Implementing the WHO Recommendations whilst Avoiding Real, Perceived or Potential Conflicts of Interest

Amandine GARDE*, Bill JEFFERY** and Neville RIGBY***

I. Introduction

Resolution WHA 63.14 urges Member States "to cooperate with civil society and with public and private stakeholders in implementing the set of recommendations on the marketing of foods and non-alcoholic beverages to children in order to reduce the impact of that marketing, *while ensuring avoidance of potential conflicts of interest*" (our emphasis). The Recommendations themselves also warn Member States against conflicts of interest. In particular, Recommendation 6 provides that "governments should be the key stakeholders in the development of policy […]. In setting the national policy framework, governments may choose to allocate defined roles to other stakeholders, *while protecting the public interest and avoiding conflict of interest*." As paragraph 21 of the explanatory notes accompanying the Recommendations further emphasises, this is because "governments are in the best position to set direction and overall strategy to achieve population-wide public health goals".

A conflict of interest, which has been defined as a situation where "interests or commitments compromise … independent judgment or … loyalty",[1] are "pervasive features of life within all complex societies".[2] The question therefore arises as to how existing, potential or perceived conflicts of interest should be managed in global public health.[3]

Regrettably, however, WHO has not yet given clear guidance as to what would constitute a conflict of interest, thus allowing major players in the food industry to act as if the industry itself had become legitimate market regulators by adopting

* University of Liverpool, agarde@liverpool.ac.uk.

** Centre for Health Science and Law, billjeffery@healthscienceandlaw.ca.

*** International Obesity Forum, nevillerigby@aol.com.

[1] M Rodwin, *Medicine, Money and Morals: Physicians' Conflicts of Interest* (Oxford University Press, 1993).

[2] D Moore et al., "Conflicts of interest and the case of auditor independence: Moral seduction and strategic issue cycling" (2006) 31 *Academy of Management Review* 10, 11. On the notion of conflicts of interest, see Y Mény (ed), *Les Conflits d'Intérêts*, Pouvoirs 147 (2013) and J Moret-Bailly, "Définir les Conflits d'Intérêts" (2011) 187(16) *Recueil Dalloz* 1100.

[3] On the position of WHO on the question of conflicts of interest, see Judith Richter's insightful contributions, and in particular "Editorial: WHO Reform and Public Interest Safeguards: An Historical Overview" (2012) 6 *Social Medicine* 141 and "Time to turn the tide: WHO's engagement with non-state actors and the politics of stakeholder governance and conflicts of interest" (2014) 348 *British Medical Journal* g3351.

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loophole-ridden, voluntary pledges not to promote unhealthy food to children under 12 years of age in certain media.

This contribution has a twofold purpose: first, to argue that self-regulation cannot provide a long-term solution to the failure of governments to adequately implement the Recommendations; and secondly, to urge the WHO to provide the necessary guidance that would allow Member States to determine the nature and extent of their involvement with food industry operators in implementing the Recommendations, and more generally in preventing and controlling obesity and other non-communicable diseases (NCDs) associated with food, including breast-milk substitutes and non-alcoholic beverages, alcohol, tobacco, and sedentary work and play.

II. The failure of the WHO to tackle conflicts of interest in NCD prevention and control policies

There is a widely-held expectation among citizens that governments should serve voters, without bias toward the moneyed interests among them. This applies not just to law- and policy-setting, but also program development, and priority-setting in governments. The opportunities for conflicts of interest to cause problems are especially numerous in the realm of public policy because of its far-reaching potential impact on commerce, and in relation to NCD prevention and control more specifically, where the food, the tobacco and the alcohol industries have been identified as "vectors of disease".[4]

Mandating transparency about conflicts of interest is a necessary but insufficient safeguard. There is far more to dealing with conflicts of interests than merely recognising and disclosing them. Industry operators have fiduciary responsibilities to their shareholders to make profits whatever the health cost to consumers.[5] It therefore should be obvious that there are likely to be "significant limits to the compatibility of industry interests with public health",[6] and that food business actors should not be entrusted with the development of public health policies:

> Firms that participate in costly [Corporate Social Responsibility] activities will have to raise prices, reduce wages and other costs, accept smaller profits, or pay smaller dividends – and accept the economic consequences. After taking such measures, a firm's stock price may decline until proportional to returns, and attracting new capital may be difficult because returns are below market averages. Other short-term economic consequences may include loss of market share, increased insurance costs, increased borrowing costs, and loss of reputation. *In the long term, the firm may face shareholder litigation*, corporate takeover, or closure.[7] (emphasis added)

[4] World Health Organization. *Global Health Risks: Mortality and burden of disease attributable to selected major risks* (WHO, 2009), especially pp. 10, 11 and 17, available at www.who.int/healthinfo/global_burden_disease/GlobalHealthRisks_report_full.pdf. See also the Global Burden of Disease Report available at vizhub.healthdata.org/irank/arrow.php.

[5] A Gilmore et al, "Public health, corporations and the New Responsibility Deal: promoting partnerships with vectors of disease?" (2011) 33 *Journal of Public Health* 2; M Brady and P Rundall, "Governments should govern, and corporations should follow the rules" (2011) 39 *United Nations Standing Committee on Nutrition News* 51, 51; G Hastings and K Angus, "When is social marketing not social marketing?" (2011) 1 *Journal of Social Marketing* 45, 51.

[6] A Gilmore et al., "Public health, corporations and the New Responsibility Deal: promoting partnerships with vectors of disease?" (2011) 33 *Journal of Public Health* 2.

[7] Forest L Reinhardt and Robert N Stavins, "Corporate social responsibility, business strategy, and the environment" (2010) 26(2) *Oxford Review of Economic Policy* 164, 178.

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Since its establishment in 1948, the WHO has projected its concern and resolved to safeguard against commercial conflicts of interest. Its Constitution articulates a commitment to establish the independence of the Director General and WHO staff from the narrow political interests of any one Member State or "other external authority".[8] Similarly, the "Principles Governing Relations between the World Health Organization and Nongovernmental Organizations", published as part of the WHO's "Basic Documents" along with WHO's Constitution, provided that "the main area of competence of the NGO shall fall within the purview of WHO. Its aims and activities shall be in conformity with the spirit, purposes and principles of the Constitution of WHO, shall centre on development work in health or health-related fields, and shall be free from concerns which are primarily of a commercial or profit-making nature."[9]

Certain WHO instruments take a clear stance on what would constitute a conflict of interest. Most notably, the Framework Convention on Tobacco Control (FCTC) contains a specific and unequivocal prohibition against the involvement of the tobacco industry in the development and implementation of tobacco control policies.[10] Similarly, the International Code of Marketing of Breast-milk Substitutes calls upon Member States to ban all commercial marketing of breast-milk substitutes in consideration of the special vulnerabilities of mothers to commercial influence.[11]

However, the WHO Strategy on Diet, Physical Activity and Health, which was adopted in 2004, is less clear on the role that it envisages for the food industry in the prevention and control of overweight and obesity. On the one hand, the main aim of the WHO strategy was to challenge the food and beverage sectors primarily in Europe and the USA to do far more to improve nutrition and help tackle obesity prevention. Led by both European and US sugar trade lobbyists, these powerful sectors had adopted confrontational positions; at a critical moment prior to the WHO Executive Board meeting in Geneva to consider the draft strategy, they appeared to have secured strong support from the US government. This was effectively disarmed in an open letter from Professor Kaare Norum, the Norwegian chair of the WHO's strategy reference group.[12] By the time health ministers had endorsed the strategy, the food and beverage trade group, Confédération des Industries Agro-Alimentaires de l'UE (CIAA) (now FoodDrinkEurope) and its US counterpart, the Grocery Manufacturers of America (GMA), issued terse statements purporting to support the WHO Strategy. On the other hand, however, the wording of the Strategy is ambiguous concerning the involvement it foresees for food companies and their associations. Not only does it explicitly encourage governments to consult stakeholders, including the private sector and the media,

[8] Art. 37 states: "In the performance of their duties the Director-General and the staff shall not seek or receive instructions from any government or from any authority external to the Organization. They shall refrain from any action which might reflect on their position as international officers. Each Member of the Organization on its part undertakes to respect the exclusively international character of the Director-General and the staff and not to seek to influence them."

[9] At para. 3.1 (emphasis added). This text was adopted at the 40th session of the World Health Assembly in 1987 by Resolution WHA40.25.

[10] Art. 5(3) of the WHO FCTC, available at treaties.un.org/doc/source/RecentTexts/FCTC_en.pdf.

[11] Art. 5(1) of the WHO International Code of Marketing of Breast-milk Substitutes, available at www.who.int/nutrition/publications/code_english.pdf.

[12] K Norum, "World Health Organization's Global Strategy on diet, physical activity and health: the process behind the scenes" (2005) 49 *Scandinavian Journal of Nutrition* 83.

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on policy, but it also encourages them to establish mechanisms to promote their participation in activities related to diet, physical activity and health,[13] thus formalising institutional conflicts of interest. Similarly, it provides that "[WHO] will hold discussions with the transnational food industry and other parts of the private sector in support of the aims of the Strategy, and of implementing the recommendations in countries".[14] In other words, it starts from the premise that the food industry can play a positive role in the prevention and control of overweight and obesity worldwide, even though it has not defined in any specific terms what this role could be. Of course, hearing from industry is, of itself, not problematic. However, putting companies in a privileged position to shape opinions, advice, or standards upon which governments rely is an abdication of responsibility that is not in the public interest.

In January 2004, as the food industry furore over the WHO's proposed global diet strategy mounted, the WHO Executive Board was asked to approve applications for formal WHO Official Relations by two international food industry associations, The International Council of Grocery Manufacturer Associations (ICGMA) and the CIAA renamed as FoodDrinkEurope in June 2011 on the recommendation of the WHO Standing Committee on Nongovernmental Organizations. A decision was deferred and at the subsequent Executive Board meeting in May 2004, some government delegates questioned the recommendation in view of both groups having links with the tobacco industry.[15] "The food industry is aggressively using its trade associations to influence international health policy", complained the NGO INFACT (a prominent critic of the marketing of breast-milk substitutes) in a statement issued during the WHA in May 2004.[16] By the time the Executive Board met again in January 2005, the Board was still being invited to approve the two industry groups. It was only due to vigorous lobbying by NGO representatives, who distributed a statement pointing out that approval would mean WHO would be in violation of the "Principles Governing Relations between the World Health Organization and NonGovernmental Organizations" set out in its Basic Documents, the Agency's formal Constitution, that both industry associations decided to ask that consideration of the proposal be further postponed, which was interpreted by public interest NGOs as a tactical retreat to avoid the embarrassment of rejection.[17]

The food industry does have a positive role to play in ensuring that healthier products are available to consumers through product reformulation; however, companies and industry associations cannot be relied upon to voluntarily sacrifice profits to achieve public interest objectives. In particular; food companies have no incentive to voluntarily curb marketing for unhealthy food to children, except to foil efforts to enact potentially far-reaching legislation in this field. Indeed, the food industry has a vested interest in marketing its products to as broad an audience as possible in light of the fact that

[13] Para. 44.

[14] Para. 50.

[15] WHO Executive Board EB114/19 114th Session 26 May 2004 Agenda item 6.4.

[16] "NGOs Denounce Industry Influence Over International Health Policy Big Food and Big Tobacco Flex Muscles With Help of U.S. Government, Face Resistance from Countries Committed to Health" (Geneva, 18 May 2004), available at www.prnewswire.com/news-releases/ngos-denounce-industry-influence-over-international-health-policy-74126907.html.

[17] Minute of the WHO Executive Board session of 24 January 2005: Reconsideration of two applications for admission into official relations with WHO (Document EB115/34).

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marketing increases preferences and purchase requests for unhealthy food. It is clear that the food industry has adopted strategic approaches to reconfigure and redirect their marketing to children following the implementation of Ofcom restrictions in the UK applicable to ads targeting children under age 16 and the voluntary industry commitment not to advertise to children under 12. Global market forecasts indicate that the confectionery trade within the food and beverage sector continues to project volume growth in per capita sales – inevitably ensuring that efforts to improve dietary health are undermined, particularly in target markets where populations are known to have a greater susceptibility to diet-related metabolic diseases.[18]

The WHO recommendations on marketing to children, adopted six years after the WHO Global Strategy on Diet, Physical Activity and Health was approved, contain emphatic recognition of the deleterious impact of industry involvement. They expressly warn governments to be wary of conflicts of interest. Recommendation 4 clearly states that:

> "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."

This is echoed in Recommendation 6, which put governments at the centre of the policy making process, urging them to act as:

> "the key stakeholders in the development of policy… [and] … provide leadership, through a multi-stakeholder platform, for implementation, monitoring and evaluation. In setting the national policy framework, governments may choose to allocate defined roles to other stakeholders, while protecting the public interest and avoiding conflict of interest."

If, as noted above, governments are indeed in the best position to set direction and overall strategy to achieve population-wide public health goals, the reference to the establishment of multi-stakeholder platforms may create more confusion than it provides solutions for complex issues such as NCD control and prevention. The confusion is further compounded by Recommendation 7, which invites governments, on the basis of the resources, benefits and burdens of all stakeholders involved, to consider the most effective approach to reduce the marketing of unhealthy food to children, specifying however that "any approach selected should be set within a framework developed to achieve the policy objective".

In other words, the Recommendations seem to suggest that if the key parameters of a national policy on unhealthy food marketing to children should be set by governments, this does not preclude governments from involving food businesses in the implementation of these parameters.

The warnings that Member States should avoid conflicts of interest are echoed in the WHO Global Action Plan for the Prevention and Control of NCDs 2013–2020. This Action Plan, which urges Member States (among others) to halt the rise of diabetes and obesity worldwide by 2025, explicitly lists "the management of real, perceived or

[18] D Yu, "Two percent faster: Asia Pacific to outpace Europe and North America chocolate sales" *Confectionarynews.com* (25 April 2016), www.confectionerynews.com/Markets/Asia-Pacific-to-outpace-North-America-chocolate-sales-by-2.

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potential conflicts of interest" as one of its overarching principles. This is further defined as meaning that: "public health policies for the prevention and control of NCDs must be protected from undue influence by any form of vested interest. Real, perceived or potential conflicts of interest must be acknowledged and managed." Less than a month after the adoption of the WHO Global Action Plan, WHO Director General Margaret Chan went so far as to state: "Efforts to prevent non-communicable diseases go against the business interests of powerful economic operators […] In the view of WHO, *the formulation of health policies must be protected from distortion by commercial or vested interests* [our emphasis]."[19] Dr Chan's remarks reinforced earlier comments to health ministers which related to food and beverage industry lobbying and conflicts of interest.[20]

To date, however, efforts of WHO Member States to elaborate principles of institutional conflicts of interest related to food have generally lacked sufficient specificity to guide Member States in designing effective, evidence-based NCD prevention and control policies. The final report of the WHO Commission on Ending Childhood Obesity continues to send mixed messages:

> The Commission recognizes the important role the private sector can play in addressing childhood obesity but that additional accountability strategies, including legal, market-based and media-based mechanisms are often necessary. Initiatives of the private sector (including retailers, food manufacturers, food services, insurers) to address obesity that are supported by an independent evidence base, should be considered. Conflict of interest risks need to be identified, assessed and managed in a transparent and appropriate manner. Codes of conduct and independently audited assessments of compliance with government oversight are therefore important.
>
> Governments can use their regulatory power to improve the food environment, to enforce regulatory standards, to implement internationally-recognized standards such as the WHO International Code of Marketing of Breast-milk Substitutes,1 and the WHO Set of Recommendations on the Marketing of Foods and Non-alcoholic Beverages to Children.[21]

Such ongoing ambiguity has been used by the food industry to support its claim that it is a credible "partner" in the fight against overweight and obesity, rather than an integral part of the problem. In particular, food businesses have made several "pledges" and "commitments" with a view to convincing public authorities that they can provide cost-effective solutions to the obesity epidemic. The next section focuses on the relevance of the EU Pledge in the implementation of the WHO Recommendations in EU Member States.

III. The EU Pledge or the EU fudge?

The impetus of European health ministers, among the government representatives who voted to approve the WHO Global Strategy on Diet, Physical Activity and Health in

[19] Dr Margaret Chan, Director-General, WHO 10 June 2013, available at www.who.int/dg/speeches/2013/health_promotion_20130610/en/.

[20] Dr Margaret Chan, Director-General, WHO: "I am fully aware that conflicts of interest are inherent in any relationship between a public health agency, like WHO, and industry. Conflict of interest safeguards are in place at WHO and have recently been strengthened. WHO intends to use these safeguards stringently in its interactions with the food, beverage, and alcohol industries to find acceptable public health solutions." from the Address to the Sixty-sixth World Health Assembly Geneva, Switzerland, 20 May 2013, available at www.who.int/dg/speeches/2013/world_health_assembly_20130520/en/.

[21] "Report of the Commission on Ending Childhood Obesity" (WHO, Geneva, 2016) p. 39.

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May 2004, prompted the European Commission to consider its own response to the growing obesity epidemic. Its Directorate General for Health and Consumers followed up the adoption of the WHO Strategy with a series of informal obesity roundtable sessions involving some NGO and industry association representatives before it set up the EU Platform for Action on Diet, Physical Activity and Health in March 2005,[22] as envisaged within the WHO Strategy itself. However, neither WHO nor the European Commission addressed the issue of how to deal with "real, perceived or potential conflict of interest".

The then Health and Consumer Protection Commissioner, Markos Kyprianou, warned that "binding measures" could follow if the food and beverage industries did not take adequate and rapid steps to address the obesity challenge.[23] The main industry players, under pressure by constant media focus, lobbied hard against the concept of regulation and instead insisted that they should be given public plaudits for any small concessions they made. The implicit threat of any EU controls over the industry subsequently evaporated, and the Platform was stripped of the "Damocles Sword" of regulation.

By November the following year, the Commissioner's softer stance drew criticism in the European Parliament, as well as from health NGOs on the Platform, expressing concern over conflicts of interest after DG SANCO itself convened a "name and praise" press conference to which it invited the leading European executives of several major corporations including Coca Cola, PepsiCo, McDonald's and Unilever. The companies were allowed to promote their brands within the EU headquarters in Brussels, while Commissioner Kyprianou provoked adverse media coverage when he lauded what NGO members of the Platform felt were limited voluntary pledges inadequately addressing individual cases of reformulation, labelling or marketing to children.[24]

Only a few days later, health ministers met in Istanbul to ratify the European Charter on Counteracting Obesity, developed by the WHO Regional Office for Europe. The Charter included the following reference for business:

> The private sector should play an important role and have responsibility in building a healthier environment, as well as for promoting healthy choices in their own workplace. This includes enterprises in the entire food chain from primary producers to retailers. Action should be focused on the main domain of their activities, such as manufacturing, marketing and product information, while consumer education could also play a role, within the framework set by public health policy. There is also an important role for sectors such as sports clubs, leisure and construction companies, advertisers, public transportation, active tourism, etc. The private sector could be involved in win-win solutions by highlighting the economic opportunities of investing in healthier options.

[22] On the EU Platform, see ec.europa.eu/health/nutrition_physical_activity/platform_en. For a critical account, see O Bartlett and A Garde, "The EU Platform and the EU Forum: New Modes of Governance or a Smokescreen for the Promotion of Conflicts of Interest?" in A Alemanno and A Garde, *Regulating Lifestyle Risks: The EU, Alcohol, Tobacco and Unhealthy Diets* (Cambridge University Press, 2014) ch 13.

[23] Markos Kyprianou, 20 April 2005: "Self-regulation of the food and advertising industries is possibly the quickest and most effective way of making rapid and significant progress, and the signs from these industries in Europe are encouraging and positive. However, should this approach fail, or should progress prove disappointing, the Commission stands ready to consider proposing more binding measures." See europa.eu/rapid/press-release_SPEECH-05-244_en.htm?locale=en.

[24] "Fighting obesity: Commissioner Kyprianou 'names and praises' companies for concrete commitments" European Commission - IP/06/1530 09/11/2006, available at europa.eu/rapid/press-release_IP-06-1530_en.htm.

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The Charter remained vague about what specific changes were needed to reduce consumption of unhealthy food, and made no reference to the conflicts of interests involved in dealing with businesses with a vested interest in promoting the consumption of such food. Instead companies were encouraged to expect "win-win solutions", so that the upward childhood obesity trend could be reversed by 2015 "at the latest".[25]

WHO's policy guidance manual, linked to the Charter and published the following year, noted the emergence of the EU Platform as a model commenting:

> Great emphasis has been placed on the private sector's delivering new initiatives, to demonstrate both its commitment and its ability to involve a substantial proportion of its members in joint action. Work is under way to develop a framework to monitor the implementation of actions and commitments undertaken via the Platform. Whether sufficient resources can be mobilized through the relatively minor changes envisaged to have any significant or lasting impact in combating the escalating rates of obesity in the EU is also an issue. Moreover, additional, comprehensive, coherent and effective strategies need to be developed and implemented across all sectors, not merely among the limited group of Platform participants; this is of paramount importance.[26]

The EU regulatory framework itself encouraged this unsatisfactory state of affairs by opting for a hands-off approach, on the basis that legally binding, compulsory measures were not welcomed by the wider industry in Europe. The wording of Article 9(2) of the Audiovisual Media Services Directive, which was then under discussion, is very revealing in this respect. It merely provides that "Member States and the Commission shall encourage media service providers to develop codes of conduct regarding inappropriate audiovisual commercial communications, accompanying or included in children's programmes, of [unhealthy foods], excessive intakes of which in the overall diet are not recommended".[27] One cannot fail to note that this provision stands in stark contrast to the ban the EU has imposed on the marketing of tobacco products in all media whose regulation falls within the scope of its powers.[28] As far as unhealthy food is concerned, the European Commission and EU Member States have only undertaken to "encourage" businesses to adopt their own pledges to restrict the marketing of such food to children.

Anticipating the adoption of the AVMS Directive, food businesses adopted a range of EU-wide pledges to restrict the marketing of unhealthy food to children. In particular, the Union of European Soft Drinks Associations (UNESDA), including Coca Cola and PepsiCo, made a range of public commitments in 2006, in particular claiming they would not market to children under 12 where they formed more than 50% of the

[25] European Charter on Counteracting Obesity EUR/06/5062700/8 (16 November 2006), www.euro.who.int/__data/assets/pdf_file/0009/87462/E89567.pdf?ua=1.

[26] "The challenge of obesity in the WHO European Region and the strategies for response" (WHO Europe, 2007), ch 18 Involving Different Stakeholders, available at www.euro.who.int/__data/assets/pdf_file/0010/74746/E90711.pdf.

[27] Directive 2010/13/EU, OJ 2010 L 95/1. This directive codifies Directive 2007/65/EU, OJ 2007 L 332/27. The role of the AVMS Directive in regulating cross-border marketing and the implementation of WHO Recommendation 8 is discussed more fully in the next contribution.

[28] See in particular Arts. 4 and 5 of Directive 2003/33/EU on tobacco advertising and sponsorship, OJ 2003 L 152/16, as well as Arts. 9(1)(d), 10(2) and 11(4) of Directive 2010/13/EU on audiovisual media services, JO 2010 L 95/1/EU. For a discussion of these provisions, see A Garde and M Friant-Perrot, "The Regulation of Marketing Practices for Tobacco, Alcoholic Beverages and Foods High in Fat, Sugar and Salt – A Highly Fragmented Landscape" in Alemanno and Garde, supra note 22, ch 4.

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audience (a very weak standard compared to the UK Ofcom rule, which applies to children under 16 and the Quebec *Consumer Protection Act,* which defines a children's audience as having more than only 15% under age 13 and includes Internet, billboard and other types of advertising).[29] This was followed by the adoption in 2007 of the EU Pledge whereby major food and beverage companies undertook not to promote their products to children under 12 on TV, print and Internet, "except for products which fulfil specific nutritional criteria based on accepted scientific evidence and/or applicable national and international dietary guidelines". They also pledged not to put product materials in primary schools, unless requested to.[30] Launched with 11 signatories in 2007, the EU Pledge now has 21 members which, together, account for over 80% of food and beverage advertising expenditure in the EU.[31]

The EU Pledge was seen as one of the first significant stakeholder Platform commitments. The World Federation of Advertisers (WFA), a prominent Platform member, which officially supports the EU Pledge, described it as "a response from industry leaders to calls made by the EU institutions for the food industry to use commercial communications to support parents in making the right diet and lifestyle choices for their children".[32] In particular, EU Pledge signatories have been challenged to adopt common criteria for defining products that should not be advertised, ending the practice of individual companies using their own standards to determine which of their products could be marketed to children under 12. The nutritional criteria which define products permitted to be marketed to children under 12 were published in the EU Pledge Nutrition White Paper.[33]

However, as has already been discussed elsewhere,[34] the EU Pledge's contribution to public health and obesity prevention is not sufficient to consider that the Pledge is an effective tool of childhood obesity prevention. Firstly, it has not been signed by all food businesses in the EU and remains a voluntary commitment. Secondly, it does not apply to all media. In effect, while given the appearance of a major industry concession, in reality by 2007 many companies had already adopted new strategies to switch their advertising spending from the media covered by the EU Pledge, not least television,

[29] "UNESDA Commitments to Act Responsibly", europa.eu/rapid/press-release_IP-06-1530_en.htm.

[30] See www.eu-pledge.eu/.

[31] The founding members of the EU Pledge are Burger King, Coca-Cola, Danone, Ferrero, General Mills, Kellogg, Mars, Mondelez, Nestlé, PepsiCo and Unilever. They have since been joined by the European Snacks Association and its leading corporate members, McDonald's, Royal Friesland Campina and the Quick Group.

[32] www.eu-pledge.eu/.

[33] EU Pledge Nutrition Criteria White Paper updated 2015, available at www.eu-pledge.eu/sites/eu-pledge.eu/files/releases/EU_Pledge_Nutrition_White_Paper_Nov_2012.pdf. An independent evaluation, which contrasted the EU Pledge criteria with alternative nutrient profiling approaches, found that the UK advertising criteria were more lenient (although applied to children under 16s) while the strictest nutritional criteria used regarding advertising to children was applied by Disney: P Scarborough et al, "How important is the choice of the nutrient profile model used to regulate broadcast advertising of foods to children? A comparison using a targeted data set" (2013) 67 *European Journal of Clinical Nutrition* 815. One cannot help but notice the lack of WHO and EU leadership on this issue, as discussed in M Friant Perrot and A Garde, "From BSE to Obesity – EFSA's Growing Role in the EU's Nutrition Policy" in A Alemanno and S Gabbi (eds), *Foundations of EU Food Law and Policy: Ten Years of the European Food Safety Authority* (Ashgate Publishing, 2014).

[34] Bartlett and Garde, supra note 22, ch 13. See also S Galbraith-Emami and T Lobstein, "The impact of initiatives to limit the advertising of food and beverage products to children: a systematic review" (2013) 14 *Obesity Review* 960; and J Jensen and K Ronit, "The EU pledge for responsible marketing of food and beverages to children: implementation in food companies" (2015) 69 *European Journal of Clinical Nutrition* 896.

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to media falling outside its scope. In particular, it did not originally cover company-owned websites (only third-party websites), thus allowing food businesses to target children through the use of different advergames.[35] This was addressed via the adoption of enhanced commitments in 2012 and 2014. The fact remains, however, that the EU Pledge still contains several loopholes, not least because it does not apply to all media (for example, it does not apply to product packaging). In the same vein, the caveat that Pledge signatories do not promote their products in primary schools, "except where specifically requested by, or agreed with, the school administration for educational purposes" is extremely cynical: in an age of austerity where education budgets are tightened, one can easily imagine how educational establishments may be lured into accepting the sponsorship of food businesses. As the WHO Recommendations explicitly point out, schools and other settings where children gather should be free of any form of unhealthy food marketing.[36] Similarly, if the 2012 enhanced commitment reduced the audience threshold to 35% of children under 12 years, as opposed to 50% originally, the fact remains that this will still leave food businesses free to promote unhealthy food during popular family programmes which, if they are watched by a high number of children, are also watched by a large number of adults, thus making the proportion of children below 35%. Children do not stop being exposed to the impact of television advertising when adults are present. Some of these shortcomings have been exposed in the annual EU Platform monitoring reports[37] and have led the Commission to announce that it would "support the development of a definition of stricter age and audience thresholds for advertising and marketing and more consistent nutritional benchmarks across companies".[38] However, the ongoing debates relating to the revision of the AVMS Directive, discussed below, suggest that this may be difficult to achieve.

Furthermore, as far as the implementation of the EU Pledge is concerned, and despite claims that none of the EU Pledge member companies promote unhealthy food to children under 12, the EU Pledge monitoring report for 2015 suggested that the overall compliance rate for television advertising amounted to 98.6%, whilst compliance on company websites was lower at 97%.[39] The difficulty of regulating children's exposure on the internet was reflected in the EU Pledge's lower compliance among corporate websites. The report acknowledged that monitoring since 2009 showed a downward trend in children's exposure to television food advertising by EU Pledge member companies, but that children's exposure to advertising for products that do not meet their self-determined nutrition criteria in all programmes was reduced only by 48% over all markets monitored in the past six years and that the reduction in exposure to advertising

[35] This trend had already been noted a year earlier in the USA by the Kaiser Foundation in its report *It's Child's Play: Advergaming and the online marketing of food to children*, July 2006. It has since been confirmed by others. See in particular in the UK, A Nairn and H Hang, *Advergames: It's not child's play* (Family and Parenting Institute, 2012) available at www.agnesnairn.co.uk/policy_reports/advergames-its-not-childs-play.pdf.

[36] Recommendation 5. On the notion of "settings where children gather", see also the WHO Framework Implementation Report, 2012, at para 3(4)(2), available at www.who.int/dietphysicalactivity/MarketingFramework2012.pdf?ua=1.

[37] The EU Platform annual monitoring reports and the EU Platform special reports are available at ec.europa.eu/health/nutrition_physical_activity/key_documents/index_en.htm#anchor0.

[38] First Report on the application of the AVMS Directive, "Audiovisual Media Services and Connected Devices: Past and Future Perspectives", COM(2012) 203 final, at p. 9.

[39] "EU Pledge 2015 Monitoring Report" (March 2016), available at www.eu-pledge.eu/sites/eu-pledge.eu/files/reports/EU_Pledge_2015_Monitoring_Report.pdf.

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for all EU Pledge member companies' products regardless of nutrition criteria was only 32%. However, the latest EU Pledge Monitoring Report, published in January 2017, claimed that children's exposure to advertising for all company products had been reduced by nearly one third over six years, but that a much larger reduction (83%) had been achieved in curbing advertising of products not meeting nutritional criteria during children's programmes. The switch of marketing focus to the internet and company websites may account for much of the reduction, but the report claimed that 95% of company sites complied with Pledge standards, acknowledging that one in 20 of the company sites breached the industry's own code.[40]

An extension of the EU Pledge beginning in 2017 was outlined to the EU Platform for Action on Diet, Physical Activity and Health at its meeting on 9 March 2017. However, the criticism remains that caveats regarding limiting the application of the various elements of the Pledge to under 12s allows companies to significantly limit the scope of the Pledge irrespective of existing evidence that teenagers are also negatively affected by unhealthy food marketing. A procedure to allow public complaints about breaches of EU Pledge commitments is under development and is due to be ready by the end of 2017. Companies are also promising to introduce common nutrition criteria, which will include salt and sugar reductions, mostly by the end of 2018.[41]

The criticism remains that not only are EU Pledge commitments insufficiently broad in their coverage (both in terms of products, companies, media and ages covered), but the food and beverage industries have yet to fully implement the Pledge. However recently Dame Fiona Kendrick, Chair and CEO of Nestlé UK & Ireland, broke ranks to support a call for regulation of the industry, acknowledging that:

> Critics of the voluntary approach have pointed to its limited take-up, and this perspective is understandable. For action to match the scale of the public health challenge, the entire UK food and drink industry needs to act, including the out-of-home sector, for example. An unintended consequence of voluntarism is that companies that voluntarily invest to reformulate their products are disadvantaged compared to those that take time to act, or take only limited action.[42]

While EU Pledge members may be challenged to deliver food and beverages that measure up to the benchmarks of "healthy", and address the shortcomings that have been highlighted in the Pledge coverage, they should also be challenged to consider the context in which their brands, rather than specific products, are promoted. Coca Cola and McDonald's sponsorship of the Olympics faced criticism for achieving significant brand exposure to young children at a time when the companies pledged not to advertise directly to them.[43] The issue of sports sponsorship requires careful consideration by EU

[40] "EU Pledge Monitoring Report 2016", available at www.eu-pledge.eu/sites/eu-pledge.eu/files/reports/EU_Pledge_2016_Monitoring_Report.pdf.

[41] From 1 January 2017, the EU Pledge commitments apply to the following media: TV, radio, print, cinema, online (including company-owned websites and company-owned social media profiles), DVD/CD-ROM, direct marketing, product placement, interactive games, outdoor marketing, mobile and SMS marketing, see euagenda.eu/upload/publications/untitled-60067-ea.pdf.

[42] Fiona Kendrick, "A call to action on childhood obesity strategies" *The Grocer* (17 March 2017), www.thegrocer.co.uk/buying-and-supplying/health/a-call-to-action-on-childhood-obesity-strategies/550052.article

[43] A Garde and N Rigby, "Going for gold – Should responsible governments raise the bar on sponsorship of the Olympic Games and other sporting events by food and beverage companies?" (2012) 17 *Communications Law* 42.

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Pledge members if they are serious about fulfilling the spirit of their commitments to help reverse obesity. It is true that the WHO Recommendations refer to the marketing of products and services; they do not refer explicitly to the promotion of brands (as distinct from products and services). Nevertheless, as certain brands and organisations are clearly associated with products or services whose marketing could fall within the scope of the Recommendations, efforts to restrict marketing in this area also needs to consider how brands are marketed, in line with the spirit of the Recommendations.[44]

Despite its many shortcomings, the EU Pledge is portrayed by the European Commission as one of the Platform's success stories.[45] Yet such acclaim ignores the overall impact that ubiquitous brand awareness achieves. More fundamentally, 12 years after the EU Platform was established, the EU has failed to acknowledge, let alone address, the questions of conflicts of interest and undue influence at the very heart of unhealthy food marketing self-regulation.

IV. Conclusion

Much work remains to be done to clarify and operationalise the WHO's hitherto vague and often internally inconsistent stances on conflicts of interest. Despite years of warning from the public health community that the food industry is a "vector of disease" that has engaged in effective marketing campaigns to increase sales of unhealthy food, not least to children, and has opposed and challenged measures adopted by governments across the world to regulate their commercial practices, the WHO's response still falls short. That businesses are consulted by governments to explain where their interests lie is one thing and can be seen as an integral part of the democratic process; that these businesses are regarded as credible partners in the prevention and control of NCDs and are, as such, entrusted with the development and implementation of public health policies, and participate in agenda-setting with money and influence, including the implementing of the WHO Recommendations on the marketing of unhealthy food to children, is a fundamentally different one. Businesses should be run within the rules that society places upon them.[46] These rules can be determined through a thorough consultation process with all relevant parties, including industry operators that have a stake in the rules in question; however, the public interest should not be placed in the hands of businesses through the establishment of inadequately considered "partnerships" with such operators. This would amount to granting a seal of approval to large-scale conflicts of interest, thus preventing any effective response to growing NCD rates in Europe and beyond.[47]

Recent developments in global food governance are not reassuring. In the autumn of 2015, the WHO's Department of Nutrition for Health and Development held a technical consultation to help elaborate technical guidance to Member States on how to avoid conflicts of interest and manage conflicts of interest that cannot be reasonably avoided in nutrition

[44] "WHO Framework Implementation Report, 2012" at para. 2(1).

[45] ec.europa.eu/commission_2010-2014/borg/docs/speech_20140610_en.pdf.

[46] M Brady and P Rundall, "Governments should govern and corporations should follow the rules" (2011) 39 *SCN News* 51, 55; G Williams, ""Big Food" and Children's Health" (Briefing Note, I.Family Project, February 2017), www.ifamilystudy.eu/wp-content/uploads/2017/03/12-Garrath-Williams-Big-Food-FINAL.pdf.

[47] See also Bartlett and Garde, supra note 22, ch 13.

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governance.[48] The resultant guidance may assume a special relevance in light of the WHA's subsequent adoption of the Framework of Engagement with Non-State Actors (FENSA), which proposes to dramatically alter WHO's relations with industry organisations, public interest organizations, and industry influenced non-governmental organisations (for the last of these, the degree of commercial influence varies along a spectrum).[49]

Uncertainty is manifest about the Framework's impact on the independence and effectiveness of the WHO.[50] The final text of FENSA only states:

> 44. WHO does not engage with the tobacco industry or non-State actors that work to further the interests of the tobacco industry. WHO also does not engage with the arms industry.
>
> Engagement where particular caution should be exercised
>
> 44bis WHO will exercise particular caution, especially while conducting due diligence, risk assessment and risk management, when engaging with private sector entities and other non-State actors whose policies or activities are negatively affecting human health and are not in line with WHO's policies, norms and standards, in particular those related to non-communicable diseases and their determinants.

However, so long as the WHO has only one Director General, one budget, and one governing body (the WHA), it is impossible to financially support one part of WHO (e.g., a donation to buy something seemingly innocuous) without supporting another more vulnerable, fundamental public health function (e.g., standard-setting, policy-advising, or priority-setting). The final FENSA agreement presumes that commercial organisations and industry associations might be motivated to engage with the WHO at their own expense, but not be interested in a way that might give rise to a conflict of interest. The "due diligence" promised by WHO is a poor substitute for a clearly demarcated red line.

For the WHO to decide what is a conflict of interest on a case-by-case basis and, if so, how it should be dealt with, can undermine its legitimacy. Quantitative cut-offs (e.g., percentage and absolute amounts of revenue in US dollars per organisation) should be adopted. If strict enough, these standards will increase the transparency and legitimacy of WHO's policy on conflicts of interest and could reduce the amount of WHO staff time needed to perform due diligence deliberations. The answers to such questions will help reveal the candour of applicants and serve as a rationale for the WHO retaining previous

[48] WHO, "Technical Report: Addressing and Managing Conflicts of Interest in the Planning and Delivery of Nutrition Programmes at Country Level", available at apps.who.int/iris/bitstream/10665/206554/1/9789241510530_eng.pdf?ua=1.

[49] Framework of engagement with Non-State actors (FENSA). Sixty-Ninth World Health Assembly. A69/A/CONF./11, available at apps.who.int/gb/ebwha/pdf_files/WHA69/A69_ACONF11-en.pdf.

[50] A statement of concern issued by 60 public interest civil society groups during the May 2016 WHA meeting (echoing several other communiques published in recent years) was neither reflected in the final Framework nor even officially acknowledged by the WHO or Member States. That critique discorded sharply with the jubilant mood of Member States when they unanimously adopted the text in the final hours of the Assembly after a week-long series of in camera negotiations from which, ironically, all civil society organisations were excluded. The legitimacy of civil society worries is reflected in the continuing failure of the WHO to even publicly acknowledge that its second largest benefactor, the Bill and Melinda Gates Foundation (which directly foots 13%, $573,629,000, of the entire WHO $4,384,900,000 biennial budget for 2016–17, a close second to the United States Government – see the WHO Budget Portal), holds billions of dollars' worth of shares in soft drink bottlers, fast food and candy manufacturers, food and pharmaceutical retailers, and cable television companies that sell products about which the WHO has issued recommendations for member states to regulate.

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donations that are subsequently found to be in contravention of its conflict of interest standards. To properly make these determinations, the WHO needs to ask current collaborators and applicants for Official Relations Status and donors to describe the mechanism or possible pathway of the stated conflict of interest, and to quantify the extent of that conflict of interest in US dollars. The answers to this question will help the WHO to determine if the conflict is direct or too remote or diffuse to be a concern, and should discourage the use of the Declaration of Interest statement as a venue to bury worrisome conflicts of interest disclosures among a series of innocuous confessions or further claims to institutional expertise.

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