

# **Advertising Regulation and the Protection of Children-Consumers in the European Union: In the Best Interests of ... Commercial Operators?**

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## *Abstract:*

This article argues that, despite its promise to mainstream the best interests of the child into all EU policies, the European Commission has failed to ensure that the EU internal market and consumer policies, which are at the heart of the EU legal order, adequately protect children. Two main pieces of EU legislation illustrate the argument: the Unfair Commercial Practices Directive and the Audiovisual Media Services Directive.

## *Keywords:*

children's rights – European Union – mainstreaming – internal market – public health and consumer protection – advertising – commercialisation of childhood – vulnerable consumers – obesity prevention

## **Introduction:**

The EU internal market has always been at the very heart of European integration. It lays down that goods, persons, services and capital shall move freely from one Member State to another in accordance with the provisions of the Treaties.<sup>1</sup> Its rationale is to stimulate competition by opening

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<sup>1</sup> Article 26(2) TFEU (ex-Article 14(2) EC).

up frontiers so that consumers have a larger choice of goods and services and businesses benefit from larger markets and more opportunities to establish themselves abroad. Market integration requires, however, that consumers are sufficiently informed about the goods and services available to them.<sup>2</sup> This is why advertising is regarded as playing a central role in the establishment and functioning of the internal market. Not only does the freedom to advertise allow commercial operators to promote their goods and services in all 27 EU Member States and thus ensure that consumer habits do not crystallise along national lines, but it also fits in with the model of consumer protection promoted by EU political institutions, which relies on the explicit assumption that consumers must be informed in order to be sufficiently confident to engage in cross-border transactions and take full advantage of the opportunities a wider market offers.<sup>3</sup> As a result, the Court of Justice of the European Union (ECJ) protects the right of individuals and companies to promote their goods and services,<sup>4</sup> which derives not only from their right to engage in economic

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<sup>2</sup> Most EU consumer legislation is based on Article 114(1) TFEU (ex-Article 95(1) EC). This clearly stems from both the wording of Article 169 TFEU (ex-Article 153 EC), which explicitly refers to Article 114 TFEU and the wording of Article 114(3), which explicitly provides for the obligation of EU institutions to ensure a high level of consumer protection when adopting harmonising measures on the basis of Article 114(1). The mainstreaming provision previously contained in Article 153(2) EC has become a provision of general application enshrined in Article 13 TFEU: ‘consumer protection requirements shall be taken into account in defining and implementing other Union policies and activities’.

<sup>3</sup> ‘Empowered and informed consumers can more easily make changes in lifestyle and consumption patterns contributing to the improvement of their health, more sustainable lifestyles and a low carbon economy’: (European Commission, 2007a, 11). Note, however, that the information paradigm thus promoted may only be effective if the information is of sufficient quality to guide consumer choices and effectively allows them to ‘protect’ themselves (Weatherill, 2005, 9).

<sup>4</sup> Article 10(1) of the European Convention on Human Rights and Fundamental Freedoms (ECHR) provides that ‘everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers’. The case law of the European Court of Human Rights has indicated that all forms of expression are protected under this provision,

activities and the general commitment, in the EU context, to a market economy based upon free competition, but also from their inherent entitlement freely to express and receive views on any topic, including the merits of the goods or services that they market.<sup>5</sup>

Nevertheless, if economic integration increases opportunities for consumers and businesses alike, it may also give rise to difficulties when the fundamental principle of free movement conflicts with other fundamental interests such as public health, consumer or child protection. In particular, the freedom of business operators to promote their goods and services may facilitate the marketing of goods and services whose consumption should be either avoided altogether or strictly limited (including tobacco, alcoholic beverages, unhealthy food, as well as gambling services). The

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including commercial expression which consists in the provision of information, expression of ideas or communication of images as part of the promotion of a commercial activity and the concomitant right to receive such communications. See, in particular, *Markt Intern v Germany* Series A no 165 (1990) 12 EHRR 161, paras 25 and 26; *Groppera v Switzerland* Series A no 173 (1990) 12 EHRR 321, para 55; and *Casado Coca v Spain* Series A no 285 (1994) 18 EHRR 1, paras 35 and 36; *Krone Verlag GmbH & Co. KG v Austria* Series A no 9605/03 (14.11.08), para 31. The ECJ has upheld the principle of freedom of expression as a general principle of EU law, the observance of which it ensures. To do so, it draws upon the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or to which they are signatories. The ECHR has special significance in that respect: see, *inter alia*, Case C-260/89 *ERT* [1991] ECR I-2925, para 41; Case C-274/99 P *Connolly v Commission* [2001] ECR I-1611, para 37; Case C-94/00 *Roquette Frères* [2002] ECR I-9011, para 25; Case C-112/00 *Schmidberger* [2003] ECR I-5659, para 71; Case C-71/02 *Karner* [2004] ECR I-3025, para 48; and Case C-380/03 *Germany v Parliament and Council (Tobacco Advertising II)* [2006] ECR I-11573, para 154. See also Article 11(1) of the EU Charter of Fundamental Rights, which states that ‘everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers’.

<sup>5</sup> Opinion of Advocate General Fennelly in Case C-380/03 *Germany v Parliament and Council (Tobacco Advertising II)* [2006] ECR I-11573, para 154.

concerns are particularly acute for children who are more credulous and inexperienced than adults and therefore less able to distinguish the commercial intent of advertising. The impact of advertising on children's consumption choices, health and well-being is an integral part of the broader debates on the commercialisation of childhood (see, for example, Linn, 2005), particularly in the EU context where goods and services are subjected to the principle of free movement, thus calling on a transnational response to the concerns advertising raises for child welfare.

Free movement has never been unlimited, and it is universally accepted that the proper functioning of the internal market requires that certain non-commercial interests should be sufficiently protected. In particular, public health, consumer and child protection may all be invoked to limit the free movement of goods and services, and more specifically the right of commercial operators to promote their goods and services. The question therefore arises as to how potentially conflicting interests – the free movement of goods and services, including the fundamental freedom of commercial operators to promote their goods and services, on the one hand, and public health, consumer or child protection, on the other – should be balanced against each other. This contribution focuses more specifically on the extent to which EU institutions have taken the principle of the best interests of the child as a primary consideration in the development of the core area of internal market policy, as mandated by the Commission Communication of 4 July 2006 (European Commission, 2006), by Article 24 of the EU Charter and, following the entry into force of the Lisbon Treaty, by Article 3 TEU. It argues that the Commission Communication has yet to play a role in shaping EU internal market and consumer law. Indeed, discussion of such issues has barely featured at all in discussions relating to the development of the EU's broader Children's Rights Strategy. It starts by acknowledging that the EU has recognised that children constitute a group of particularly vulnerable consumers and has adopted legislation intended to protect them from unfair commercial practices. Nevertheless, the threshold it has laid down to assess the fairness of commercial practices is insufficient and, as such, incapable of protecting children adequately

from the negative impact advertising has on them (I). The same observation may be made when considering the debates which have surrounded the adoption of another key piece of EU legislation, the Audiovisual Media Services Directive (II).

## **I. The Explicit Recognition that Children are Vulnerable Consumers: the Unfair Commercial Practices Directive**

Children, who make up more than a fifth of the EU population, represent three markets:

- the primary market, as they have more and more buying power with their own money to spend;<sup>6</sup>
- the parental market, as they play a major role in influencing what their parents buy;<sup>7</sup> and
- the future market, as it is likely that they stick to the consumption habits which they have acquired as children when they grow older: In relation to food choices, for example, evidence emphasises the need to focus obesity prevention policies on children in light of the fact that an obese child is more likely to become an obese adult if he/she does not change his/her eating habit.<sup>8</sup>

It should therefore not come as a surprise that advertisers have developed marketing techniques specifically designed to seduce young audiences. The growing number and range of commercial messages relied upon extend far beyond traditional media advertising and involve activities such as online marketing, sponsorship and peer-to-peer marketing (Buckingham, 2009). The development

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<sup>6</sup> Recent estimates suggest that children in the UK receive an average of £10 per week in pocket money and £16 in ad hoc handouts (Buckingham, 2009).

<sup>7</sup> In the UK alone, overall spending on children (including childcare and education) amounts to around £100 billion per year (Buckingham, 2009).

<sup>8</sup> Overweight children enter adulthood with a raised risk of adult obesity of up to seventeen-fold (Hauner, 2004, 219).

of integrated marketing strategies, relying on a broad range of media, therefore increases the exposure of children to advertising. Moreover, commercial messages have become all the more effective as they rely on the use of marketing techniques such as cartoon characters, licensed characters, equity brands and celebrities, to which young audiences are particularly vulnerable (see in particular McGinnis *et al.*, 2006, and Harris *et al.*, 2009). Their impact is even more powerful since companies tend to use ‘integrated marketing communications’, in which promotional activities range across different media platforms and which often blur the distinction between promotional and other content (Buckingham, 2009). These techniques contribute to reinforcing the power of advertising. To reduce the potentially injurious impact of advertising on children, it is therefore necessary to tackle both components, namely the exposure of children to advertising and the power of advertising on children.

Directive 2005/29 on unfair business-to-consumer commercial practices, one of the cornerstones of EU consumer policy, explicitly recognises that children constitute a group of particularly vulnerable consumers deserving, as such, special protection. This directive introduces the first EU-wide ban on all unfair business-to-consumer commercial practices (for commentaries in English, see in particular: Bakardjieva-Engelbrekt, 2005; Garde and Haravon, 2006; Howells *et al.*, 2006; Stuyck *et al.*, 2006; Micklitz *et al.*, 2008; Weatherill and Bernitz, 2006).<sup>9</sup> Its key provision is Article 5 which prohibits all such practices and provides that a practice will be considered unfair if it satisfies two criteria: it must be contrary to the rules of professional diligence and materially distort or be likely to materially distort the economic behaviour of a consumer, that is ‘to appreciably impair the consumer’s ability to make an informed decision, thereby causing the consumer to take a transactional decision which he would not have taken otherwise’.<sup>10</sup> In EU consumer law, the

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<sup>9</sup> Directive 2005/29, OJ 2005 L 149/22.

<sup>10</sup> Article 2(e).

benchmark used to assess the economic behaviour of ‘a consumer’ has traditionally been that of the ‘average consumer’ (see Weatherill, 2007, for a discussion of the case law of the ECJ). This is confirmed by Article 5(2) of the Directive. Nevertheless, to highlight the special vulnerability of certain groups of consumers, Article 5(3) of the UCP Directive introduces – along the average consumer test – the benchmark of the average member of a group of particularly vulnerable consumers:

‘Commercial practices which are likely to materially distort the economic behaviour only of a clearly identifiable group of consumers who are particularly vulnerable to the practice of the underlying product because of their mental or physical infirmity, age or credulity in a way which the trader could reasonably be expected to foresee, shall be assessed from the perspective of the average member of that group. This is without prejudice to the common and legitimate advertising practice of making exaggerated statements or statements which are not meant to be taken literally.’<sup>11</sup>

By referring to the age as a criterion for determining the impact of a commercial practice on consumers, the UCP Directive explicitly acknowledges that children-consumers deserve special protection.<sup>12</sup> This is confirmed by Point 28 of Annex I of the Directive which provides that ‘including in an advertisement a direct exhortation to children to buy advertised products or persuade their parents or other adults to buy advertised products for them’ is an unfair commercial

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<sup>11</sup> See also Recital 19 of the Preamble. In any event, no assessment is required of ‘each individual’s circumstances, which would be unworkable’ (Common Position of November 2004).

<sup>12</sup> Measures focusing specifically on the special vulnerability of children had been previously adopted in EU consumer law, not least the Toy Safety Directive: Directive 88/378 OJ 1988 L 187/1, as amended by Directive 93/68, OJ 1993 L 220/1. An extended amendment process led to the adoption, on 18 June 2009, of Directive 2009/48, which repeals and replaces Directive 88/378, OJ 2009 L 170/1.

practice and should therefore be prohibited.<sup>13</sup> Nevertheless, the wording of both Article 5(3) and Point 28 is so restrictive that it does not support the argument that the UCP Directive upholds the best interests of the child.

The first criticism relates to the second and final sentence of the general clause which allows commercial operators to rely on ‘exaggerated statements or statements which are not meant to be taken literally’. This provision is striking, insofar as it implies not only that EU institutions have taken a clear stance that advertising to children should be allowed, but also that advertisers are perfectly entitled to rely on exaggerated statements to advertise their goods and services to them. This does not take into account the fact that it is precisely in the case of vulnerable groups such as children that exaggerations can be taken literally. Children perceive commercials very differently from adults and are more likely to be influenced than them by what they see. Most children do not begin to develop the ability to distinguish between advertising and programming until the age of 8 and they often do not fully understand the purpose of advertising until the age of 11 or 12 (Ramsay, 1996). Nevertheless, understanding the purpose of advertising is essential to develop a critical,

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<sup>13</sup> The Annex is intended to give a more concrete flavour to the general definition of unfairness. It lists thirty-one commercial practices which are considered unfair in all circumstances. The list, which is applicable in all the Member States and can only be modified by revision of the Directive, is not exhaustive; however, if a consumer claims that his/her economic behaviour has been distorted as a result of a practice which is not listed, s/he will have to establish that the practice is indeed unfair. The list therefore reverses the burden of proof by laying down a presumption of unfairness. In other words, if Annex I is not exhaustive of all unfair commercial practices, it is exhaustive of the commercial practices which are presumed to be unfair. This has been confirmed by the ECJ in three preliminary rulings: Joined Cases C-261 and 299/07 *VTB-VAB* [2009] I-2949; Case C-304/08 *Plus Warengesellschaft* [2010] ECR I-xxx, judgment of 14 January 2010, not yet reported; and Case C-540/08 *Mediaprint Zeitungs- und Zeitschriftenverlag* [2010] ECR I-xxx, judgment of the Grand Chamber of the ECJ of 9 November 2010, not yet reported. All ECJ judgments are available at <[www.curia.eu](http://www.curia.eu)>.



questioning attitude and distinguish between entertainment and commercial communications.<sup>14</sup> It is precisely on the basis of this rationale that freedom of commercial expression has been granted constitutional protection: consumers must be free to receive commercial information so as to make informed consumption choices. One may regret that the UCP Directive does not in any way question whether this rationale is indeed applicable to children, whose cognitive abilities may not allow them to make such ‘empowered’ choices. The *travaux préparatoires* do not display any evidence that the question whether advertising to children is inherently unfair has been at all discussed. It has been argued that commercial operators should not be able to exploit children’s inexperience and credulity for commercial gain and insinuate consumerist values into childhood (Linn, 2005). This is particularly so as the constant commercial pressures to which children are subjected as a result of the omnipresence of marketing may inhibit them from playing creatively (Linn, 2008). The UCP Directive, however, does not allow for this argument to be made.<sup>15</sup>

The second criticism relates to the benchmark itself which the UCP Directive has set to assess the unfairness of a commercial practice directed at children. Article 5(3) requires that the group of vulnerable consumers in question must not only be ‘clearly identifiable’ but also ‘*particularly vulnerable*’; there is, however, no indication as to how the threshold should be determined. If children of 12 years old are better equipped than younger children to understand the commercial purpose of advertising, this does not mean that they are as able as adults to adopt the necessary

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<sup>14</sup> As regards adolescents, the issue may be more one of self-control and peer identification (Cutler *et al.*, 2003).

<sup>15</sup> More specific concerns have also been raised, and in particular that much of the goods and services marketed to children are not conducive to healthy consumption choices. In particular, most food marketing in Europe is for foods high in fat, salt and sugar and has been recognised as a factor (though, admittedly, one factor among several others) of overweight and obesity, causing elevated blood pressure, cholesterol and blood sugar levels, and leading to type 2 diabetes – the latter a serious obesity and diet-related disease which until recent years only affected adults, not children. The legislative response required to address childhood overweight and obesity is discussed more fully below.

critical stance towards the good or service advertised to them and act as ‘reasonably well informed and circumspect consumers’. Would they nonetheless be considered as a ‘particularly vulnerable’ group within the meaning of Article 5(3)? One would hope so, but there is no evidence that this question has been given the consideration it requires to ensure that the Directive duly upholds the best interests of the child.

The analysis of the scope of Point 28 of the Annex reinforces the argument that the UCP Directive is unlikely to limit meaningfully the development of marketing techniques specifically intended to induce children to buy or put pressure on their parents to buy. As stated above, Point 28 bans direct exhortations to children to buy advertised products or persuade their parents or other adults to buy advertised products for them. This implies *a contrario* that forms of indirect exhortations to children are not prohibited. Commercial communications tend not to ‘directly’ call upon children either to buy a specific good or service or to use their ‘pester power’ so that their parents buy the good or service in question on their behalf. Rather, marketing to children tends to be covert. This is even more so in light of the development of numerous marketing techniques specifically designed to attract the attention of children, such as host selling, character merchandising and the use of celebrities, as well as the integration of marketing into programmes (product placement, advergames...), which all accentuate the difficulties for children to grasp the commercial intent of marketing practices. For example, is it not arguable that it is unfair for a food operator to market its unhealthy meals to children by focusing their attention on the collectable toys they will be ‘given’ if they buy or get their parents to buy the meals in question? The UCP Directive does not suggest that it is.<sup>16</sup> Notwithstanding the effectiveness of character merchandising and similar marketing techniques, which are specifically designed to capture children’s imagination, so as to induce them to buy or put pressure on their parents to buy the advertised good or service for them, they are not

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<sup>16</sup> The problem is similar when characters such as Kellogg’s Tony the Tiger are used by food operators to capture the imagination of children and make them want breakfast cereals with a sugar content of 37%.

categorised as unfair within the scope of the prohibition laid down by the UCP Directive.

These remarks, which suggest that the UCP Directive has failed to ensure that the two components of marketing – exposure and power – are dealt with effectively, are compounded by the fact that the UCP Directive is a measure of full harmonisation which does not allow Member States to adopt more protective measures on their territories.<sup>17</sup> Taking the best interests of the child as a primary consideration would have warranted a stronger regulatory intervention from EU political institutions.

The UCP Directive only applies in the absence of more specific rules.<sup>18</sup> One therefore needs to turn to other relevant instruments of EU law to determine whether the EU can claim that it has taken the best interests of the child as a primary consideration in its internal market and consumer policies. In particular, with regard to advertising to children, Point 28 of the Annex explicitly states that it is ‘without prejudice to Directive 89/552’.

## **II. The Audiovisual Media Services Directive**

Directive 89/552, which is often referred to as the Television Without Frontiers Directive or TVWF Directive,<sup>19</sup> has now been replaced by Directive 2010/13 on Audiovisual Media Services (AVMS) Directive.<sup>20</sup>

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<sup>17</sup> The UCP Directive therefore departs from the method of minimum harmonisation traditionally used in EU consumer law (Article 3(5)).

<sup>18</sup> Article 3(4) confirms that the UCP Directive is a framework legislative instrument: in the case of conflict between the provisions of this Directive and other [EU] rules regulating specific aspects of unfair commercial practices, the latter shall prevail and apply to those specific aspects.

<sup>19</sup> OJ 1989 L298/23.

<sup>20</sup> OJ 2010 L 95/1.

The TVWF Directive was intended to ensure the free movement of broadcasting services within the European Union. Its primary purpose therefore was to facilitate the functioning of the internal market. The free movement of broadcasting services within the EU would only have been acceptable to all the Member States, however, if provisions were inserted to ensure that potentially competing public interests were sufficiently protected across the EU. The TVWF Directive thus laid down minimum standards binding on all the Member States. In particular, it explicitly provided that the broadcasts benefiting from free movement should not contain harmful material, not least for children. As regards advertising regulation more specifically, the TVWF Directive contained provisions designed to restrict the amount of advertising to which children were exposed. Article 11 imposed scheduling restrictions.<sup>21</sup> Moreover, Article 16 contained a general clause prohibiting television advertising causing moral or physical detriment to minors. In particular, it banned direct exhortation to minors to buy a product or a service by exploiting their inexperience or credulity and television advertising which directly encouraged minors to persuade their parents or others to purchase the goods or services being advertised. Nevertheless, television advertising to children was not altogether banned and restrictions imposed were unlikely to be effective in curbing significantly their exposure, except for tobacco products, as well as medicines and medical treatments available only on prescription, whose advertising was prohibited. The TVWF Directive suggested that children were perceived as particularly vulnerable, but the provisions relating to advertising to children were insufficient to alleviate the growing concerns associated with the commercialisation of childhood.

The EU was given a chance to re-assess its legislative framework in light of the principle of the best interests of the child during the revision process of the TVWF Directive by the AVMS Directive.

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<sup>21</sup> 'Children's programmes, when their scheduled duration is less than 30 minutes, shall not be interrupted by advertising or by teleshopping' (Article 11(5)).

The reform led to three major changes of direct relevance to our purposes:

- the extension of the scope of the TVWF Directive to new media, not least the Internet and video-on demand services;
- the extension of its scope to new marketing techniques, not least product placement; and
- the extension of its scope to new problems, not least the regulation of food marketing to children.

It is not suggested that the need for reform originated from the need to re-assess the TVWF Directive in light of the principle of the best interests of the child. Nevertheless, it is worth pointing out that the discussions surrounding the revision of the TVWF Directive took place at the same time as the discussions surrounding the adoption by the Commission of its Communication on the EU Strategy on Children's Rights (European Commission, 2006). One could therefore have hoped that the best interests of the child would have been considered in the revision process. Regrettably, this does not, however, appear to have been the case.

As regards the rules intended to limit the exposure of children to marketing, they vary depending on the marketing technique at stake. The AVMS Directive distinguishes different categories of audiovisual commercial communications, including advertising, teleshopping, sponsorship and product placement.<sup>22</sup> Article 20 of the AVMS Directive is similar to Article 11 of the TVWF Directive and provides that children's programmes of less than thirty minutes may not be

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<sup>22</sup> Article 1(h) of the AVMS Directive defines the notion of audiovisual commercial communications as 'images with or without sound which are designed to promote, directly or indirectly, the goods, services or image of a natural or legal entity pursuing an economic activity. Such images accompany or are included in a programme in return for payment or for similar consideration or for self-promotional purposes. Forms of audiovisual commercial communication include, *inter alia*, television advertising, sponsorship, teleshopping and product placement'.

interrupted by television advertising or teleshopping. If their scheduled duration is thirty minutes or longer, they may be interrupted once for each scheduled period of at least thirty minutes. Article 11 prohibits product placement in all children's programmes, irrespective of their duration,<sup>23</sup> while Article 10(4) grants an option to Member States to prohibit the showing of a sponsorship logo during children's programmes. These provisions show that the AVMS Directive merely limits the amount of marketing to which children may be exposed without banning marketing to children as such. Moreover, the AVMS Directive does not define the notion of 'children's programmes'.<sup>24</sup> The Hieronymi Report noted this shortcoming and suggested that, 'in the absence of a uniform EU-wide definition of "children" and "children's programmes" for the purposes of this directive', New Recital 33A should be inserted in the Preamble and provide that 'in order to reach an adequate level of protection of minors, the national regulatory authorities should determine time-zones for children and define the programmes aimed at children'.<sup>25</sup> Recent findings such as those published by Ofcom, the independent regulator and competition authority for the UK communications industries, suggest that around 70% of the time children spend watching television in the UK is outside designated children's viewing times, thus highlighting the importance of this question.<sup>26</sup> Consequently,

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<sup>23</sup> One should note, however, that the AVMS Directive does not ban product integration (i.e. when no remuneration or similar consideration is provided for). One may nonetheless wonder whether this distinction is justified from a child protection point of view: whether the placement is remunerated or not, children will be exposed to the presence of branded goods and their consumption choices likely to be influenced (Woods, 2007).

<sup>24</sup> The AVMS Directive is a measure of partial harmonisation which leaves it to Member States to define at national level the terms which have been left undefined at EU level.

<sup>25</sup> Amendment 35.

<sup>26</sup> Ofcom recently noted that 'adult airtime accounted for 67.2% of children's viewing in 2009. For 4-9 year olds, the figure was lower at 54.4% and higher for 10-15 year olds at 79.8%' (Ofcom, 2010, para 4.14). In the UK, a programme of particular appeal to children under 16 would be deemed to be one that attracted an audience index of 120 for this age group. If a programme attracts an under-16 audience in a proportion similar to that group's presence

children will not be sufficiently protected from the adverse effects of advertising if the notion of ‘children’s programme’ is defined too narrowly.<sup>27</sup> It is unfortunate, however, that the final version of the AVMS Directive does not acknowledge, let alone address, this important concern.

As regards the rules relating to the content of the commercial communications to which children are exposed, Article 9(1)(g) provides, after stating the general principle that ‘audiovisual commercial communications shall not cause moral or physical detriment to minors’, that:

- they shall not directly exhort minors to buy or hire a product or service by exploiting their inexperience or credulity;
- they shall not directly encourage minors to persuade their parents or others to purchase the goods or services being advertised;
- they shall not exploit the special trust minors place in parents, teachers or other persons; and
- they shall not unreasonably show minors in dangerous situations.

The wording of Article 9(1) (g) is very similar to the wording of Article 16 of the TVWF Directive; in particular the use of the word ‘directly’ restricts its scope significantly. It is noteworthy that during the revision process which led to the replacement of the TVWF Directive by the AVMS Directive, the Hieronymi Report suggested that the scope of the Directive should be extended to

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in the population as a whole, it is said to index at 100. So an index of 120 is an over-representation of that group by 20%.

<sup>27</sup> The Recommendations for an International Code on Marketing of Foods and Non-Alcoholic Beverages to Children provide that ‘both the absolute number of children likely to be watching or listening and the number of children as a proportion of the overall audience should be taken into account’ (IOTF and Consumer International, 2008, Article 5(1)).

cover both direct and indirect exhortations to children:

‘Audiovisual commercial communications must not cause moral or physical detriment to minors. Therefore, it shall not directly *or indirectly* exhort minors to buy a product or service by exploiting their inexperience or credulity, directly *or indirectly* encourage them to persuade their parents or others to purchase the goods or services being advertised, exploit the special trust minors place in parents, teachers or other persons, *especially role models or persons exercising authority*, or unreasonably show minors in dangerous *or degrading* situations *unless justified for learning or training purposes*’.<sup>28</sup>

It is not by pure coincidence that the justification invoked to propose this amendment was the need to protect the rights of the child. The Commission was then about to adopt its Children’s Rights Strategy. It is all the more regrettable that the suggestion to extend the prohibition of marketing to children to indirect exhortations was not subsequently mentioned as a worthy consideration in the legislative process. This would have allowed for a thorough debate on the value of advertising and its impact on children.

### ***Product specific rules***

The marketing of certain goods, whose consumption should either be prohibited or strictly regulated, has attracted specific criticisms. The original version of the TVWF Directive already banned tobacco advertising and the advertising of cigarettes and other tobacco products, as well as the advertising of medicinal products and medical treatments available only on prescription. It also banned the advertising of alcoholic beverages aimed specifically at minors. Following the adoption of the AVMS Directive, these restrictions have been extended to cover all other forms of

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<sup>28</sup> Amendment 68 (emphasis contained in the original text).



audiovisual commercial communications.<sup>29</sup> Furthermore, in light of research findings that food marketing impacts negatively on children's food choices and dietary patterns, the question of how food marketing to children should be regulated has gained momentum in Europe and beyond (see, in particular, Hastings *et al.*, 2003 and 2008). Consequently, while obesity prevention was not part of the EU agenda when the TVWF Directive was adopted in 1989, it had become one of its growing health concerns by the time the AVMS Directive was published in December 2007 (European Commission, 2007b; Garde, 2010a). The latest figures published by the European Commission confirm that overweight and obesity should remain priority items on the EU Public Health Agenda: overweight now affects between 30 and 70% of adults in EU countries, obesity between 10 and 30%. Childhood obesity is more difficult to measure, but the World Health Organisation has estimated that, in 2007, on average 24% of the children aged 6-9 years old were overweight or obese (European Commission, 2010).

During the consultations which took place as part of the AVMS Directive legislative process, several stakeholders called for the prohibition, or at least the strict regulation, of unhealthy food advertising to children. Reflecting (in part at least) their concerns, Article 9(2) of the AVMS Directive provides:

‘Member States and the Commission shall encourage media service providers to develop codes of conduct regarding inappropriate audiovisual commercial communication, accompanying or included in children's programmes, of foods and beverages containing nutrients and substances with a nutritional or physiological effect, in particular those such as fat, trans-fatty acids, salt/sodium and sugars, excessive intakes of which in the overall diet are not recommended.’

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<sup>29</sup> See Article 9(d), (e) and (f) applying respectively to tobacco products, alcoholic beverages and medicinal products and medical treatments available only on prescription.

This approach is in line with the position which the Commission's Directorate General for Health and Consumers adopted on the same issue in its Obesity Prevention White Paper of May 2007 and in which it stated its preference, at this stage, 'to keep the existing voluntary approach at EU level due to the fact that it can potentially act quickly and effectively to tackle rising overweight and obesity rates' (European Commission, 2007b, 6).

If it is welcome that Article 9(2) recognises the negative influence of unhealthy food marketing on children's dietary choices, it remains that its scope is strictly circumscribed and raises questions as to its effectiveness. First, the wording of Article 9(2) is unclear. In particular, the phrase 'inappropriate audiovisual commercial communication' seems to leave the food industry with an important margin of discretion. If it is arguable that all forms of commercial communication for unhealthy food directed at children are inappropriate (World Health Organisation, 2010), this is not what the wording of Article 9(2) suggests. Rather, it implies that there are appropriate and inappropriate unhealthy food adverts, thus putting the onus on the industry to tackle only the latter in its codes of conduct. One could imagine that using celebrities or cartoon characters would be viewed as inappropriate, as these techniques are particularly effective in detracting children's attention away from the actual product, whereas adverts that would not rely on these or similar techniques would not be regarded as 'inappropriate'. Such an approach, apart from being ineffective, would be extremely cynical, as it would leave the industry with a broad margin of discretion in relation to the content of its codes of conduct. It would be comforting to believe that this provision was drafted with an unintentional error, rather than cynically... The disappointment is accentuated by the fact that Article 9(2) only requires Member States and the Commission to 'encourage' media service providers to develop codes of conduct on the advertising of unhealthy food to children and to monitor the fulfilment of this commitment. There is no duty to ensure that

such codes are indeed adopted and that they are sufficiently effective.<sup>30</sup>

Secondly, Article 9(2) only requires that the industry should limit inappropriate unhealthy food marketing ‘accompanying or included in children’s programming’. As stated above, however, the AVMS Directive does not define what is meant by ‘children's programming’. Consequently, the EU Pledge, one of the main self-regulatory initiatives which have been adopted to comply with Article 9(2), only applies when at least 50% of the audience is made of children of less than 12. This percentage is extremely high and will leave a range of popular programmes with children outside the scope of the food industry’s commitment to abstain from advertising during children’s programmes. Alternatively, and probably more effectively, it is possible to define a ‘watershed’ – i.e. a time in the evening after which the child audience is likely to be small and before which it is not allowed to advertise to children or, more specifically, promote foods which are high in saturated fats, trans-fatty acids, free sugars, or salt. This option would have the advantage of being both effective and easy to administer. One should also note that the narrow remit of the EU Pledge raises the question of the groups of children who need regulatory protection: which age group should be protected from unhealthy food marketing? The EU Pledge applies a threshold of 12. If it is generally accepted that children cannot fully grasp the commercial intent of advertising until the age of 11 or 12 and that children below 12 years of age should therefore be protected, this does not mean that children who are more than 12 years old are unaffected by unhealthy food marketing. Older children will normally respond to the persuasive intention of advertising, and a decision

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<sup>30</sup> As the Commission has stated, however, ‘the co-regulatory and self-regulatory schemes have to be broadly accepted by main stakeholders in the Member States concerned and provide for effective enforcement. How these concepts of acceptability and effectiveness are interpreted can be decided at national level’; similarly for the interpretation of the terms ‘encourage’ and ‘monitor’: see the minutes of the meeting of the EU Platform held on 19 November 2008 and whose afternoon was devoted to the role of the EU Platform on Diet, Nutrition and Physical Activity in relation to marketing and advertising, available at:

[ec.europa.eu/health/ph\\_determinants/life\\_style/nutrition/platform/docs/ev\\_20081119\\_mi\\_en.pdf](http://ec.europa.eu/health/ph_determinants/life_style/nutrition/platform/docs/ev_20081119_mi_en.pdf), at paragraph 8.

needs to be taken on whether this alone is sufficient to protect them, as in the case of tobacco products or medicines and medicinal treatments available only on prescription, thus raising the question whether older children are able to act in their own long-term interests. The principle of the best interests of the child and the principle of the evolving capacities of the child should be focal points in this debate.

Finally, and very significantly, self-regulation is unlikely to provide a suitable regulatory mechanism to protect children effectively from exposure to unhealthy food marketing. Self-regulation is, by definition, voluntary and, as such, cannot guarantee that all food operators will abide by the relevant standards.<sup>31</sup> Furthermore, evidence suggests that food operators exploit loopholes in the regulatory framework. For example, while they have accepted to adopt codes of conduct limiting television and internet advertising to children – two media on which most of the attention has focused so far – they have simultaneously invested in new media falling outside the scope of the rules, including advergames or mobile phone marketing, as well as in store promotions (Harris *et al.*, 2009). More fundamentally, one may question whether the food industry should be required to ‘shoot itself in the foot’ and stop using all the (legal) means at their disposal to increase their customer base in the absence of binding regulation obliging them to do so. Is it not the very purpose of commercial expression to try and increase (and at the very least maintain) one’s market shares? (Garde, 2010a). Corinna Hawkes has shown the structural limitations of self-regulatory systems to address the problem of unhealthy diets among children. She argues that self-regulation aims to protect advertisers (from external regulation) as well as consumers, thereby facilitating the proliferation of advertising. Self-regulation in the advertising sector may therefore be a win-win situation for consumers and advertisers alike when it is about avoiding misleading advertising – a commercial

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<sup>31</sup> Self-regulation has been defined as ‘the possibility for economic operators ... to adopt amongst themselves and for themselves common guidelines at European level’ (European Parliament, Council and European Commission, 2003, para 22).

practice which harms consumers as well as competitors' interests. Nevertheless, the question arises what if perfectly truthful advertisements send out messages inconsistent with public policy goals, as tends to be the case with food advertising (Hawkes, 2005). The question is all the more relevant in light of the fact already mentioned above that companies often use a variety of marketing practices to influence children's dietary choices (Hawkes, 2005; Ludwig and Nestle, 2008; Sharma *et al.*, 2010). Hawkes convincingly states:

‘Current systems remain concerned with the content of individual marketing campaigns – whether they are truthful or not – not the alleviation of a public health problem. Yet it is not just individually misleading, deceptive or offensive marketing campaigns that are the cause for concern, but the cumulative effects of perfectly legal, truthful marketing campaigns, appearing in many forms, times and places . . . In other words, self-regulation cannot prevent marketing that works.

There is thus an important disjuncture between the laudable (and necessary) aim of the self-regulatory organisations to prevent misleading, deceptive advertising that exploits the credulity of children, and the very different aim of preventing the effects of advertising on children's diets . . . In the system, there are no grounds to complain about the amount of advertising, or where it is, as long as it is honest and truthful.’

Consequently, it is only if the cumulative effects of the marketing of unhealthy food on children's health is taken into account that self-regulation may work to fight childhood obesity. This will require, in turn, that the very aims of self-regulation are reconsidered so that self-regulation is no longer solely intended to support manufacturers by ensuring that none of them engage in commercial practices allowing them to gain an unfair competitive advantage, but that it also protects consumers, and vulnerable consumers more specifically, by restricting the exposure to, and

the impact of, certain forms of marketing. It is however counter-intuitive to consider entrusting the food industry with the task of curtailing the promotion of the products it has lawfully placed on the market. The sales of these products reap large profits and marketing to children has proven a very effective means to increase sales figures. Stakeholders have different roles to play in matters pertaining to overweight and obesity prevention, and their respective roles should not be confused (Ludwig and Nestle, 2008).

The issue of the regulation of the marketing of unhealthy food to children in light of growing childhood obesity rates has given rise to debate both within and beyond the European Union. The set of recommendations endorsed by the Sixty-third World Health Assembly on 21 May 2010 expressly calls upon Member States to reduce both the exposure to and the power of unhealthy food marketing to children (World Health Organisation, 2010). Quite significantly, the Recommendations acknowledge the central role of state authorities in the policy making process:

‘Government should be the key stakeholders in the development of policy and provide leadership through a multi-stakeholder platform for implementation, monitoring and evaluation. In setting national policy framework, governments may choose to allocate defined roles to other stakeholders, while protecting the public interest and avoiding conflict of interest’ (Recommendation 6).

Even if the Recommendations do not go as far as prescribing the approach which Member States should adopt, they nonetheless require that ‘whole industry sectors’ should abide by the standards they have adopted to regulate themselves. Moreover, the approach (which should be ‘the most effective to reduce marketing to children of [unhealthy] foods’) must be ‘set within a framework developed to achieve the policy objectives’, which suggests that Member States may not abdicate their overall responsibility. This should be interpreted as requiring that Governments should set the

standards which food industry operators must uphold. It is only at the implementation and/or at the evaluation and monitoring stages of the policy process that Governments may allocate defined roles to other stakeholders, including industry operators. Finally, ‘the policy framework should specify enforcement mechanisms and establish systems for their implementation’ and include ‘clear definitions of sanctions’ and ‘a system for reporting complaints’. The Recommendations therefore highlight how much more the European Union should do in terms of policy development, policy implementation, policy monitoring and evaluation to ensure that the best interests of the child principle is effectively upheld.<sup>32</sup>

### ***Stricter national standards***

As the AVMS Directives is a measure of minimum harmonisation (as was the TVWF Directive), Member States are entitled to apply stricter requirements for audiovisual media service providers established on their territories.<sup>33</sup> In particular, the UK has, following an extensive consultation

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<sup>32</sup> Two remarks are warranted at this stage: firstly, the EU itself is not a signatory party to Resolution WHA63.14 and therefore to the Recommendations. Nevertheless, all 27 Member States are; the EU should therefore support them in implementing their international commitments rather than frustrate their efforts to do so. Secondly, it is not suggested that the EU should comprehensively regulate food marketing to children: the EU only has attributed powers (Article 5 TEU). In particular, it does not have general competence to harmonise national laws on health grounds (Article 168 TFEU, ex-Article 152 EC); and, as the ECJ has confirmed in the *Tobacco Litigation*, it is only if the regulation of marketing has a cross-border effect that the EU may intervene: Case C-376/98 *Germany v Council and the European Parliament* [2000] ECR I-8419 and Case C-380/03 *Germany v Council and the European Parliament* [2006] ECR I-11573. Thus, the EU can regulate cross-border food advertising involving media such as television, the internet, the radio, but probably not in-store or in-school marketing (except for food labeling regulation). By analogy with tobacco advertising, it could also regulate the sponsorship of international events by food operators, but not the sponsorship of local events (Garde, 2010a).

<sup>33</sup> Their freedom is nonetheless subject to the limits set by Treaty provisions, and Article 34 TFEU (ex-Article 28 EC) on the free movement of goods and Article 56 TFEU (ex-Article 49 EC) on the free movement of services more

process, adopted measures which go beyond the narrow confines of Article 9(2) of the AVMS Directive and are therefore more likely to reduce the impact of marketing for unhealthy foods on children. These measures, which came into effect on a phased basis from April 2007 to January 2009, include a total ban of unhealthy food advertising in and around all children's television programming and on dedicated children's channels as well as in youth-oriented and adult programmes which attract a significantly higher than average proportion of viewers under the age of 16. In addition to general content rules requiring responsible advertising to all children at all times, Ofcom has also introduced new rules on the content of advertisements targeted at primary school children which ban the use of celebrities and characters licensed from third-parties (such as cartoons), promotional claims (such as free gifts) and health or nutrition claims.<sup>34</sup> These restrictions therefore tackle both the exposure of children to unhealthy food marketing and the power of certain marketing techniques on them.

In July 2010, Ofcom published its final report intended to measure the effectiveness of the restrictions which had been introduced. The evaluation exercise noted that exposure to unhealthy food advertising was eliminated during children's airtime (including both children's channels and children's slots on other channels). More generally, it estimated that scheduling restrictions were achieving the objective of reducing significantly the number of HFSS product advertising impacts (i.e. each occasion when a viewer sees an advert) among children aged 4–15 years: in 2009, compared with 2005 estimates, children saw around 37% less HFSS advertising (i.e. a reduction of 4.4 billion impacts). This meant, in terms of age groups, that younger children (4-9 year olds) saw 52% less (3.1 billion impacts), while older children (10–15 year olds) saw 22% less (1.4 billion

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specifically. Article 4 of the AVMS Directive indeed provides that 'Member States shall remain free to require media service providers under their jurisdiction to comply with more detailed or stricter rules in the fields coordinated by this Directive provided that such rules are in compliance with Union law'.

<sup>34</sup> Details can be found on Ofcom's website: <[www.ofcom.org.uk/consult/condocs/foodads\\_new/](http://www.ofcom.org.uk/consult/condocs/foodads_new/)>.



impacts) (Ofcom, 2010). These findings suggest that the UK regulatory framework has, to date, dealt much more effectively than the AVMS Directive with the need to reduce the exposure of children to unhealthy food marketing. Moreover, Ofcom's final review has also established that children saw less advertising featuring licensed characters (-84%), brand equity characters (-56%), other characters (-2%) and promotions (-41%). As a result, children are exposed to significantly less unhealthy food advertising using techniques considered to be of particular appeal to children, even though such techniques continue to be used during adult airtime, as well as during children's airtime to promote non-HFSS products (Ofcom, 2010). This confirms that the UK regulatory framework has also attempted to address the power of marketing techniques, the second component of the impact of marketing on children. Nevertheless, Ofcom has also found that advertisers have significantly increased the amount of HFSS advertising and sponsorship in periods outside children's airtime, at times when significant numbers of children may be watching (Ofcom, 2010). These figures show that children were still seeing two thirds of the advertising of HFSS foods, thus confirming the shortcomings of limiting the ban on unhealthy food advertising to children's programmes only.<sup>35</sup> This example illustrates how much careful reflection will have to be carried out by Governments when implementing the WHO Recommendations: the best interests of the child principle indeed mandates that the notion of 'marketing to children' should be defined sufficiently broadly.

The freedom which EU Member States have under the AVMS Directive to impose more stringent requirements is nonetheless strictly circumscribed, as it is conditional not only on their compliance

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<sup>35</sup> 'Despite an increase in the volume of HFSS advertising aired throughout the day, children's exposure to HFSS advertising fell in all day parts before 9pm and by 25% between the peak hours of 18:00-21:00. These reductions were driven by the decline in impacts during children's airtime'.

with Union law,<sup>36</sup> but also on their compliance with the State of establishment principle which obliges them to ensure freedom of reception without restricting the retransmission on their territory of audiovisual media services from other Member States for reasons which fall within the fields coordinated by the AVMS Directive.<sup>37</sup> The *De Agostini* judgment of the ECJ provides a good illustration of how the transmitting State principle and the principle of minimum harmonisation interact with each other.<sup>38</sup> In this case, Article 11 of the Swedish Broadcasting Act, which bans television advertising to children of less than 12 years old, was challenged as contrary to the provisions of the TVWF Directive. The ECJ held that the transmitting State principle only allowed Sweden to enforce its ban on children advertising on broadcasts emanating from its own territory,<sup>39</sup> but not on television broadcasts transmitted from the UK. The scope of this judgment should now be extended, following the adoption of the AVMS Directive, to all other audiovisual media services falling within its scope, including the Internet and video-on-demand services. One may therefore conclude that the combination of the transmitting State principle with the principle of minimum harmonization strictly limits, without however negating, the freedom of Member States to

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<sup>36</sup> In matters of public health and lifestyle choices, it is likely that the Court would be reluctant, in the absence of EU harmonising measures, to curtail too drastically the discretion of national authorities to adopt measures supporting their obesity prevention strategies, subject to the principle of proportionality (Garde, 2010b). For an analogy with the regulation of alcohol advertising, see Case C-405/98 *Gourmet International Products* [2001] ECR I-1795) and Case C-429/02 *Bacardi France* [2004] ECR I-6613, where the ECJ refused to hold near total bans on alcohol advertising in breach of the principle of proportionality.

<sup>37</sup> Article 3(1). Article 2(1) however requires that ‘each Member State shall ensure that all audiovisual media services transmitted by media service providers under its jurisdiction comply with the rules of the system of law applicable to audiovisual media services intended for the public in that Member State’. The State of establishment principle has also been referred to as the transmitting State principle or the country of origin principle.

<sup>38</sup> Case C-34/95 *De Agostini* [1997] ECR I-3843.

<sup>39</sup> This freedom is subject to Sweden’s compliance with the general Treaty provisions on the free movement of goods and services (respectively Articles 34 and 56 TFEU (ex-Articles 28 and 49 EC)).

implement coherent strategies aimed at curbing childhood obesity levels on their territories. As the Recommendations state, it is extremely important that Member States collaborate on the regulation of cross-border marketing (World Health Organisation, 2010). Nevertheless, cross-border marketing may only be dealt with satisfactorily if competent authorities take a high level of public health protection as a basis for action.<sup>40</sup>

One may hope that the review of the AVMS Directive which is due to take place at the end of the year 2011 will acknowledge the shortcomings of its provisions on marketing to children. The best interests of the child require a much stronger commitment of EU institutions, in light of existing evidence, that marketing negatively impacts on children's consumption choices, health and development. This will require, in turn, a more refined approach than has been adopted so far, distinguishing different groups of children depending on their different needs, thus acknowledging that children are not a homogenous group.

### **Concluding remarks: Towards the Effective Mainstreaming of Children's Rights in EU Internal Market and Consumer Policy?**

As the Committee on the Rights of the Child has clearly stated, rhetorical statements that children's rights should be upheld cannot suffice. The means must be in place to ensure that they are effectively upheld:

‘Ensuring that the best interests of the child are a primary consideration in all actions concerning children (Article 3(1)), and that all the provisions of the UNCRC are respected in legislation and policy development and delivery at all levels of government demands a

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<sup>40</sup> In the EU, the obligation to mainstream public health into all EU policies is mandated by Articles 114(3) and 168(1) TFEU (ex-Articles 95(3) and 152(1) EC).

continuous process of child impact assessment (predicting the impact of any proposed law, policy or budgetary allocation which affects children and the enjoyment of their rights) and child impact evaluation (evaluating the actual impact of implementation). This process needs to be built into government at all levels and as early as possible in the development of policy' (Committee on the Rights of the Child, 2003, para 45).

To assist the development of evidence-based policies, the EU should rely more systematically on child impact assessment, particularly when the EU intervenes in a policy area through legislative means, thus restricting the freedom of Member States unilaterally to adopt more protective standards at national level. Monitoring and evaluating the effectiveness of policies *ex post* is a valuable, even an essential, exercise. Nevertheless, anticipating the consequences of policies *ex ante* on the basis of solid integrated child impact assessments will ensure that proposals are sustainable and will therefore increase their chances of success at a much earlier stage.

In the EU, all major policy initiatives with a potential economic, social and/or environmental impact require an integrated impact assessment. This applies in particular to most legislation (proposed directives or regulations) and to White Papers, action plans, expenditure programmes and negotiating guidelines for international agreements.<sup>41</sup> The Commission has published a series of impact assessment guidelines which are intended to give general guidance to the Commission services for assessing potential impacts of different policy options.<sup>42</sup> Unfortunately, children's rights are not singled out: they fall within the three broad categories of economic, social and environmental impact. There is therefore a risk that a proposal with a broad range of impacts fails to consider

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<sup>41</sup> The Commission has completed over 400 impact assessments since 2002 when the impact assessment system was put in place. In 2008 alone, 135 were carried out:

[ec.europa.eu/governance/impact/ia\\_carried\\_out/ia\\_carried\\_out\\_en.htm](http://ec.europa.eu/governance/impact/ia_carried_out/ia_carried_out_en.htm).

<sup>42</sup> [ec.europa.eu/governance/impact/commission\\_guidelines/commission\\_guidelines\\_en.htm](http://ec.europa.eu/governance/impact/commission_guidelines/commission_guidelines_en.htm).

potential impacts of a policy on children.<sup>43</sup> The constitutional obligation of EU institutions to uphold the best interests of the child as a primary consideration in all policy areas supports the argument that children's rights should be more clearly singled out.<sup>44</sup> Moreover, it is necessary to ensure that child impact assessments are used to inform policy decisions, rather than to justify a preferred policy option determined independently from the impact assessment process.<sup>45</sup> This is all the more important if policy is to rely on evidence rather than assumptions. A rigorous, objective child impact assessment is likely to contribute to the acceptance, in the longer term, by commercial operators, of the detrimental effects their practices may have on children and the need to curb such practices to effectively uphold the best interests of the child as a primary consideration in all EU policies, including the core area of internal market policy (Garde, 2010b).

Apart from systematic child impact assessments and child impact evaluation, a stronger involvement of children's rights advocates is also required in the legislative process, at the consultation, drafting and evaluation stages of policies. The mainstreaming of children's rights puts the onus on children's rights organisations to step outside their comfort zone and acquire the necessary expertise to influence the agenda in the interrelated fields of internal market and consumer policy, which they have not traditionally recognised as priority items in their work. They need to contribute to (if not prompt) the debate as to where the best interests of the child lie in all the policy areas falling within the scope of the powers conferred upon the EU by the Treaties to

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<sup>43</sup> One could draw an analogy with the EU's obligation to mainstream public health concerns into all EU policies, as laid down in Article 168 TFEU (ex-Article 152 EC). A study conducted by the National Heart Forum found that in 2005 and 2006, 73 out of the 137 impact assessments carried out by the Commission did not mention the word 'health' (Salay and Lincoln, 2008, 13).

<sup>44</sup> See Article 3 TEU and Article 24 of the EU Charter on Fundamental Rights.

<sup>45</sup> Information Note from the President to the Commission, 'Better Regulation and Enhanced Impact Assessment', 28 June 2007, SEC(2007) 926.

ensure that children are adequately protected from all forms of commercial exploitation.

The Commission's most recent Communication on the Rights of the Child confirms that the EU internal market and consumer policies are not regarded as important to the EU children's rights strategy, notwithstanding their fundamental role in the EU legal order (European Commission, 2011). EU institutions, Member States, civil society and other stakeholders should all bear in mind that no policy is child neutral (De Vylder, 2004), and that the extended powers granted to the EU in internal market and consumer policies reinforce the importance of mainstreaming children's rights and upholding the best interests of the child as a primary consideration in these areas of EU action. It is indeed high time 'to move up a gear on the rights of the child and to transform policy objectives into action' (European Commission, 2011, 3). As the Commission has underlined, 'the rights of the child, guaranteed by Article 24 of the EU Charter on Fundamental Rights, are one of the fundamental rights mentioned explicitly in the Commission's Strategy. It is thus included in the "fundamental rights checks" which the Commission applies to relevant draft EU legislation' (European Commission, 2011, 4). The practical significance of this statement will turn upon the definition given of the phrase 'relevant draft EU legislation'. The broader the understanding, the more likely the Commission can live up to the promises it made in 2006 of mainstreaming children's rights in all EU internal and external policies.

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