

Children's health, food marketing and fundamental rights: In search of a more systematic and coherent approach

Professor Amandine Garde

amandine.garde@liverpool.ac.uk

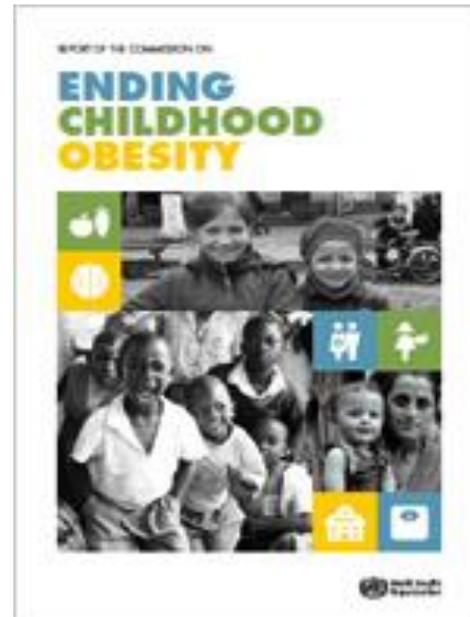
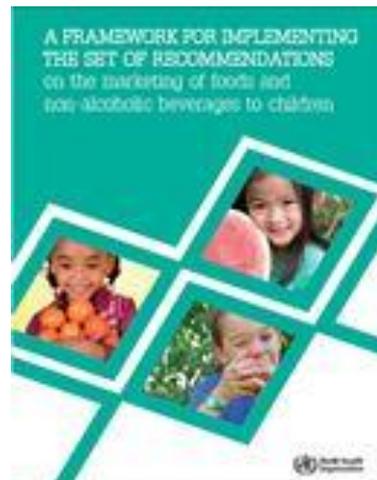
Sofia, 6 February 2018



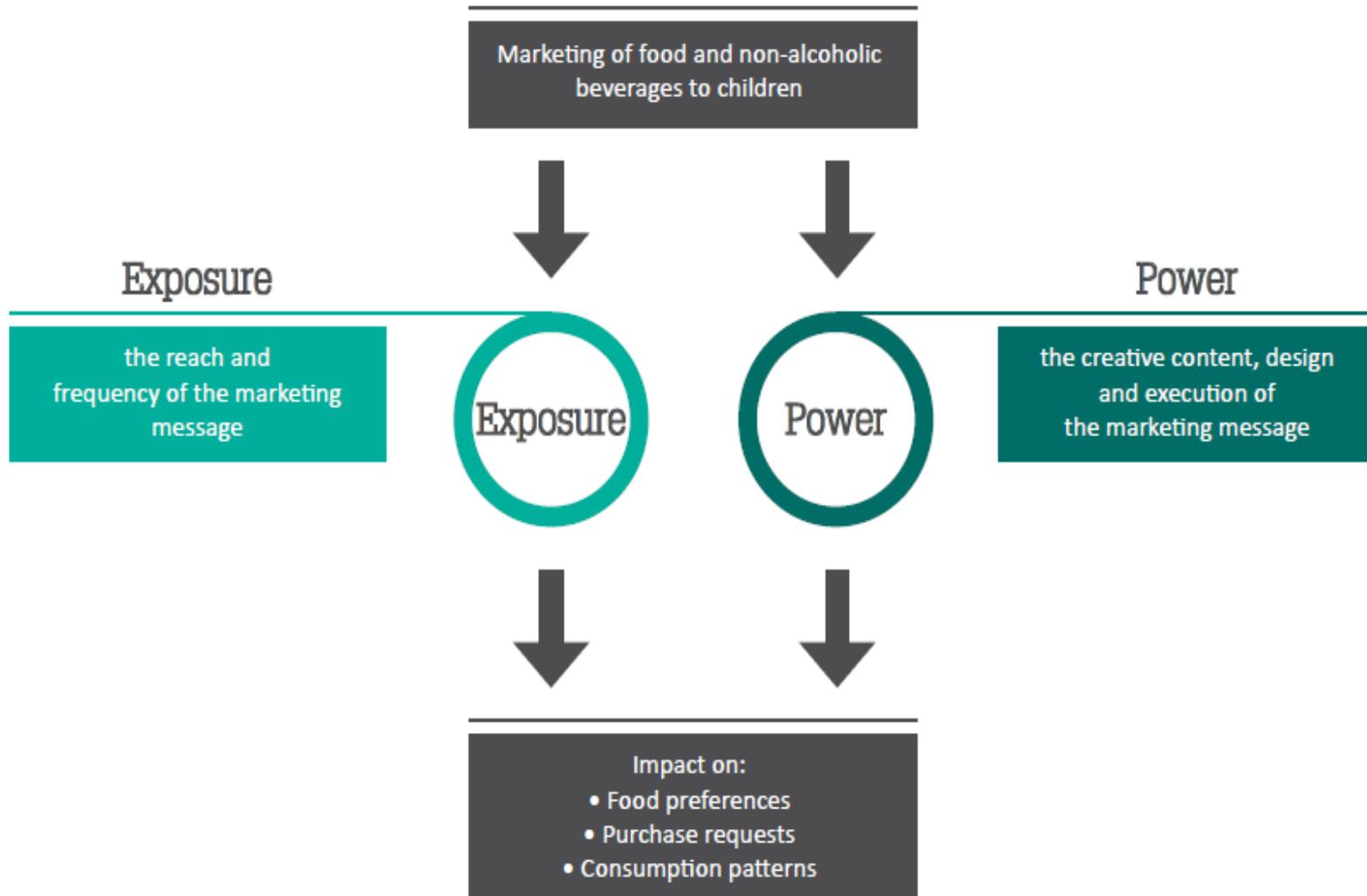
School of Law
and Social Justice

WHO Recommendations 2010

- ‘There is **unequivocal evidence** that **unhealthy food marketing is related to childhood obesity**’
- **Unanimously endorsed by Resolution WHA 63.14**
- **Overall objective:** to reduce the impact of unhealthy food marketing on children and therefore contribute to effective obesity prevention strategies



WHO Framework Implementation Report



Shifting investment

- From regulated to unregulated programme

- From regulated to unregulated media



From regulated to unregulated techniques



At a glance comparison

TOBACCO

- All forms of advertising and sponsorship with impact on the internal market are **banned**
 - Advertising
 - Sponsorship
 - Product placement
- Prohibition of claims
- Compulsory health warnings

UNHEALTHY FOOD

- **No ban of unhealthy food marketing to children**
- Prohibition on misleading, aggressive or otherwise unfair commercial practices
 - No possibility to **directly** advertise or otherwise promote goods or services to children
- Health claims have to be authorised before use
- Reliance on self-regulation by industry operators



WHO Recommendation 5:

Settings where children gather should be free of unhealthy food marketing



From the international to the local level



Anand Grover, ex-UN Special Rapporteur on the Right to Health in June 2014

‘Owing to the inherent problems associated with self-regulation and public–private partnerships, there is a need for States to adopt laws that prevent companies from using insidious marketing strategies. The responsibility to protect the enjoyment of the right to health warrants State intervention in situations when third parties, such as food companies, use their position to influence dietary habits by directly or indirectly encouraging unhealthy diets, which negatively affect people’s health. Therefore, **States have a positive duty to regulate unhealthy food advertising and the promotion strategies of food companies.** Under the right to health, **States are especially required to protect vulnerable groups such as children from violations of their right to health.’**

Article 24 CRC

1. States Parties recognize **the right of the child to the enjoyment of the highest attainable standard of health** and to facilities for the treatment of illness and rehabilitation of health [...].
2. States Parties shall pursue full implementation of this right and, **in particular**, shall take appropriate measures:
 - (a) To diminish infant and child mortality;
 - (c) **To combat disease and malnutrition**, including within the framework of primary health care [...] through the **provision of adequate nutritious foods and clean drinking-water** [...];
 - (e) To ensure that all segments of society, in particular parents and children, are **informed**, have access to **education** and are **supported in the use of basic knowledge of child health and nutrition**, the advantages of breastfeeding [...]
4. States Parties undertake to promote and encourage **international co-operation** with a view to achieving progressively the full realization of the right recognized in the present article. In this regard, particular account shall be taken of the needs of developing countries.

The Imposition of Legal Obligations

- **CRC** identifies **children as rights holders** and **States as duty bearers**
- HR are **legally binding** and impose obligations on States to:
 - **respect**: States must refrain from interfering with the enjoyment of HR
 - **protect**: States must protect individuals and groups against HR abuses, including from non-state actors / third parties
 - **fulfill**: States must take positive/active measures to establish the necessary infrastructure to facilitate the enjoyment of HR, including setting up institutions and procedures (allocation of resources, laws...) to ensure that the standards are met
- **THE CRC IN THE EU LEGAL ORDER: BINDING**

For an evolving interpretation of the CRC

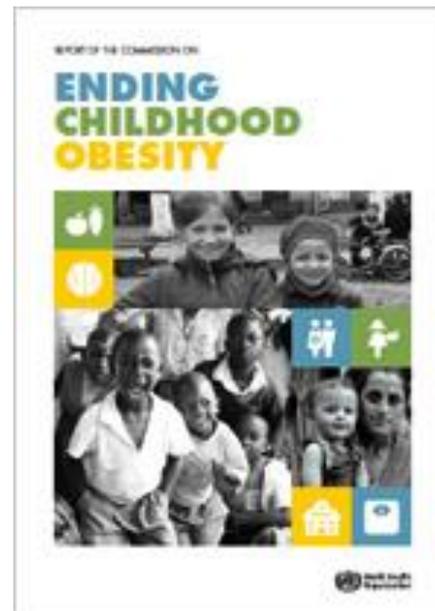
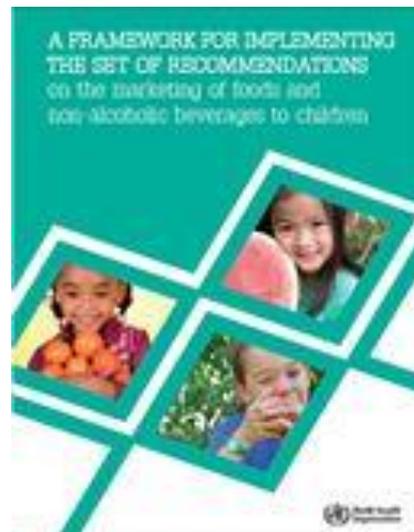
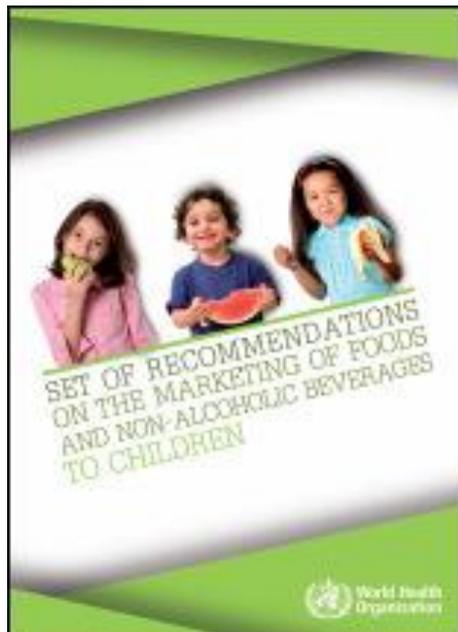
- States need to interpret the CRC in a **dynamic** manner to **address health concerns affecting children at a given point in time**
 - States should therefore prioritize issues that have received little attention to date and ensure the availability of “safe and nutritionally adequate food” and “a healthy and safe environment”
- Importance of a **life course approach**, from the neonatal stage to childhood through adolescence and into adulthood:
- **To the maximum extent of their available resources** and, where needed, within the framework of **international cooperation**

Fleshing out the right to health

- **Protected by a wide range of international treaties, national constitutions...**
 - Article 12 of the International Covenant on Economic Social and Cultural Rights (ICESCR)
- **Interpretative guidance:**
 - **General Comment 14 (2000):** States have the duty to “respect, protect and fulfill the right to health”
 - **General Comment 15 (2013):** children’s right to health interpreted as “**an inclusive right**, extending not only to timely and appropriate **prevention**, health **promotion**, curative, rehabilitative and palliative services, but also to a **right to grow and develop to their full potential and live in conditions that enable them to attain the highest standard of health through the implementation of programmes that address the underlying determinant of health.**”

Global Health and International Human Rights as Mutually Supportive

- ‘There is **unequivocal evidence** that **unhealthy food marketing is related to childhood obesity**’
- Increasing **knowledge** and **policy guidance**
- **Unanimously endorsed by Resolution WHA 63.14**



Food Marketing and Children's Rights

- **Forthcoming report commissioned by UNICEF from the Law & NCD Unit at the University of Liverpool** (in press)
 - A. Garde, S. Byrne, N. Gokani and B. Murphy
- **Analyses the negative impact of unhealthy food marketing on a range of children's rights**
 - The right to the highest attainable standard of health
 - The right to adequate food
 - The right to life, survival and development
 - The right to education
 - The right to information
 - The right to rest, leisure, recreation and cultural activities
 - The right to privacy
 - The right to non-discrimination

Back to basics: The *Cassis de Dijon* judgment [1979]



“**In the absence of common rules** relating to the production and marketing of alcohol [...], it is **for the Member States to regulate** all matters relating to the production and marketing of alcohol and alcoholic beverages on their territory.

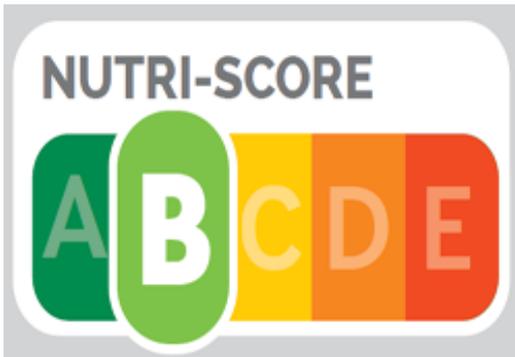
Obstacles to movement in the Community resulting from disparities between the national laws relating to the marketing of the products in question must be accepted in so far as those provisions may be recognised as being necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer.” (at paragraph 8)

Case C-333/14 *Scotch Whisky* [2015]

Picture courtesy of Creative Commons



‘it does not seem unreasonable to consider that a measure that sets a minimum selling price of alcoholic drinks, the very specific aim of which is to increase the price of cheap alcoholic drinks, is **capable of** reducing the consumption of alcohol, in general, and the hazardous or harmful consumption of alcohol, in particular, given that drinkers whose consumption can be so described purchase, to a great extent, cheap alcoholic drinks’ (at par. 36)



Case C-333/14 *Scotch Whisky* [2015]

‘It is for the Member States to decide on the level of protection of human life and health which they propose to provide [...] while taking into consideration the requirements of the free movement of goods within the European Union’

‘It is for the national authorities to demonstrate that that legislation is consistent with the principle of proportionality’

‘That burden of proof cannot extend to creating the requirement that, where the competent national authorities adopt national legislation imposing a measure such as the MPU, they must prove, positively, that no other conceivable measure could enable the legitimate objective pursued to be attained under the same conditions’ (par. 52-55)

Paradoxically...

- **If the EU does not act, then Member States are left in a potentially difficult situation**
 - They are primarily responsible for the health of their citizens
 - They are subject to a broad range of international commitments: SDGs, NCDs, WHO Recommendations...
 - They are bound by international human rights law, not least the right to food and the right to health
 - Nevertheless, they run the risk of being increasingly challenged for attempting to fulfil these commitments
- Such challenges cannot be in the spirit of cooperation underpinning Article 168 TFEU and the EU Treaties more generally
- **The EU should further reflect on the policies required at EU level to effectively promote a more sustainable food environment and healthier diets**

“Health in all policies”

- **Public Health Protection is a cornerstone of EU market integration**
 - **EU health mainstreaming provisions**
 - See Articles 12, 114(3), 168(1) TFEU and Article 35 EU Charter
 - Used before the CJEU (e.g. *Deutsches Weintor* [2012])
- **Legal obligation**
- **High level (not any level) in all its policies**
- **Health should be systematically invoked at all stages of the policy cycle**
 - policy development → policy implementation → policy monitoring and evaluation
 - **A key role for DG Health...**

The value of a children's rights approach

- **Accountability** – A children's rights approach guarantees a degree of state accountability, making effective remedies more likely where rights are violated.
- **Empowerment**
- **Advocacy** – A human rights-based approach provides an opportunity to build strategic alliances, coalitions and networks with other actors who share a similar vision and pursue common objectives.
- **Legitimacy** – Because children's rights are inalienable and universal, there is an inherent legitimacy to the language of human rights.

Back to basics: Article 3 TEU

1. The Union's aim is to promote peace, its values and **the well-being of its peoples**

3. The Union shall establish an **internal market. It shall work for the **sustainable development** of Europe based on economic growth and price stability, a highly competitive **social market economy**, aiming at full employment and **social progress**, a high level of **protection and improvement of the quality of the environment...****

It shall **combat social exclusion and discrimination**, and shall promote **social justice and protection**, equality between women and men, **solidarity between generations** and **protection of the rights of the child**.

Proportionality as a key legal principle

A MEASURE MUST BE NECESSARY
(LEGITIMACY TEST)



AND IT MUST NOT EXCEED WHAT
IS REQUIRED TO ACHIEVE A GIVEN
OBJECTIVE (LESS RESTRICTIVE
TEST)



A **careful balancing exercise** should be undertaken between potentially competing rights and interests on the basis of **existing evidence**

PARAMOUNT TO **DEFINE OBJECTIVES AND ADAPT MEANS TO THE END PURSUED**

Case C-547/14 *Philip Morris* [2016]

“[...] **human health protection** — in an area characterised by the proven harmfulness of tobacco consumption, by the addictive effects of tobacco and by the incidence of serious diseases caused by the compounds those products contain that are pharmacologically active, toxic, mutagenic and carcinogenic — **outweighs the interests put forward by the claimants in the main proceedings.**”

Indeed, as is apparent from the second sentence of **Article 35 of the Charter** and **Articles 9 TFEU, 114(3) TFEU and 168(1) TFEU**, a high level of human health protection must be ensured in the definition and implementation of all the European Union’s policies and activities.” (at paragraphs 156 and 157)

Opinion of AG Kokott of 23 Dec. 2015

“Certainly, the standardisation of the shape, size and minimum content of cigarette packets brought about by the Directive means a loss of diversity, marketing opportunities and competitive potential for manufacturers of tobacco products. However, **the purely economic interest in the greatest possible inter-product and inter-brand competition must be secondary to the protection of human health**, which, as has already been stated, has considerably greater importance in the value system under EU law (see Articles 9 TFEU, 114(3) TFEU and 168(1) TFEU and the second sentence of Article 35 of the Charter of Fundamental Rights)” (at paragraph 193)



Upholding the best interests of the child

'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration'

- Article 3(1) CRC should be interpreted **broadly** with a **child-focus**
- *Ex post* and *ex ante*
- 'A primary consideration'
 - Recognition that there may be other considerations
 - CRC Committee: 'the child's best interests may not be considered on the same level as all other considerations'

Committee on the Rights of the Child in General Comment No. 14 (2013)

- Identification of a three-fold conceptual frame-work:
 - **A substantive right**: the individual personal right of the child to have his or her best interests taken as a primary consideration
 - **A fundamental, interpretative legal principle**: where a legal provision is open to more than one meaning, it must be construed in a manner which best serves the child's best interest
 - **A rule of procedure**: any decision likely to impact upon the best interests of the child must include an evaluation as to the probable impact such a decision will have on the child's best interests

Not to be considered 'on the same level as all other considerations'

- Article 3 include the 'obligation to ensure that the interests of the child have been assessed and taken as a primary consideration in decisions and actions taken by the private sector, including those providing services, or any other private entity or institution making decisions that concerns or impact the child' (Paragraph 14(c))
- The Committee states that a **CRIA** can foresee the proposed impact and effect of a given policy and should therefore be built into government processes at all levels to ensure compliance with the CRC

Conclusion

- Changing the food environment to promote the sustainability of the internal market and the well-being of Europeans should become a more pressing priority at EU level
- To this effect, **the EU should use its internal market powers more effectively** and therefore support Member States in their efforts to protect children from unhealthy food marketing
 - in line with both the letter and the spirit of the EU Treaties
- **From EU rhetoric to EU action?**