoritative reports into the state of regulatory and non-regulatory standards on the marketing of food and drink to children. However, they tend to focus on the form of marketing and potential gaps in the control of certain marketing practices, along with an assessment of the inconsistencies in self-regulatory codes and industry pledges. There is little information on whether the private sector responses were actually implemented and certainly no evidence that they have an impact on consumers' behaviour.

The Reports identify several EU or UK wide pledges, commitments or similar initiatives:

PLEDGE, CODE, STATEMENT OR OTHER INITIATIVE
European Network on Reducing Marketing to Children- Code on Marketing of Food and Non-Alcoholic Beverages to Children to guide other Member States (Norway)
Confederation of the Food and Drink Industries of the EU (CIAA) – Principles on Food and Beverage Marketing Communications (2005)
The EU Pledge Programme (supported by the World Federation of Advertisers)
European Advertising Standards Alliance – EASA Digital Marketing Communications Best Practice (2008)
Responsible Advertising and Children Programme

European Association of Communications Agencies (EACA) – Ethical Guidelines for Advertising to Children (2002)
UNESDA (Union of European Soft Drinks Associations) Pledge – Contribution by UNESDA and its corporate members to the EU Platform for Action on Diet, Physical Activity and Health.

SUMMARY: PolMark (Policies on Marketing of food and beverages to children) Project. IASO, July 2010.
http://www.iaso.org/site_media/uploads/The_PolMark_Project_Executive_Report_FINALJuly_2010.pdf

Table 3.1: Countries with actions on food marketing to children

Specific statements about food marketing to children in broader policies, plans or strategies	Specific policies on food marketing to children	Planned action on food marketing to children
Belgium Bulgaria Denmark Finland Germany Greece* Ireland Italy Netherlands Portugal Spain Sweden UK Iceland Norway Croatia Israel* Moldova Serbia Turkey* Australia Canada New Zealand** Brazil Colombia South Korea	***Approved self-regulation %*** Belgium Denmark France Netherlands Portugal Spain UK Iceland Norway ***Encouraging self-regulation @*** Germany Australia Canada United States ***Official guidelines $*** Finland ***Statutory regulation*** France Ireland UK Brazil* Chile* Colombia Malaysia South Korea	Austria Belgium Bulgaria Cyprus France Germany Greece Ireland Lithuania Malta Netherlands Portugal Slovenia Spain Sweden UK Norway Switzerland Bosnia Croatia Israel Macedonia Moldova Serbia Turkey Australia Canada United States Brazil Colombia Chile South Korea

* In draft.
** Policy shelved by new government.
$ Official guidelines refer to guidelines that are not legally binding but have been issued by a government or government-approved body.
% Approved self-regulation refers to self-regulation that has been developed in collaboration with, or at the request of, government.
@ Encouraging self-regulation means the government has made a policy statement saying it favours self-regulation, but has not explicitly approved a particular code.

- The International Chamber of Commerce (ICC) **"Framework on Food and Beverage Communications". The European Advertising Standards Alliance (EASA)** *encourages* the application of the ICC Framework among its members.

- **Approved Self-Regulation** (see Table 3.1 above); Governments have been demanding more from self-regulation, in particular, the Netherlands, Norway and Iceland (call for complete restrictions on food marketing to children).

  - 2/3rds of Interviewees (105 stakeholders) believed current controls were not strong enough
  - Controls could be strengthened- in Sweden where the code of practice is seen as generally effective, both industry and other bodies 'look to the introduction of a Marketing Ombudsman'

  Concern over new uncontrolled marketing media including;
  - advergaming
  - viral marketing and 'dark marketing'

SUMMARY: Marketing Food and Drink to Children. National Heart Forum, 2011 (United Kingdom). http://www.heartforum.org.uk/our-work/policy/nutrition/marketing-food-and-drink-to-children/

- 'This report shows that current codes and regulation do not fully address the integrated nature of marketing to children across many platforms using a variety of techniques.'
- 'What is striking about the voluntary pledges made by commercial companies and trade organisations is the potential reach of these pledges. The parties to the International Food and Beverage Alliance (IFBA) pledge are estimated to be responsible for more than 83% of global food and beverage advertising. It is also noteworthy that, despite the number and diversity of these pledges, they are remarkably consistent in some respects (age definitions and common exemptions, for example) and very varied in other respects (such as nutritional criteria) (1.4).'

- p.15 Point of sale marketing falls outside all voluntary codes applicable in the UK (apart from the Co-Operative's Code)

- p.16 huge variation in definition of 'child' 11-18, marketing 'directed to children' (as % of audience) and nutritional criteria (often industries' own).

- p.18 Lack of retailer-owned codes means point of sale is a big gap

Mapping areas

- includes self-regulatory regimes & voluntary codes applicable in the UK
- includes self-regulatory regimes in other countries

- voluntary commitments, policies and pledges of manufacturers, retailers, trade groups and media owners

Best Practice Guidance and Codes (p 58)

International industry codes reviewed in Grid 2b	**Compliance monitoring?**
International Chamber of Commerce Consolidated ICC Code (2006)	
ICC Framework for Responsible Food and Beverage Marketing Communication	
Confederation of the Food and Drink Industries of the EU (CIAA) – Principles on Food and Beverage Marketing Communications (2005)	
CIAA Principles of Food and Beverage Product Advertising (2004)	
The EU Pledge Programme (supported by the World Federation of Advertisers)	**World federation of advertisers**
European Advertising Standards Alliance – EASA Digital Marketing Communications Best Practice (2008)	
Responsible Advertising and Children Programme	
European Association of Communications Agencies (EACA) – Ethical Guidelines for Advertising to Children (2002)	
ICC/ESOMAR International Code on Market and Social Research (2007)	
Market Research Society Code of Conduct (2010)	
International Food and Beverage Alliance – IFBA Global Policy on Marketing and Advertising to Children	IFBA
UNESDA (Union of European Soft Drinks Associations) Pledge – Contribution by UNESDA and its corporate members to the EU Platform for Action on Diet, Physical Activity and Health.	

National industry codes reviewed in Grid 2b	
ISBA Online Promotion of Food to Children (2007)	
Direct Marketing Association Code of Practice (2003)	
Internet Advertising Bureau (IAB): Good Practice Principles for Online Behavioural Advertising (2009)	Self-certification
Food and Drink Federation – FDF Manifesto for Food and Health (2004)	

Working with Schools – Best Practice Principles (2008), ISBA and former Department for Children, Schools and Families	
Guidelines on Commercial Sponsorship in Schools (2009), Consumer Focus Scotland	
_Guidelines on Commercial Sponsorship in the Public Sector (2008), Consumer Focus Scotland	

WHO Global strategy for prevention and control of NCDs

'Governments should set clear definitions for the key components of the policy, thereby allowing for a standard implementation process. The setting of clear definitions would facilitate uniform implementation, irrespective of the implementing body. When setting the key definitions Member States need to identify and address any specific national challenges so as to derive the maximal impact of the policy.'

Page 64 of the National Heart forum report also highlights the gaps and potential weaknesses of co- and self-regulatory systems in the UK, including gaps filled by code or best practice, or European/WHO network. Page 73 lists the voluntary commitments, policies and pledges of manufacturers, retailers, trade groups and media owners, as of December 2009.

SUMMARY: A junk-free childhood: Responsible standards for marketing foods and beverages to children. A briefing paper from The StanMark Project of the International Association for the Study of Obesity. June 2011, available at http://www.iaso.org/site_media/uploads/IASO_food_marketing_report_30_June_2011.pdf

Excerpts from the Paper

'In order to assist governments and guide industry, the StanMark project undertook a series of policy and research meetings involving experts and officials from countries in Europe and North America, funded under the Pilot Projects programme of the European Union's External Affairs Service.'

'From these meetings a series of proposals were generated and are presented here for use by WHO member state governments. For cross-border marketing it is intended that the food and advertising industries will recognise the advantages of a common, universal set of standards applicable to all companies and which can protect children across the globe. The standards proposed are based on the WHO recommendations, which identify both 'exposure' and 'power' as independent factors determining the effectiveness of marketing messages.'

The Challenge of Obesity in the WHO European Region and the Strategies for Response

This is a comprehensive study that identifies the harms of obesity and proposes multi-sector solutions. The report identifies several problems with self-regulation. First, industry codes do not address the problems of the volume of advertisements. The adjudicating bodies are retrospective; they cannot act sometimes until the advertisement has aired or until they have received a complaint and by this time the campaign may have ended. Additionally, they have limited sanctions which are unlikely to be in proportion to the sales advantage. As an example of the failure of self-regulation, the report points out that a substantial portion of countries in Europe are in violation of the WHO/UNICED code of marketing of breast milk substitutes, despite industry assurances that such violations do not occur.

At the European Commission level, after the threat of legislation, industry stakeholders designed the Platform for Action on Diet, Physical Activity and Health. This works under the Commission's leadership to reverse obesity by offering increasing resources.

In 2007, the European Commission white paper on a strategy for nutrition raised issues directly related to obesity prevention policies, such as:

- information to consumers, such as food labelling
- the need for codes to restrict the promotion of energy-dense foods
- the role of institutional catering in schools and workplace
- the role of commercial operators in school-based health education
- the adequacy of physical activity in school
- the role of health professionals in promoting healthy diets and physical activity
- the measures needed to reach disadvantaged and minority population groups
- They will evaluate voluntary compliance in 2010, to assess if mandatory measures are required

Most countries appear to be focused on soft techniques—reviewing, promoting and working with industry stakeholders rather than legislative action. For example, Spain created a national strategy for countering obesity which involves a series of agreements to be voluntarily signed by the industry, but which will be externally monitored and results published.

At the conclusion of its report, the WHO made the following relevant recommendations:

- Protecting traditional foods
- Setting higher standards—considering alternative national food standards, such as for the fat content of meat carcasses, and implementing regulation domestically that also alters imported food products;
- invoking sanitary and phytosanitary measures under the WTO agreement on the application of sanitary and phytosanitary measures, which permits the restriction of food imports (such as products containing high levels of salt, saturated fats or *trans* fats) if they pose a possible threat to health that is scientifically justifiable;

For summaries of applicable advertising laws in different countries, see pages 126-137 of the report.

Literature Review

The following section reviews academic literature on the regulation of the food industry, including information about its implementation and effectiveness

Robyn Martin 'The role of law in the control of obesity in England: looking at the contribution of law to a healthy food culture' 5 Australia and New Zealand Health Policy available online: http://www.anzhealthpolicy.com/content/5/1/21

The government has passed a variety of legislation, but it is not comprehensive enough. It is argued this is because obesity is viewed as a personal problem and the government only sees itself as having a role in supporting consumers to provide access to knowledge on healthy foods.

The government has been most active regarding advertising towards children. From 2009, it is not legal to run ads for high fat, sugar or salt products on children channels. The effectiveness of this could be undermined by the EU regulations which hold ad content is controlled by the country of origin; however, no evidence is presented to verify this. Additionally, there remain issues concerning the regulation of other media sources.

As regards food labelling, it is only required when the food makes some sort of nutritional claim. The article is critical of the current system as it is not easy for the lay purchaser to understand. The Food Standards Agency accepts the need to review the law to make nutrition labelling compulsory and to indicate levels of fat content. The law is necessary because under a voluntary scheme, there would be no guarantee that all manufacturers and retailers would indicate content in the same way which creates confusion for the customer; as an example the author points to the different methods Tesco, Sainsbury and Waitrose use to highlight the healthy range products.

The government has also been active in passing nutrition regulations for school lunches, mandating what food can be offered to children and its nutritional content. This is after a previous policy of offering healthy options alongside fast-food options failed.

Hawkes C: Self-regulation of food advertising: what it can, could and cannot do to discourage unhealthy eating habits among children. Nutrition Bulletin 2005, 30:374-382

The author's thesis is—if and how could self-regulation be more responsive to obesity in the United Kingdom and elsewhere? First, the author explains The Advertising Standards Authority, a policing mechanism in the UK. This body operates largely on the complaints

system. If an advertiser violates the voluntary code, the central enforcement mechanism is negative publicity, although there are some tougher penalties if the violation persists.

Bodies like this can only effectively control the most irresponsible advertisements. It is able to achieve this relatively fast, cheaply and flexibly, but monitoring and enforcement are necessary. However, there are severe limitations. Self-regulation generally only takes account of individual ads not their cumulative effect. These codes do not control advertisements that use creative and emotional techniques to build brand (and category) power with children, such as depicting happy family scenes, romance or success. This is because self-regulation is not designed to ask consumers to *eat less* of their product, use techniques that *less effectively* communicate brand identity, or broadcast *fewer advertisements*.

Amandine Garde. 'Freedom of Commercial Expression and Public Health Protection in Europe' 12 Cambridge Yearbook of European Legal Studies 225.

Concludes that the European Court of Justice is very reluctant to exercise its review powers and has failed to require public authorities who intend to curtail the freedom of commercial operators to advertise their goods effectively, to discharge the burden of proving that their restrictive measures are necessary to protect public health and do not have any suitable, less restrictive alternatives. The author calls for a more balanced approach.