The Norwegian Implementation of the WHO's Recommendations

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The WHO Recommendations "Marketing of foods and non-alcoholic beverages to children" of 2010 have been implemented in Norway by way of a new self-regulatory regime introduced with full effect from 1 January 2014. The Norwegian Government first aimed at implementing the WHO Recommendations through a legally binding regulation, and a draft was introduced in June 2012. The draft regulation met with both acceptance and criticism, and particularly the latter as it suggested banning all marketing of particular food categories aimed at children below 18 years. An amended draft regulation was later launched. Having negotiated a self-regulatory regime in parallel, the Norwegian authorities chose to accept the regulatory regime suggested by the industry rather than bringing the second draft regulation into effect, under the pressure that the self-regulatory regime would be evaluated within two years. Should the self-regulatory regime not function as intended, then the regulation as drafted would be brought into effect.

The object of this article is to give insight into the process leading up to the self-regulatory regime. Whilst this process raised various legal questions of interest, this article will focus on some key elements that triggered most discussion, namely setting the age limit, how to define marketing, and the selection of food to be covered by the regime. In addition, the legal arguments made by the Government in favour of the draft regulations and the objections to the draft regulations made by the industry will be addressed. This article will not discuss the pros and cons of self-regulation versus legally binding regulation.[1]

I. What happened – in a nutshell

Norway has been leading the European Network on reducing marketing pressure on children, since 2008. After the WHO adopted the Recommendations "Marketing of foods and non-alcoholic beverages to children" ("the Recommendations") at the World Health Assembly in May 2010,[2] the Norwegian authorities started work on a new

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[1] For evaluation of self-regulatory regimes vs. legally binding regulations, see e.g. A Garde and O Bartlett, "Time to Seize the (Red) Bull by the Horns: The European Union's Failure to Protect Children from Alcohol and Unhealthy Food Marketing" (2013) 38 *European Law Review* 498 et sqq.

[2] Resolution WHA63.14, endorsed in May 2010, at the Sixty-third World Health Assembly.

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regulation, and it follows from the hearing memo of 7 June 2012 ("Hearing Memo I") that it was "expected internationally", without further references, that Norway took a lead in the work on implementing the Recommendations.[3]

The first proposal was launched in June 2012 ("First Draft Regulation") by the Ministry of Health and Care Services and the Ministry of Children, Equality and Social Inclusion ("Government").[4] It proposed a full ban on the marketing of unhealthy food (as defined) to the extent that it was deemed to be "directed at children". Children were defined to be people below 18 years of age. The proposal instantly created debate by stakeholders representing the industry, and it was claimed that the First Draft Regulation did not comply with EU/EEA law, not just because of the age limit, implying that most marketing activities could potentially be deemed illegal, but also because the terms used, e.g. "directed at children" were claimed to be unclear and thus difficult to practice. Out of 78 hearing statements, 32 were clearly negative (representing the view of the industry), while 34 were clearly positive (representing health and consumer views) and the remaining statements did not take a clear stance.[5]

A revised proposal was launched in 2013[6] ("Revised Draft Regulation", "First Draft Regulation" and "Revised Draft Regulation" collectively referred to as "Draft Regulations"). The Revised Draft Regulation suggested that certain parts of the criticism raised by the industry had been heard. In particular the age limit was reduced to children of 15 and under, and the term "directed at" was explained in more detail. The hearing statements, however, made it clear that many objections still existed, and principally the same objections as claimed with regard to the First Draft Regulation (explained in more detail below).[7] Further, EFTA Surveillance Authority (ESA) commented on the Revised Draft Regulation during the summer of 2013, underlining the need for proportionate measures with reference to EU/EEA law.[8]

In parallel with the legislative works, the Government was in dialogue with the industry regarding a new self-regulatory regime. An "amicable settlement" between

[3] Ministry of Health and Care Services and the Ministry of Children, Equality and Social Inclusion, "Hearing Memo to proposal for new regulation of marketing of unhealthy food towards children and youths" (Hearing Memo I) , at p. 7, 7 June 2012, available (in Norwegian) at www.regjeringen.no/contentassets/eb5bf2aeba0c429a832f9cc74fe159ad/hoeringsnotat.pdf, accessed on 12 January 2015. All information on the two regulations, hearing memos and hearing statement is available in Norwegian at the Ministry of Health and Care Services' website.

[4] "Draft to Regulation on marketing of food stuff to children and youths" (First Draft Regulation). 7 June 2012, available (in Norwegian) at www.regjeringen.no/contentassets/eb5bf2aeba0c429a832f9cc74fe159ad/vedlegg2.pdf, and in English at www.eftasurv.int/media/notification-of-dtr/Regulations-relating-to-marketing-practices-for-foods-and-beverages-to-c...–9005.pdf and www.eftasurv.int/media/notification-of-dtr/Appendix-to-Regulations.-Unhealthy-foods—9005.pdf, all accessed on 12 January 2015.

[5] 16 statements came from industry associations in the food, beverage and marketing sector, 13 statements came from food business operators, 18 statements came from NGOs and trade unions, 3 statements came from universities and colleges, 8 statements came from municipalities and counties, 9 statements came from government agencies and 11 statements came from other ministries.

[6] "Regulation on the marketing of food and beverages to children" (Revised Draft Regulation), 16 May 2013, is available (in Norwegian) at www.regjeringen.no/nb/dep/hod/dok/hoeringer/hoeringsdok/2013/horing—revidert-forslag-til-forskrift-/horingsbrev.html?id=727096, accessed on 12 January 2015.

[7] Further links to the hearing statements are found at www.regjeringen.no/nb/dokumenter/horing—forslag-til-ny-regulering-av-ma/id684709/ (First Draft Regulation) and at www.regjeringen.no/nb/dokumenter/horing—revidert-forslag-til-forskrift-/id727092/ (Revised Draft Regulation), accessed on 12 January 2015.

[8] Letter from EFTA Surveillance Authority to the Ministry of Trade and Industry, "Comments by the EFTA Surveillance Authority to Norway concerning notification 2013/9005/N", dated 17 July 2013.

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the industry and the authorities was made when the new industry guideline ("Guideline") imposing a self-regulatory regime was launched on 5 June 2013, along with an explanatory guide on how to interpret the Guideline ("Explanatory Guide")[9] with effect from 1 January 2014. It follows from the Guideline section 2 that "Products included in the product list ... should not be marketed directly to children below the age of 13". Possibly the biggest difference, when comparing the Guideline and the Draft Regulations, is that the age limit is set differently. However, the Guideline also states that marketing aimed at youth shall take age and maturity into conscious account.[10]

Pressure was nevertheless placed on the industry, as the Government informed them that the Guideline would be given a two-year "try out" period until Autumn 2015. The Guideline's effect would thereafter be evaluated by the Government, together with the industry, and should this review conclude that the Guideline did not have sufficient effect, then the Revised Draft Regulation would be brought into effect. However, details on the evaluation process were not disclosed.[11]

The Norwegian self-regulatory regime is a "name and shame system", as decisions made by the Food and Drink Industry Professional Practices Committee ("*Matvarebransjens Faglige Utvalg*"/"MFU") will be made public.[12] Should the campaign in question involve violation of legislation, e.g. in the Marketing Control Act, then other measures such as bans and fines may be imposed by the competent authority.

II. Brief introduction to the legal framework prior to the Guideline

Before explaining how the Recommendations are implemented in Norway, some attention should be given to the overall legal framework that applies in Norway, as it illustrates the overall protection of children in general from a marketing perspective. Marketing to children is restricted under the current Marketing Control Act of 9 January 2009[13] (Marketing Control Act) as had been the case under the preceding act too.[14] The particular rules protecting children, which are set out in the Marketing Control Act, outline not only that the promotional activities aimed at children must abide by these rules, but also that all activities that may be seen or heard by children must take into account that children are easily swayed, that they lack experience and are

[9] The Guideline and the Explanatory Guide are available (in English) at mfu.as/37540-Code-and-Guidance, accessed on 11 January 2015.

[10] Guideline section 3, supra note 9.

[11] Letter from the Ministry of Health and Care Services, dated 5 June 2013.

[12] Any entity, NGO or private person may lodge a complaint. The plaintiff's identity will, if requested, not be disclosed to the respondent, only to the Commission. The respondent will be given the right to comment. The complaint will thereafter be assessed by the Complaint Commission. The decision is final.

[13] The Marketing Control Act implements Directive 2005/29/EC on unfair commercial practices, OJ 2005 L 149/22. When implementing the Directive, and overall reviewing the protection of children and marketing law, a specific chapter in the Act was outline to underpin the particular needs of children, *cf* Ot.prp. nr. 55 (2007–2008) pp. 59–74 and pp. 204–205. Section of the Act 19 states that "When a commercial practice is directed at children, or may be seen or heard by children, particular care shall be exercised with regard to the impressionability, lack of experience and natural credulity of children."

[14] Act of marketing of 16 June 1972 no 47 and practice related thereto.

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naturally credulous. These rules apply to all marketing activities, regardless of the type of media.

Furthermore, TV commercials are restricted. The Broadcasting Act of 4 December, 1992, section 3-1 states in general that commercials are not allowed to be broadcast during children's programmes. Moreover, it prohibits advertisements that are specifically targeted at children, involving much stricter requirements than those outlined in the Marketing Control Act, which does not impose a ban as such. Marketing restrictions concerning children are further outlined in the Regulation on Broadcasting of 28 February 1997, section 3-6: It is illegal to broadcast advertisements for any product (including foodstuffs) or service that is of particular interest to children and young people, if the advertisement involves people or characters that e.g. within the past 12 months have appeared regularly as a substantial part of a programme aimed at children or young people and broadcast either on television or radio. Further, it indicates what factors are relevant when assessing whether the advertisement is specifically targeted at children, i.e. whether the advertisement relates to a product or service of particular interest to children, at what time during the day the advertisement is broadcast, if children under the age of 13 are playing a part in the commercial or if it has an animation or content that particularly appeals to children.[15]

In addition, the Education Act of 17 July 1998, section 9-6, aims to reduce the marketing pressure on pupils. Section 9-6 states that pupils shall not be exposed to advertisements that might create a commercial pressure or that can substantially influence the pupils' attitude, behaviour and values. These restrictions apply to advertisements in school areas, in textbooks as well as other learning material used as part of the education process.

To complete the legal background, an industry guideline had been in place since 2007 aimed at reducing the marketing of unhealthy food at children, but with a less extensive scope than the Guideline. It was not mandatory to comply with this, and in the legal hearing the effectiveness of the guideline is questioned and discussed, particularly with regard to the SIFO[16] evaluation of 2010, an evaluation performed by Standard Norge in 2009/2010.[17]

In summary, it is the view of the authors that Norwegian law and practice are in general protective of children, but whether it was de facto sufficient and efficient taking into account the particular challenges in combating non-communicable diseases as pinpointed by the WHO, may be questioned, as children would still, for example, be exposed to general advertisements for unhealthy food even though they were not particularly made for children. The Government concluded that there *was still potential for strengthening* the current legislation. The key reason was that the current legal framework had the economic

[15] The EU Directive 2010/13/EU of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States, concerning the provision on audio-visual media services (the Audio-visual Media Services Directive), OJ 2010 L 95/11, demands freedom to provide broadcasting services within the Community and imposes the *"country of origin"* principle, see Art. 3. Thus, only the originating country's legislation will apply even though it is less strict than the Norwegian equivalent rules. The minimum requirements in e.g. the Directive's Arts. 9(1)(g) and 9(1)(e) will, in any case, apply to all EU/EEA countries, but the Norwegian legislation is stricter.

[16] National Institute for Consumer Reseach.

[17] Hearing Memo I, supra note 3, at p. 32 et sqq.

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perspective of consumers as its main aim, rather than health, and moreover the authorities found that a regulation would hinder marketing that currently would be legal. Thus, such a regulation would in general hinder marketing of unhealthy food directed at children on the internet, marketing in public areas on board etc.[18]

III. Key issues – defining the scope

1. Overview

Although there appeared to be an understanding or acceptance amongst the food suppliers that the Government desired stricter rules than those that currently existed in Norway, the scope of the Draft Regulations was challenged, both legally and factually.[19] The key discussion points, which are discussed below, were the age limit, which marketing activities should fall within the scope of the rules, and, lastly, which food was to be regarded as unhealthy and consequently be restricted when it came to marketing.

2. Definition of "children"

Defining "children" was probably one of the issues that created the most debate in Norway. The age limit is one of the most important components in defining the scope. The aim is to protect children due to their particular vulnerability and lack of critical attitude, but as children develop and gain maturity at different ages and for various reasons, setting age limits inevitably involves some uncertainty.

The EU Pledge,[20] which is a voluntary initiative by leading food and beverage companies to change the way they advertise to children, applies to children under the age of 12 years. The old Norwegian industry guideline, referred to above, defined children to be 12 years old or younger. During both the first and the second legal hearing the industry claimed that this age limit should be maintained, and referred to scientific assessments that supported such a view.[21]

The First Draft Regulation set the age limit at children below 18 years. In Hearing Memo I for the First Draft Regulation, the age limit was not thoroughly discussed. The Government said that children should be defined as any person under the age of 18, as this definition was consistent with the Guardianship Act, section 1, the Regulation on Broadcasting, section 3-6 and the UN Convention on the Rights of Children, Article 1. The Marketing Control Act does not define children, but it follows from both the Act itself in section 19, 2nd paragraph and from the preparatory works that age and maturity shall be taken into account when applying the law.[22]

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[18] Hearing Memo I, supra note 3, at p. 29.

[19] The Recommendations include references to the scientific documentation underpinning the need for action. This article will not revolve around an analysis of the factual arguments, and least of all indicate an evaluation of references to scientific documentation including scientific quality and standards. All hearing statements are publicly available (in Norwegian), supra note 7.

[20] EU Pledge, available at www.eu-pledge.eu/, accessed on 12 January 2015.

[21] See hearing statement submitted by ORKLA, p. 18, further references are made to the studies made by Vlakenburg and Cantor (2001), Livingstone and Helsper (2006) and McGinnis et al. (eds) (2006), available at www.regjeringen.no/contentassets/e0f21d0606b7419996c5163c709fef36/orkla1.pdf, accessed 11 January 2015.

[22] *Cf* Ot.prp.nr.55 (2007–2008) on the supervision of marketing and contract terms.

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A similar margin of discretion, depending on age and maturity (as set out in the Marketing Control Act), was not, however, explicitly stated in the First Draft Regulation. Consequently the industry deemed it very restrictive, as most marketing activities would then fall within its scope. The underlying rationale – amongst others – was that what is appealing, for example, to a 20-year-old person is likely also to be appealing to a 17-year-old person, so the regulation would arguably function almost as an unlimited ban.[23] In the Hearing Memo for the Revised Draft Regulation (Hearing Memo II), the Government made it clear that it was not its intention that age as such was to have legal effect, and it confirmed that age and maturity were to be taken into account according to the First Draft Regulation. Despite this, the Revised Draft Regulation does not explicitly state that age and maturity shall be taken into account.[24]

The Revised Draft Regulation defined "children" as anyone below 16 years. In the Hearing Memo to the Revised Draft, the Government only briefly addresses the essential issue, namely at what age a person may be considered to have developed a critical attitude.[25] It simply states that science cannot give an answer to this question; reference is also made to the WHO, more precisely that the WHO has stated that it is difficult to be conclusive with regard to age limits when taking into account the current scientific documentation.[26] Without referring to particular scientific documentation, the Government stated that, in its view, children above the age of 12 can be vulnerable too, and must thus be protected. Despite the fact that these children have reached a better understanding of what marketing is, compared to younger ones, they are still vulnerable and they are in the preface of adulthood, where parents have reduced impact. In brief, it followed a middle course between the First Draft Regulation and the position of the industry, and defined children as "persons up to and including 15 years".

In light of the above, it may be wondered why the Government accepted that the Guideline "only" defines children in the same way as the preceding guideline, namely as "aged 12 or younger". In the Government's defence, they have stated that they will be paying particular attention to the low age limit in the guidelines in the "try out" period until 2015.[27]

3. Definition of "marketing"

Classic marketing activities are defined as activities falling within the scope of both the Draft Regulations and the Guideline, and this was not disputed during the legal hearing.[28] The definition of marketing that created debate in Norway was mainly

[23] Ministry of Health and Care Services and the Ministry of Children, Equality and Social Inclusion, "Hearing Memo to Regulation on the marketing of food and beverages to children" (Hearing Memo II) p. 13, 16 May 2013, available (in Norwegian) at www.regjeringen.no/contentassets/f1a82c7111674735902cafb8f170f8f5/hoering.pdf, accessed 12 January 2015.

[24] Hearing Memo II, supra note 23, p. 12.

[25] Hearing Memo II, supra note 23, pp. 12–14.

[26] "A framework for implementing the set of recommendations" (WHO, 2012).

[27] Letter from the Ministry of Health and Care Services, dated 5 June 2013.

[28] The Draft Regulations defined marketing as "any action taken to promote sales of foodstuff to consumers", cf. section 3, 1st paragraph litra b and c, supra note 3 and 4. The Guideline states in section 2 that "Marketing is defined as any sales promotional act", supra note 9.

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whether sponsorships, give-aways/samplings, packaging and in-store displays were to be considered as marketing.[29]

The First Draft Regulation section 5 stated that when assessing whether marketing is directed at children and young people, the following factors shall, among others, be emphasised, i.e. whether the marketing or the marketed foodstuff has a form of presentation, content or design that may appeal particularly to children, for example because of its language, colours, effects or use of images.[30]

In Hearing Memo II, the Government explained that it was not the intention to hinder e.g. regular shop displays and sponsoring. In the Revised Draft Regulation section 3, 1st paragraph, litra c, the definition of marketing was retained, but it was made clear that the term marketing did not include, for example, the general presentation of a product at retail outlets, containers and packaging without inducements that might particularly appeal to children according to section 4, litra g regulating specific usage of gifts, toys, games etc. and sponsorships that only involve the use of the sponsor's name, trademark and logo.[31]

The Guideline generally complies with the Revised Draft Regulation in this regard: General (and customary) display of unhealthy food is not restricted, but when other features especially appealing to children are added or used when displaying the product, such as cartoon characters, celebrities or similar, it may trigger the applicability of the Guideline. In the Explanatory Guide it is emphasised that whether a display is permissible or not depends on an overall assessment, "having regard to the use of e.g. characters, posters, images, etc. in addition to the actual display".[32] While it is stated explicitly in Hearing Memo II[33] that sampling of unhealthy foodstuff to children is illegal marketing, the Guideline allows "sampling of products if a parent or other responsible adults have consented to the sampling."[34]

4. Definition of "directed at"

Both the Draft Regulations and the Guideline use the phrase "directed at"/"directly to". It is the marketing "directed at" children that is illegal, and it is essential to understand

[29] *Cf* Recommendations, p. 7: "The systematic reviews show that, although television remains an important medium, it is gradually being complemented by an increasingly multifaceted mix of marketing communications that focuses on branding and building relationships with consumers. This wide array of marketing techniques includes advertising, sponsorship, product placement, sales promotion, crosspromotions, using celebrities, brand mascots or characters, popular with children, web sites, packaging, labelling and point-of-purchase displays, e-mails and text messages, philanthropic activities tied to branding opportunities, and communication through 'viral marketing' and by wordof-mouth. Food marketing to children is now a global phenomenon and tends to be pluralistic and integrated, using multiple messages in multiple channels."

[30] Other factors of relevance were e.g. the time and place of marketing, the use of famous people, the use of animation or cartoon characters appealing to children, the use of extras, gifts, toys, coupons, discounts or collectables appealing to children and the sponsoring of products, activities or places either popular among, or to a great extent reaching children and young people either as participants or as audience, supra note 3.

[31] These exemptions were further explained in Hearing Memo II, supra note 23, p. 15. *"General presentation"* was according to the Government's view the normal display in shelves, but placing that would specifically capture children's attention would be regarded as marketing, typically when combined with effects that could appeal to children.

[32] The Explanatory Guide to Guideline section 2, 2nd paragraph, litra b, supra note 9. The Hearing Memos and the Guideline also address whether, for example, toys inside packets of cereal are acceptable, *cf* Hearing Memo II, supra note 23, pp. 15–16, and the Explanatory Guide to Guideline section 2, supra note 9.

[33] Hearing Memo II, supra note 23, p. 16.

[34] Guideline section 2c, supra note 9.

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when marketing falls within this category. Even though the starting point is equal, the Guideline and the Draft Regulations use different ways of explaining the term.

Both Draft Regulations list the particular factors to be taken into account, but they do not do so identically: the Guideline states that the assessment shall emphasise to what extent the media and means used appeal particularly to children, as well as to what extent the promoted products appeal particularly to children. This is explained more thoroughly by way of examples in the Explanatory Guide.[35]

Several of the factors in the Revised Draft Regulation are incorporated into the Guideline and also into the examples of the Explanatory Guide, but in a manner the authors find easier to apply in practice. Also, some of the indistinctiveness in the Draft Regulations is avoided. The Explanatory Guide refers to assessments under the Regulation on Broadcasting of 28 February, 1997, *cf* Broadcasting Act of 4 December, 1992, section 3-1, which prohibits advertisements that are targeted specifically at children, and there is also similarity to the criteria set by the Consumer Ombudsman according to the Marketing Control Act.[36] Thus, the way in which these Acts have been interpreted might be helpful when interpreting the Guideline, but as the wording is not identical, there may be different results. Unlike the Draft Regulations, it follows explicitly from the Guideline that marketing transmitted on TV after 21.00 will not be regarded as marketing aimed at children.

It is the authors' view that, except as stated below, the outcome of particularly the Revised Draft Regulation and the Guideline would be that they principally will cover the same situations. The legal conclusion *should generally* turn out more or less the same, but due to variations in language, and also legal techniques during drafting, some differences might perhaps also be established.

5. What is "unhealthy food"?[37]

The Government's outspoken intention was that the Draft Regulations were to cover the food deemed as the unhealthiest food, and by implication there would be food categories deemed as less healthy not falling within the scope. Unhealthy food was defined as "energy-dense, salty, sweet or nutrient-poor food". The food categories are exhaustively defined, under the same categories as the customs tariffs, and included e.g. chocolate, biscuits, snacks, soda and different kinds of fast food.[38] The Guideline principally follows the same definitions as set out in the Revised Draft Regulation, and to a large extent also the First Draft Regulation.[39]

[35] Both the First and the Revised Draft Regulation, supra notes 4 and 6, list factors which are relevant when assessing whether marketing is "directed at" children, i.e. "the use of people who in particular may appeal to children". Some nuances were introduced in the Revised Draft. Amongst others, it emphasised that the factors were only possible, relevant factors, and not mandatory for the assessment, which was contrary to the First Draft Regulation. Also, the wording "may appeal" in the listed factors, was changed to "in particular may appeal". The Government stated in the Hearing Memo II that the amendment would narrow the scope of the marketing ban, supra note 23, p. 18.

[36] See e.g. www.forbrukerombudet.no/asset/5216/1/5216_1.pdf, accessed 12 January 2015.

[37] Various foods were discussed in the Hearing Memos, e.g. fast food/take away, see Hearing Memo I, supra note 3, pp. 50–58 and Hearing Memo II, supra note 23, pp. 19–29.

[38] The tariff categorisation is outlined in the Regulation on certain tariffs, 11 December 2001 no. 1451.

[39] While there are some changes between the First Draft Proposal and the Revised Draft Regulation, the Guideline principally follows the second proposal, but there are some changes, e.g. fast food.

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The First Draft Regulation defined beverages with sweeteners as unhealthy food.[40] A close to united food and beverage industry argued that such a ban would affect the industry's possibilities of offering healthier alternatives.[41] If the purpose of the regulation is to prevent obesity, the marketing of products where sugar is substituted by sweeteners should not be prohibited. The authorities decided nevertheless to keep the definition that included beverages with sweeteners, and they emphasised the indirect marketing effect when beverages are sold under the same trademark.[42] Children do not have the same ability as adults to differentiate between beverages sold under the same trademark.

The result was the opposite for sugar-free sweets (mints, pastilles, chewing gum etc). These products were also included in the First Draft Regulation, but the authorities concluded that there was less risk of confusion. It was also emphasised, for example, that Xylitol in chewing gum reduces tooth decay in children, and is thus beneficial to health.[43]

III. Legal counter-arguments – compliance with EEA law

1. The principle of proportionality

A prohibition on marketing may be considered as an obstacle to trade under EEA Agreement, Article 11 on the free movement of goods. Quantitative restrictions on import and all measures of equivalent effect are prohibited. Case law from the ECJ provides further details on interpretation and establishes that the prohibition applies to any trading rule that is capable of hindering, either directly or indirectly, trade within the EEA.[44] Thus, the prohibition will only be acceptable under EU/EEA law when justified under the EEA Agreement, Article 13, as detailed by the practice from EFTA Court and the ECJ.[45]

The protection of, inter alia, public health is recognised under EEA Agreement, Article 13 as a *possible* justification for restricting the free movement of goods, but only when the principle of proportionality is observed. Consequently, the measure (in this case the Draft Regulations) must be suitable, necessary and proportionate with regard to the aim pursued. In particular, it must be established that the same objective may not be as effectively achieved by measures which are less restrictive of intra-EEA trade. Undoubtedly, these requirements are strict and presuppose that when implementing the WHO Recommendations, a fine-knitted policy must be developed, balancing the various interests in a manner acceptable under EEA law. As regulations involving public health, amongst others, involve complex assessments, Member States have been granted a certain margin of discretion.[46]

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[40] Appendix to First Draft Regulation, "Foodstuff regarded as energy-dense, salty, sweet or nutrient-poor food according to this regulation" (30 May 2012), available at www.regjeringen.no/contentassets/eb5bf2aeba0c429a832f9cc74fe159ad/vedlegg3.pdf, accessed 12 January 2015.

[41] Hearing Memo II, supra note 23, p. 19.

[42] Hearing Memo II, supra note 23, p. 19.

[43] Hearing Memo II, supra note 23, p. 20.

[44] See, inter alia, Case 8/74 *Dassonville* [1974] ECR 877; Case E-5/98 *Fagtun* [1999] EFTA Ct Rep 5 and joined cases C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097.

[45] Equivalent to the Treaty on the Functioning of the European Union, Art. 36. Relevant case law is Case 120/78 *Cassis de Dijon* [1979] ECR 649; Case E-6/00 *Dr Jürgen Tschannett* [2000-2001] EFTA Ct Rep 203; Case C-420/01*Commission v ltaly* [2003] ECR I-6445 and Case C-110/05 *Commission v ltaly (Motorcycle trailers)* [2009] ECR I-519.

[46] See Case T-13/99 *Animal Health v Council* [2002] ECR II-3305, at para. 168 et sqq.

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The legal hearing makes it clear that the industry was of the view that the principle of proportionality was not met, and that the Draft Regulations were thus in violation of EEA law.[47] In particular, the industry *claimed* that it was not documented that there was a cause and link between marketing of unhealthy food on the one hand and obesity and diet-related diseases among children on the other.[48] The Government on its side stated that in its view it would fulfil its burden of proof as long as it was established that it was reasonable to assume that the measure would contribute to protecting public health by countering obesity and non-communicable diseases.[49] This line of argument follows a judgment from the Oslo City Court of 14 September 2012:[50] Phillip Morris had sued the Ministry of Health and Care Services because of a ban in the Prevention of the Harmful Effects of Tobacco Act, against visible display of tobacco products.[51] The case raised the question of whether it had been proven that the ban on visible display of products was a suitable measure in pursuit of the aim of protecting public health. To answer this, the Oslo District Court also discussed the level of evidence necessary for a measure to be deemed suitable.

The EFTA Court was asked by the Oslo District Court to give an advisory opinion (E-16/10). The EFTA Court found that the ban was suitable for the protection of public health "as by its nature it seems likely to limit, at least in the long run, the consumption of tobacco products. Accordingly, in the absence of convincing proof to the contrary, a measure of this kind may be considered suitable for the protection of public health" (paragraph 84). The EFTA Court reached this conclusion by applying de facto a precautionary principle (although without mentioning it explicitly) to the question on a causal link between the measure and the aim pursued. The principle has been applied in EEA/EU law when there is scientific uncertainty regarding the health risk itself, and not applied in situations where there is uncertainty whether the measure taken is suitable and effective (see e.g. E-3/00 – *Kellogg's v Norway*).[52] Whether the ECJ will agree to apply the precautionary principle in the same manner remains to be seen.

The industry claimed that this judgment from the Oslo City Court had little legal effect, and moreover that the advisory opinion from the EFTA Court had been wrongly interpreted. It claimed that still, Member States are obliged to base their policies on science-based knowledge. Even though the Member States were in position to take measures also in a situation where there is scientific uncertainty, it was claimed that there had to be some sort of causal link supported by scientific evidence, and reference was made to C-73/08 *Bressol*, paragraph 71.[53] The triggering question is nevertheless which

[47] See hearing statements submitted by ORKLA to the Revised Draft, available at www.regjeringen.no/contentassets/e0f21d0606b7419996c5163c709fef36/orkla2.pdf and www.regjeringen.no/contentassets/e0f21d0606b7419996c5163c709fef36/orkla1.pdf , both accessed 11 January 2015). See also Hearing Memo II, supra note 23, pp. 36–39.

[48] See the above-mentioned hearing statements provided by ORKLA, supra note 47, at pp.11–21 in the first reference and pp. 9–13 in the second reference.

[49] Hearing Memo II, supra note 23, p. 38.

[50] Hearing Memo II, supra note 23, p. 37.

[51] Act of 9 March 1973 No 14 relating to the Prevention of the Harmful Effects of Tobacco.

[52] Indeed the unusual applicability of the precautionary principle is commented on by A Alemanno "The legality, rationale and science of tobacco display ban after the Philip Morris Judgment" (24 October 2011), available at papers.ssrn.com/sol3/papers.cfm?abstract_id=1948507, accessed 12 January 2015.

[53] See legal opinion submitted by Orkla, *supra* note 47, first link at p. 15; Case C-73/08 *Bressol* [2010] ECR I2735.

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requirements must be met *in the absence of convincing proof*. In order to secure a high level of protection of human health, the current guidance from the EFTA Court is that a measure may be found "suitable" when it is "reasonable to assume" that the measure would be able to contribute to the protection of human health.[54]

In addition to the above, several other claims of non-conformity were made by the industry, e.g. other and less extensive measures could be taken instead of a regulation, which by implication means that the principle of proportionality has not been complied with. As the Guideline was adopted, instead of the Revised Draft Regulation, no court has yet assessed whether the principle of proportionality is correctly observed by the Government in this particular case. The EFTA Surveillance Authority (ESA) has commented on the Revised Draft Regulation briefly in its letter of 17 July 2013,[55] and underlined the need to apply the principle of proportionality, but ESA has not yet performed any assessments and thus it is premature to predict its assessments.

2. Other legal counter-arguments

The other objections made by the industry were as follows. Firstly, that the Draft Proposals were claimed to be to the contrary to the freedom of speech as outlined in the Norwegian Constitution, section 97 and the EMK, Article 10.[56] Marketing acts are not within the core of the freedom of speech, but still enjoys protection. The Government agreed that the Draft Proposals were limiting the freedom of speech, and that such a limitation presupposed that the limitation was justifiable and proportionate. Although not referred to by the Government in Hearing Memo II, recent case law from the ECJ does support the idea that policies and activities ensuring a high level of health protection are compatible with the fundamental rights referred to in TFEU, Article 6.[57]

Secondly, it was claimed that the Norwegian Food Act did not provide a proper legal basis for establishing a ban through a regulation. Moreover, it was claimed during the hearing that the regulation is of such a character that it must be enacted in the form of a law, not a regulation, which would call for a more thorough process in the Norwegian Parliament.[58]

Thirdly, it was alleged that the Draft Regulations infringed the Audiovisual Media Services (AMS) Directive (2010/13/EU). More precisely, it was claimed that the Draft Regulations were not in accordance with the exemptions for a stricter regulation that are available under the Directive. The Government said that the intention was that the Draft

[54] EFTA Court, case E-16/10, *Philip Morris Norway* [2011] EFTA Ct Rep 330, at para. 84.

[55] Norwegian Notification 2013/9005/N, supra note 8.

[56] The Constitution § 100 and EMK, Art. 10 are assumed to provide the same protection of freedom of speech, but the margin of discretion provided to the Member States by European Court of Human Rights will not be granted by the national courts.

[57] In the matter C-544/10 *Deutsches Weintor eG v Land Rheinland-Pfalz*, the ECJ assessed whether restricting marketing would be compatible with TFEU, Art. 6.1. The ECJ found that the freedoms to occupation and to conduct a business are not absolute and it was necessary to strike a fair balance between the fundamental rights and protection of health, the latter being explicitly protected in the Charter of Fundamental Rights of the European Union (2010/C 83/02) Art. 35, *cf* para. 42 et sqq; A Alemanno and A Garde "Fundamental rights as obstacles and as opportunity for policymaking to promote healthier lifestyle" (2013) 7 *Sieps* 87 et sqq.

[58] See hearing statements submitted by ORKLA to the Revised Draft, available at www.regjeringen.no/contentassets/e0f21d0606b7419996c5163c709fef36/orkla1.pdf, at pp. 5–8 and www.regjeringen.no/contentassets/e0f21d0606b7419996c5163c709fef36/orkla3.pdf, accessed 11 January 2015.

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Regulations would only apply to Norwegian entities, thus consistent with the "country of origin" principle, to which the industry stated that it would incur competitive disadvantages between Norwegian entities and foreign suppliers.[59]

Fourthly, it was alleged during the public hearing that the Unfair Commercial Practice Directive (2005/29/EC) also represented an obstacle to the Draft Regulations. The Directive provides for a total harmonisation that leaves no freedom to the Member States to set other rules. The authorities argued that the Directive only protects economic interests, not health, and the Draft Regulations consequently fell outside the scope of the Directive. Reference was made to EU case law C-288/10 *Wamo* and C-126/11 *Inno*, which did provide for national rules made for other reasons than protecting consumers' economic interests.[60] The authorities also referred to Com SEC (2009) 1666, para 1.6, which says that the Directive does "not affect the possibility for Member States to have additional and more restrictive rules regulating commercial practices for reasons of protection of health and safety of consumers". Also, recent case law from the EJC follows the same line; that national rules setting out stricter rules than outlined in the Directive have been found legitimate, as the regulations were set for other reasons than those covered by the Directive.[61]

IV. Final remarks

Adapting a self-regulatory regime, instead of a legally-binding regulation, may have less impact on the effectiveness of the implementation of the Recommendations. That being said, Norway has now in force rather strict rules aiming at reducing the impact of marketing of unhealthy foods towards children under the age of 13. The call on action from the WHO has been responded to, but whether the current Guideline truly adopts the Recommendations and the motives underpinning them in an adequate and sufficient manner, will be for others to assess.

The objections raised by the industry in Norway presumably do not differ from most other countries; objections are inevitable when strict limitations on marketing are suggested. Despite this, in the authors' view, it should be possible to deduce some learning points from the Norwegian process. As underlined in Recommendation 4, clear definitions ought to be used on key components, and one may question whether the Draft Regulations succeeded in this respect. Despite controversy, much of the criticism raised was indeed attacking the ambiguities in both sets of Draft Regulations, and in this particular regard reviewing and comparing the Guideline to the Draft Regulations might be of some interest. In our view, the Guideline's approach (combined with the Explanatory Guide) to the discretionary assessment to be made under the regime, appear to be more precise and thus easier to apply in practice than the Draft Proposals.

The Guideline had been in effect for slightly more than a year when this article was written. The MFU has so far given 10 opinions related to the marketing ban in 2014.[62]

[59] Hearing Memo II, supra note 23, at pp. 39–41.

[60] Distinguishing the economical interests from other interests may be difficult, see A Garde, "The Unfair Commercial Practises Directive – A successful example of legislative harmonisation" in P Syrpis (ed.), *The Judiciary, the Legislature and the Internal Market* (Cambridge, Cambridge University Press, 2012) p. 139 et sqq.

[61] C-391/12 *RLvS v Stuttgarter Wochenblatt Gmhb*.

[62] The opinions are available (in Norwegian) at mfu.as/39309-Aktuelt, accessed 9 January 2015.

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The MFU concluded that there had been illegal marketing in five of these. The question repeatedly assessed in these cases has principally been whether the marketing was aimed directly at children.[63] So far, if the marketing does not appeal particularly to children, but appeals to consumers in general, the marketing has been deemed to comply with the Guideline. In the authors' view, the outcome of the current decisions appears to correspond rather well with the Guideline and the Explanatory Guide. That being said, an assessment of whether the industry is in fact complying with the Guideline has not yet been undertaken, to the knowledge of the authors. Undoubtedly, it will be interesting to learn if and what content an evaluation of self-regulation in Norway will have, at last but not least, its outcome and consequences.

V. Addendum

As of 29 March 2017, the situation is that the Norwegian self regulatory regime is under evaluation by the Directorate of Health. It is expected that the results from this evaluation will be published during Spring 2017. Little information has so far been made publicly available, as the evaluation is ongoing. The authors are, however, aware that the Directorate of Health has requested a survey in order to demonstrate the actual exposure of marketing of unhealthy food towards children. In addition, and as expected, stakeholders have been asked to give their comments. It would come as no surprise were the current scope of the self-regulatory regime to be challenged again, particularly the list of products, as well as the current conditional "green card" for product display and product packaging.

The authors are aware that some criticisms have been made of the fact that filing a complaint is not easy accessible in practice, both because knowledge of the self-regulatory regime is generally low, and because the current set up on how to file a complaint could be improved in order to make it more user friendly. Moreover, some criticisms have been made about the quality of the assessments and procedural handling of the complaints. It remains to be seen how the Directorate of Health will assess and respond to these comments. As a final note we mention that the Norwegian Cancer Society has initiated a project to improve awareness amongst children of the impact marketing has, as well as to have the children themselves assess whether marketing follows the self-regulatory regime.[64] Consequently, children themselves would also learn how to log a complaint, should the marketing – in the children's view – be non-compliant or questionable. Indeed, this project did lead to a considerable increase in the number of complaints lodged during the past year.

[63] *Cf* the Guidelines clause 2, supra note 9.

[64] See kreftforeningen.no/forebygging/forebygging-i-skoler-og-barnehager/reklamedetektiver/.

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