

Internal Market, Industry, Entrepreneurship and  
SMEs Directorate-General  
GROW.E.3  
N105 5/25  
B-1049 Brussels

Oslo, 22 November 2024  
Counsel in charge: Svein Terje Tveit

[GROW-E3@ec.europa.eu](mailto:GROW-E3@ec.europa.eu)

Dear Sirs/Madams

**Stakeholders Contribution - comments to the draft technical regulation notification  
2024/9015/NORWAY**


Reference is made to the EU Commissions call for comments regarding Draft Technical Regulation - Amendment to the Food Act and proposal for new Regulations on the prohibition of the marketing of certain foods and beverages aimed at children.

We represent Orkla ASA, which owns branded consumer goods and consumer-oriented companies. With headquarters in Oslo, Orkla owns operations in a number of countries, with a focus on Northern Europe. In Norway, Orkla owns several companies that will be affected by the proposed regulation: Orkla Foods Norway AS ("OFN"), Orkla Confectionery & Snacks Norway AS ("OCSN") and Orkla Health AS ("OH").

In total, Orkla has 3000 employees in Norway and accounts for significant value creation throughout the country through 24 factories.

The attached document is being submitted on behalf of Orkla and on behalf of the Norwegian companies owned by Orkla.

Sincerely yours,  
Arntzen de Besche Advokatfirma AS



Svein Terje Tveit



*Assessment of the Proposed Ban on Marketing of Certain Food  
Products Targeted at Children*

*20 November 2024*

## ASSESSMENT OF THE PROPOSED BAN ON MARKETING CERTAIN FOOD PRODUCTS TARGETED AT CHILDREN

<b>1</b>	<b>SCOPE, SUMMARY AND CONCLUSION .....</b>	<b>3</b>
1.1	Scope of the issue .....	3
1.2	Summary and conclusion.....	3
<b>2</b>	<b>FACTUAL CONDITIONS.....</b>	<b>4</b>
2.1	More about the Proposed Measure.....	4
2.2	Brief Overview of Matbransjens Faglige Utvalg.....	5
<b>3</b>	<b>EEA LEGAL FRAMEWORK .....</b>	<b>6</b>
<b>4</b>	<b>MARKETING BAN - ILLEGAL TRADE RESTRICTION.....</b>	<b>7</b>
4.1	The Measure is a Discriminatory Restriction .....	7
4.2	The Measure is Not Suitable for Combating Diet-Related Diseases .....	8
4.3	The Measure is Not Part of a Consistent Set of Regulations .....	11
4.4	The Measure is not Necessary .....	13
4.5	The Measure is Not Proportional.....	14
4.6	Is Public Health the Genuine Justification for the Measure?.....	16
4.7	The Measure May Be in Conflict with the Principle of Legal Certainty in EEA Law.....	17
<b>5</b>	<b>THE MEASURE MAY BE IN CONFLICT WITH CERTAIN RULES IN SECONDARY LEGISLATION .....</b>	<b>19</b>
5.1	Overall .....	19
5.2	The Measure May Hinder the Free Movement of Goods in Violation of Regulation (EU) No. 1169/2011.....	19
5.3	The Measure May Conflict with Regulation (EU) No. 609/2013 and (EU) No. 2016/127, (EU) No. 2016/128.....	19
<b>6</b>	<b>THE MARKETING BAN IS NOT SUFFICIENTLY ASSESSED AND JUSTIFIED .....</b>	<b>20</b>

## 1 SCOPE, SUMMARY AND CONCLUSION

### 1.1 Scope of the issue

- (1) Orkla ASA ('Orkla') has asked us to conduct an EEA law assessment of the Ministry of Health and Care Services' ('HOD') proposal for a new regulation on the prohibition of the marketing of certain foodstuffs to children ('the marketing ban' or 'the measure'). The proposal has been sent out for a public consultation, with a deadline for submissions on 22 November 2024.
- (2) The measure aims to protect children under the age of 18, and adults who buy for children (often parents), from the marketing of a number of foodstuff products. Restrictions on product placement are also proposed. The ban covers chocolate and sugar confectionery, energy bars and sweet spreads and desserts; cakes, biscuits and other sweet and/or fatty pastries; snacks, ice cream, energy drinks, soft drinks, juices and the like. In addition, juices, milk and plant-based beverages with added sugar or sweeteners are included, as well as breakfast cereals, yoghurts and fast food/ready meals with certain specified nutritional values (fat, sugar, energy, salt and/or fibre content above certain predefined values).

### 1.2 Summary and conclusion

- (3) **Our conclusion is that the proposed marketing ban constitutes a clear restriction on the free movement of goods within the EEA, contrary to Article 11 EEA. The measure may also have a discriminatory effect, at least indirectly, in that foreign products may be hit harder than domestic products. The proposal, as currently described and analysed, is not sufficiently suitable, necessary and consistent to be legally justified under Article 13 EEA. We therefore believe that the proposed measure is in breach of EEA law.**
- (4) The protection of public health is clearly a **legitimate aim**. However, the products targeted by the marketing ban are not inherently harmful – the harm stems from over-consumption, dietary balance and composition in general, and lack of physical activity. The potential harm of individual products depends on the amount of unhealthy ingredients they contain and their other characteristics, whereas the measure is designed in a binary manner – marketing is either prohibited or allowed. The measure does not sufficiently account for the varying characteristics of the affected products. The evidentiary basis in the consultation paper is weak. It is unclear to what extent marketing restrictions or bans actually change consumption. Doubts also exist about the effectiveness of the measure, partly because it applies solely to marketing within and from Norway, etc. For these reasons, it is also questionable whether the measure is genuinely motivated by public health or whether it is more about consumer protection.
- (5) The measure does not appear to be sufficiently **consistent**. Among other things, we would like to see a more in-depth analysis on the actual extent to which marketing to children and young people constitutes a problem. Secondly, we do not see any reflection on the fact that the rules cannot include marketing from other EEA states, via the internet or across social media or television programs.
- (6) In our assessment, the measure is not **necessary** under EEA Article 13. The Ministry's evaluation does not consider that the measure is indirectly discriminatory, which raises the threshold for whether the regulation is necessary. It also fails to consider that the group

most significantly affected by the restriction is producers from the EEA (not Norwegian producers). In our view, alternative measures have not been adequately explored. These include measures such as (1) closer collaboration with the industry; (2) more direct regulation of unhealthy products (e.g., bans, taxes, requirements, ingredient-focused measures) and (3) consumer information (e.g., labelling, product information, sales information), etc. On this basis, the measure does not appear to be necessary.

- (7) In our opinion, the measure represents a **disproportionate intervention** under EEA Article 13. The measure is indirectly discriminatory, and its restrictive impact is far-reaching, inter alia due to the extensive scope of the product list. Previous assessments of advertising bans show that such measures have a limited effect on consumption. There are several alternative measures that are more targeted at harmful ingredients, less discriminatory and more consistent with other legislation. These alternatives could also avoid the challenges inherent in drawing clear distinctions between young adults and older children.
- (8) We have doubts as to whether the measure fulfils the **requirements for legal certainty** applicable to the formulation of restrictions, as established by the European Court of Justice and the EFTA Court. The measure introduces numerous standards and discretionary terms and involves boundaries that are difficult to draw and which may result in arbitrary outcomes, potentially not rooted in public health considerations. We refer to the aforementioned distinction between young adults (19 years old) and older children (17 years old), what can 'appeal' to children, what constitutes placement 'in connection with', etc.
- (9) In our assessment, the proposal may potentially be in conflict with several provisions in **secondary legislation**. This includes the Food Information Regulation, since the prohibition could indirectly necessitate changes to packaging and wrapping; and Regulation (EU) No 609/2013 on foodstuffs for, inter alia, infant formula and baby food. Since we find that the proposal is not sufficiently suitable, necessary, consistent or proportionate, we do not consider it necessary to reach a final conclusion on its compliance with secondary legislation.
- (10) Based on this, we believe that the proposal has not been adequately **analysed and justified**. The Ministry has not considered the indirect discriminatory effects of the ban. New producers and foreign producers and products will be affected to a greater extent. Consequently, the legal assessment is not based on the correct premise.

## 2 FACTUAL CONDITIONS

### 2.1 More about the Proposed Measure

- (11) The regulation aims to prevent diet-related diseases in the population by protecting children from health-related undesirable marketing of certain foodstuff products, cf. sections 1 and 2.
- (12) The marketing ban introduced is far-reaching.
- (13) *Children* are persons under the age of 18. *Marketing* includes any communication or action that is intended to promote sales to consumers. *Sponsorship* includes any contribution to an event, business or person that directly or indirectly promotes sales to consumers. The

*foodstuffs* covered are listed in Appendix I and include a wide range of product categories and products, cf. above.

- (14) The marketing ban applies to marketing '*aimed at*' children, cf. Section 4. The provision defines a blacklist of marketing that is always considered to be aimed at children, cf. the second paragraph, e.g. competitions with an age limit under 18. Outside this blacklist, an overall assessment is required, where the regulation specifies a non-exhaustive list of relevant factors, cf. the third paragraph. Examples of such factors are time, place and whether the product is particularly appealing to children. If the marketing occurs 'in a way that encourages adults to buy the product for children', it will be covered, even if the marketing is not aimed at children, cf. the fourth paragraph.
- (15) Additionally, restrictions are proposed regarding the placement of products at retail locations, cf. section 5.
- (16) The regulation defines five exceptions to the marketing ban. These include design, packaging, and wrapping (excluding luring effects), product placement at retail locations, factual product information online and in connection with retail locations, and sponsorships limited to the use of the sponsor's company name and logo (e.g., "Orkla").
- (17) Furthermore, the Ministry proposes granting the Norwegian Directorate of Health supervisory authority and the power to impose coercive fines (for non-compliance with decisions) and administrative fines (for violations of the regulation).

## **2.2 Brief Overview of the Food Industry Professional Committee**

- (18) The Food Industry Professional Committee (Norwegian: Matbransjens Faglige Utvalg ("MFU")) has been the key actor ensuring responsible marketing of food and beverages to children and young people in Norway for nearly a decade. MFU reviews and decides on all submitted cases. The committee has handled over 300 complaints and provided 150 pre-assessments regarding products with high fat, salt, or sugar content.
- (19) MFU also plays a preventive role by offering pre-approval of marketing efforts, which prevents undesirable advertisements from reaching the market at all. The Norwegian Institute of Public Health has highlighted the pre-approval service as a strength.<sup>1</sup> A similar function is not, to our understanding, planned for the new supervisory authority.
- (20) Over the past two years, there has been a decline in complaints and decisions. This indicates a positive effect of pre-approvals and/or better compliance with the regulations. By comparison, the Consumer Authority receives several thousand inquiries annually but issues only 5–15 decisions.<sup>2</sup> Few of these decisions concern products with high fat, salt, or sugar content.
- (21) The statistics from MFU indicate that the scheme is actively utilized and considered relevant by the industry. It provides oversight and prevention within the sector. This is also reflected

---

<sup>1</sup> Evaluation of Matbransjens faglige utvalg (MFU) 2020 – Norwegian Institute of Public Health p. 5.

<sup>2</sup> Annual report for the Consumer Authority 2023 ([arsrapport-forbrukertilsynet-2023.pdf](#)) and overview of decisions ([Vedtak - Forbrukertilsynet](#)) (last visited 20. november 2024).

in evaluations conducted by the Norwegian Institute of Public Health (consultation paper p. 22 and further references). These evaluations have also led to proposals for improving the scheme. MFU has acted on these recommendations, including implementing changes and seeking feedback from the Ministry. The scheme is continuously updated to address new needs and challenges.

- (22) The MFU has proposed several measures to the Ministry to strengthen the scheme in line with the Public Health Report (Meld. St. 15, 2022-2023), including cooperation with the Consumer Authority and expanded information work.

### 3 EEA LEGAL FRAMEWORK

- (23) Marketing of wholly or partially unhealthy food and beverages specifically targeted at children is not directly regulated by specific regulations or directives (secondary legislation). However, there are certain general EU/EEA rules on marketing that may be relevant to parts of the proposal. These secondary legal principles are further assessed in section 5.
- (24) Since the rules of EU/EEA countries in this specific area are not harmonized as a starting point, the key issue for assessment is whether the measure complies with the main provisions of the EEA Agreement, cf. consultation paper sections 6.6.3–6.6.4.
- (25) For a measure to be lawful, it must satisfy one of the following requirements. It must either pursue a legitimate objective under EEA Article 13, such as *public morality, policy, security, health, the protection of plant and animal life, or the protection of artistic treasures*. Alternatively, it must serve an overriding public interest, such as consumer protection. The latter requires that the measure is not discriminatory.
- (26) The assessment of whether the restriction is lawful is based on the fact that each Member State is free to determine the level of protection it wishes to establish in national law. However, this freedom is limited by EEA law, which prohibits restrictions if the objective can be achieved in an equally effective but less restrictive way.
- (27) To be lawful, the measure must, in addition to pursuing a *legitimate aim*, also be *necessary* to achieve that aim. In addition to being suitable and necessary, the measure must be *proportionate*. Under EEA law, there is sometimes an additional requirement that national rules, to be deemed suitable for achieving a particular objective, must pursue that objective in a *consistent* manner. The consistency requirement means that the measure must, as a starting point, form part of a coherent and consistent policy to safeguard the interests invoked. In practice, this means that strict requirements and criteria must not be undermined by other, or missing, measures.
- (28) The state has the burden of proof that the measure is suitable, necessary and therefore proportionate to safeguard the public health interests it aims to address. The precise content of the burden of proof must be determined on the basis of the case law of the European Court of Justice and the EFTA Court. The question has become particularly relevant in cases where restrictions are justified on health grounds. How strictly the documentation requirement is understood and assessed varies according to practice and may depend on



how convinced the court is of the general reasonableness and proportionality of the measure.<sup>3</sup>

#### 4 **MARKETING BAN - ILLEGAL TRADE RESTRICTION**

##### 4.1 **The Measure is a Discriminatory Restriction**

- (29) The prohibition in Article 11 of the EEA Agreement against '*measures having equivalent effect*' to quantitative import restrictions applies to virtually all measures that directly or indirectly, actually or potentially may affect trade.
- (30) The Ministry considers that the measure constitutes a restriction under EEA Article 11 on the free movement of goods and Article 36 on the free movement of services, because the proposal will entail restrictions on legal foodstuffs. We agree with that.
- (31) The prohibition on restrictions applies both to measures that directly or indirectly discriminate against imported goods and to other measures that hinder market access. In this context, the European Court of Justice has repeatedly pointed out that restrictions on *certain types of sales* are also covered, as long as the measure can legally or actually affect domestic and foreign products differently. This follows, for example, from the European Court of Justice's judgement in case C-405/98 *Gourmet International* concerning the Swedish ban on alcohol advertising, and the EFTA Court's similar assessment in case E-4/04 *Pedidel* concerning the Norwegian ban under the Alcohol Act.
- (32) Although the regulation is, in principle, applied equally to both national and foreign actors, as the Ministry points out, a marketing ban is more likely to impact foreign products than domestic ones and thus has a discriminatory effect.<sup>4</sup> This was highlighted in the EU Court of Justice's Case C-405/98 *Gourmet International*, which demonstrated that marketing restrictions can be considered indirectly discriminatory when they affect domestic and foreign providers differently. The reason for this is that domestic providers' products and brands are well-established on the domestic market, whereas new products and trademarks face greater challenges in gaining consumer recognition without marketing.
- (33) This was reiterated by the EFTA Court in case E-4/04 *Pedidel* concerning the Norwegian alcohol advertising ban. In this case, the Court emphasized that if the consumption of the goods is linked to social traditions and local customs and habits, a ban on all advertising to consumers may entail greater disadvantages for market access for goods originating in

---

<sup>3</sup> In the European Court of Justice's case C-284/95, *Safety Hi Tech v S&T. SRL*, ECLI:EU:C:1998:352, the European Court of Justice found that a ban on the use and marketing of hydrochlorofluorocarbons intended for fire extinguishing for the protection of the ozone layer was lawful and justified. The test was narrow, cf. 59-61 and 66. Similarly, in the *Preussen Elektra* and *Wallonia waste* cases, the ECJ limited itself to an assessment of the necessity of the measures, without a more detailed examination of the general proportionality of the measure and the documentation requirement. Conversely, in the European Court of Justice's case C-510/99 *Tridon*, ECLI:EU:C:2001:559, the Court noted that an assessment of the proportionality of a ban on the sale of parrots born in captivity was not possible 'without further information [...] based partly on scientific studies and partly on the facts' (paragraph 58).

<sup>4</sup> See, for example, Advocate General Jacobs in *Gourmet International*, sak C-405/98, paragraph 34. A34. *It might be argued that these are matters of fact for the national court to decide, but it seems to me inherent in any rule which prevents producers from advertising directly to the public that it will disproportionately affect imported products—and will at any rate "prevent their access to the market or ... impede access ... more than it impedes the access of domestic products"*.



other Member States than for domestic goods.<sup>5</sup> In this context, domestic products are already well-known in the Norwegian market, making it more challenging for producers from other EEA countries to establish a market position and sell their products in Norway without the ability to advertise them. We therefore conclude that a ban on marketing certain foodstuff products targeted at children (and adults purchasing for children) would affect domestic and foreign goods differently.

- (34) The aforementioned cases reflect the fundamental EEA jurisprudence of the EU Court of Justice and the EFTA Court and should guide national authorities when implementing marketing bans. It is therefore a significant weakness in the Ministry's assessment that they conclude there are "no discriminatory effects of the proposal".<sup>6</sup> This represents a fundamental difference between our assessment and that of the Ministry. The indirect discrimination requires national authorities to choose the least restrictive measure. This is crucial in determining whether the measure is suitable or necessary.
- (35) The restrictive nature of the marketing ban is further amplified by the additional limitations on where the products may be placed at retail locations.

#### 4.2 The Measure is Not Suitable for Combating Diet-Related Diseases

- (36) As previously mentioned, it is up to the state to determine the level of protection. The consultation paper does not state *what* level of protection the state intends to provide. Since the ban, with few exceptions, covers all marketing and sponsorship, defines children as anyone under the age of 18, and targets a range of products - both unhealthy, less healthy and partially healthy, we must assume that the level of protection is meant to be (very) high. This imposes requirements on the consistency of the regulation and the measure as a whole, see also section 4.3.
- (37) Although public health is generally a legitimate aim that may justify restrictions on freedoms under the EEA Agreement, as follows, inter alia, from HR-2022-718, paragraph 151, the measure must be 'suitable' to contribute to the attainment of the objective the State seeks to achieve.<sup>7</sup> In other words, the measure must, in fact, be capable of promoting the health outcomes that the State wishes to achieve. The suitability test implies a certain requirement that the measure contributes to *effective* goal achievement. If the measure will only have a limited impact on public health, the measure is not suitable.<sup>8</sup>
- (38) The Court of Justice of the European Union and the Court of Justice of the EFTA States have established that national advertising bans on alcohol and tobacco are suitable measures for limiting the harmful effects of these products.<sup>9</sup> Alcohol and tobacco are harmful products in themselves.<sup>10</sup> Unhealthy, less healthy or partially healthy foodstuffs are not in *themselves*

---

<sup>5</sup> E-4/04 Pedicel, paragraph 46 with reference to C-405/98 Konsumentombudsmannen v Gourmet International Products AB [2001] ECR I1795, paragraph 21; see also case E-6/96 Wilhelmsen, paragraph 73.

<sup>6</sup> Cf. Consultation paper page 66.

<sup>7</sup> See the Opinion of Advocate General Poiares Maduro in Case C-434/04 Criminal proceedings against Jan-Erik Anders Ahokainen and Mati Leppik, paragraph 24: «*the measure at issue must indeed contribute to achieving the aim pursued*».

<sup>8</sup> Case C-170/04, Klas Rosengren and others v the Director of Public Prosecutions, paragraph 45, see Mathisen (2015) p. 169.

<sup>9</sup> See, for example, Joined Cases C-1/90 and C-176/90, Aragonesa de Publicidad Exterior SA and Publivia SAE v Departamento de Sanidad y Seguridad Social de la Generalitat de Cataluña, and Case E-16/10, Philip Morris Norway AS v Staten v/Helse-og omsorgsdepartementet.

<sup>10</sup> See, for example, Advocate General Wahl's assessment with further references in Gourmet International, paragraph 42.

harmful. It is overconsumption, the balance and composition of the diet in general and the absence of physical activity that are harmful. The potential harm of an individual product will naturally vary depending on the amount of salt, sugar, and/or fat in the product – as well as its other characteristics. The measure is designed in a binary manner, meaning the marketing ban either applies or it does not, without gradations of allowed marketing (in categories 1-6 for defined products, and in categories 7-11 for defined products with specific salt, sugar, and/or fat content).

- (39) While alcohol is harmful both to the consumer and indirectly to others through violence, road traffic injuries and other accidents, poor diet is primarily harmful to the consumer - although, like many other things, it has an indirect and possible future impact on public budgets, particularly healthcare costs. This indirect or derived future impact on public budgets depends on a wide range of factors related to lifestyle, life choices, consumption, etc. including risk acceptance, inactivity, etc. The causal relationship is complex.<sup>11</sup>
- (40) The state cannot automatically apply the same low documentation requirements for harmful products such as alcohol and tobacco in the suitability assessment to foodstuff products that may be unhealthy due to overconsumption. A stricter documentation requirement should be imposed for measures targeting products that are not inherently harmful. The fact that the state has applied a lower documentation obligation for the suitability assessment than is warranted suggests that a new assessment must be made to ensure compliance with EEA law.
- (41) The European Court of Justice's decision in case C-192/01 (Commission v Denmark) is illustrative of the state's documentation obligation in the suitability assessment. The case concerned a Danish advertising ban on foods to which vitamins and minerals had been added, unless it could be documented that such additions met the nutritional needs of the Danish population. The ECJ noted that the Danish authorities had the burden of proof to *"show in each case, in the light of national nutritional habits and in the light of the results of international scientific research, that their rules are necessary to give effective protection to the interests referred to"* and that *"the marketing of the products in question poses a real risk to public health"*.<sup>12</sup> The ECJ found that the advertising ban could not be justified on the basis of a *"real risk to public health"*. The Court noted that the required *"detailed assessment, case-by-case, of the effects which the addition of the minerals and vitamins in question could entail"* had not been carried out.<sup>13</sup>
- (42) In other words, the state must prove that restrictions on the marketing of unhealthy foodstuff products to children actually contribute to reducing consumption and thus combat diet-related diseases.<sup>14</sup>
- (43) It is somewhat unclear to what extent marketing restrictions or bans actually change consumption, especially for young consumers, as Advocate General Jacobs points out in the

---

<sup>11</sup> Compare with Advocate General Jacobs in *Gourmet International* paragraph 41.

<sup>12</sup> Case C-192/01 *Commission of the European Communities v. Kingdom of Denmark* paragraph 46.

<sup>13</sup> *Ibid* paragraph 56.

<sup>14</sup> See also Case 90/86 *Zoni*, in which Italy had not demonstrated that the additives to pasta were harmful to health in such a way as to justify a prohibition on the marketing of pasta made from certain flours.

Gourmet International case: “there appears to be no scientific agreement as to the precise effects of advertising on alcohol consumption as opposed to brand-switching”.<sup>15</sup> The Advocate General refers to a research report prepared for the US Congress. The report concludes that «there is little consistent evidence that alcohol advertising affects drinking beliefs and behaviors. Some sources, however, do report a link».<sup>16</sup>

- (44) The causal relationship between foodstuffs and diet-related diseases is more complex than for harmful products such as alcohol. For marketing aimed at children, this relationship is even more complex. Marketing aimed at children often takes place indirectly, as it is mainly parents who decide what children eat and drink. Children generally have limited purchasing power. The exception to this is older teenagers, where the marketing ban makes it difficult to draw the line between them and young adults outside the ban.
- (45) The evidentiary basis presented in the consultation paper is weak. A single international study showing a correlation between the marketing of unhealthy foodstuff products and negative effects on children's food choices appears, in itself, unconvincing – and research on foodstuff and health is extensive, yet somewhat conflicting and fragmented (consultation paper p. 8).<sup>17</sup> The failure to establish a causal relationship between the objective and the means makes it difficult to justify the proposal based on the *precautionary principle* in the regulation of foodstuff products and their marketing.<sup>18</sup>
- (46) For the measure to be suitable, it must also contribute to achieving the objective in an effective manner. Due to EU/EEA legal obligations and limitations on the scope of Norwegian law and regulations, the proposed measure will not capture all marketing of unhealthy foodstuff products targeted at children.<sup>19</sup> The proposed marketing ban therefore has a number of "gaps."
- (47) Firstly, only actors subject to Norwegian jurisdiction are covered. This means that children will continue to be exposed to advertising aimed at them abroad and inland from foreign actors via social media and the internet. A similar efficiency objection was raised by the European Commission in the Gourmet International case, where it was shown that there would still be large amounts of indirect advertising on the internet.<sup>20</sup> For a small country like Norway, the restrictive impact is further amplified by the fact that actors must adapt to specific rules in a small country, while the effect of the marketing ban is limited when the

---

<sup>15</sup> Opinion of Advocate General Wahl in case C-405/98 Gourmet International, paragraph 49.

<sup>16</sup> Ibid, footnote 19.

<sup>17</sup> Compare with the previous consultation paper from June 7, 2012, which stated that "it is difficult or impossible" to establish a link between the marketing of unhealthy food and the risk to public health based on empirical studies, cf. p. 24 ([Markedsføring av mat og drikke til barn og unge – vurdering av behov for ytterligere restriksjoner og eventuell lovregulering](#) – last visited November 20, 2024).

<sup>18</sup> Cf., inter alia, the Opinion of the Advocate General in Case C-95/01 (Greenham), which states: “A proper application of the precautionary principle presupposes, firstly, an identification of potentially negative health consequences arising, in the present case, from a proposed fortification, and, secondly, a comprehensive evaluation of the risk to health based on the most recent scientific information.” See also the EFTA Court's Case E-3/00, paragraph 30.

<sup>19</sup> Cf. the sending country principle in directive 2010/13/EU (the AMT-directive) and directive (EU) nr. 1169/2011 (e-commerce directive).

<sup>20</sup> Case C-405/98 Konsumentombudsmannen (KO) and Gourmet International Products AB (GIP) paragraph 31.

rules are not harmonized within the EU, and advertising from abroad is not covered.

- (48) Secondly, it seems counterintuitive to include such a broad range of products in a marketing ban. If the goal is to reduce demand for "*the most unhealthy food products targeted at children*," it is ineffective to ban the marketing of all products that could be unhealthy due to overconsumption within the same category, regardless of their nutritional content (consultation paper p. 38). There is a sliding scale in the healthiness of products, but the marketing ban is overly simplistic in that categories 1-6 include all products within the category, while categories 7-11 only impose certain limitations by setting thresholds without significant differentiation between multiple categories, or across nutritional values, etc. The marketing ban will therefore also impact partially healthy or less unhealthy products. One example is TORO Grove Havrevafler (flour mix) without added sugar, which falls under the category "sweet baked goods." The waffles contain only 1.9 grams of naturally occurring sugar after preparation, which is 5 to 15 times less sugar than in a regular waffle. Another example is the nut packs "Småsulten" with fruit, berries, and nuts, which would fall under the category "snacks," alongside regular potato chips. This black-and-white approach to healthy and unhealthy could discourage consumers from trying healthier alternatives and remove incentives for foodstuff companies to create healthier versions.
- (49) These conditions suggest that the marketing ban will be unlikely to achieve the objective in an effective manner.
- (50) The Ministry also points out that the marketing ban is part of a broader package of measures. Therefore, it is expected that the Ministry will also address the practical impact of each measure, both individually and collectively. Such a comparison or comprehensive assessment has not been made, and the consultation paper provides limited grounds for evaluating whether the measure will actually improve public health to a considerable degree.
- (51) Based on this, our assessment is that the state has not fulfilled the burden of proof to document a causal relationship that shows that the measure is suitable and will contribute effectively to achieving the goal of combating diet-related diseases.

### 4.3 The Measure is Not Part of a Consistent Set of Regulations

- (52) As the Ministry points out in the consultation paper (p. 67), the measure must "pursue the goal of protecting public health in a coherent and systematic manner." This is known as the consistency requirement. The requirement has been expressed in case law from the EU Court of Justice and the EFTA Court and can be anchored in EEA Article 13.<sup>21</sup>
- (53) The Supreme Court generally states the following about this assessment, cf. HR-2022-718-A:

*"In connection with the issue of suitability, the EU Court of Justice and the EFTA Court often require*

---

<sup>21</sup> See for example case E-3/00 (Kellogg's) paragraph 26, case C-209/18 Commission v. Austria paragraph 94 with further references.

that the restrictive measure must be part of a consistent safeguarding of the public interest in question. In the advisory opinion in case 30 May 200 E-3/06 *Ladbroke's Ltd* section 51, the EFTA Court stated that it had to be investigated whether "the state takes, promotes or tolerates other measures that run counter to the objectives sought to be achieved through the relevant legislation », and that "[s]uch a lack of coherence can make the relevant legislation unsuitable for achieving the intended objectives [...]"<sup>22</sup>

- (54) The consistency requirement means that the measure must form part of a coherent and consistent policy to safeguard the stated interest. For it to be coherent and consistent, it must not be undermined by other, or the absence of, measures. For example, the state must not implement, promote, or accept other measures that contradict the objectives the measure is intended to achieve.<sup>23</sup> Additionally, there must be a holistic, or systematic, approach.<sup>24</sup> The consistency requirement entails that it must be assessed whether, and if so how, the public health interest that the measure seeks to protect is being addressed through other measures.<sup>25</sup>
- (55) The Ministry does not assess whether the measure pursues public health in a coherent and systematic manner. Among other things, we miss more in-depth reflections on the actual extent of the problem posed by marketing aimed at children and adolescents. The consultation paper refers to international studies but notes that there is limited recent Norwegian data on marketing and exposure to children. At the same time, we are aware of several reports, including from SIFO, which conclude that there is surprisingly little advertising for unhealthy food and beverages targeted at children, and that exposure is *fairly modest*.<sup>26</sup> We also lack reflections on the fact that the rules cannot encompass or prevent advertising from other EEA states via the internet or social media, or TV broadcasts from other EEA states. This is a paradox, especially when recent studies show that, for example, foreign influencers account for 90% of influencer content related to food and beverages that Norwegian consumers are exposed to.<sup>27</sup> It is also unclear how the measure, given that the state aims for a very high level of protection, aligns with other measures—or the lack thereof. This includes budgetary measures (such as deficiencies in funding for food inspections, healthcare services, and state-owned health enterprises, etc.), the absence of bans or interventions on the most harmful foodstuffs, resource challenges, and the lack of funding in municipalities to organize school meals and ensure higher standards in kindergartens, or the lack of advancement in physical activity requirements in schools, the lack of a consistent approach to food labeling, etc.
- (56) A similar efficiency objection was, as already mentioned, also raised by the European Commission in the *Gourmet International* case. In our view, this suggests that the regulation does not pursue the goal in a systematic and consistent manner and is a matter the ministry must assess.

---

<sup>22</sup> HR-2022-718-A paragraph 155.

<sup>23</sup> Prop. 6 L (2023-2024) point 5.4.3.

<sup>24</sup> Harbo, T (2021) *Jussens Venner 2021/5 «Forholdsmessighet»*.

<sup>25</sup> Arnesen et al. (2022) *Oversikt over EØS-retten* s. 125-126.

<sup>26</sup> See SIFO 2013-5 (available here: [ODA Open Digital Archive: Usunne mat- og drikkereklamer rettet mot barn](#) last visited 20. november 2024) and SIFO 2016-9 (available here: [ODA Open Digital Archive: Systematisk kartlegging av reklame for usunn mat rettet mot barn og unge på tv og internett](#) last visited 20. november 2024).

<sup>27</sup> See survey carried out by Opinion on behalf of NHO Mat og Drikke (available here: [opinion\\_nho\\_rapport\\_reklametrykk-mot-barn-og-unge\\_250424.pdf](#), last visited 12. november 2024).

#### 4.4 The Measure is not Necessary

- (57) For the restriction to be lawful, the measure must be necessary. As the EFTA Court stated in Case E-4/04 Pedicel, the "*objective may not be as effectively achieved by measures which are less restrictive of intra-EEA trade*" (paragraph 56).
- (58) The Ministry's assessment of whether the marketing ban is necessary to achieve the objective is brief and general. We note that the Ministry emphasizes that the proposal "*does not involve a ban on products or requirements that would prevent certain products from being sold on the Norwegian market*" and that "*it is therefore not considered to significantly restrict the free movement of goods.*" This statement shows that the Ministry has not assessed the marketing ban in accordance with established case law from the EU and EFTA Courts on advertising bans.<sup>28</sup> In these cases, the courts concluded that such bans more significantly affect foreign products, which are not as well-known to consumers as established domestic products. Therefore, the EU and EFTA Courts have considered such measures to be indirectly discriminatory.
- (59) A marketing ban is a serious obstacle to the free movement of goods. When the Ministry assesses necessity based on a lower threshold, they risk making an incorrect assessment. In short, it is more challenging for national states to meet the necessity requirement when the measure discriminates against producers from other EEA countries.
- (60) In the necessity assessment, the Ministry *first* refers to the fact that the industry has already implemented a ban through the self-regulation scheme MFU. The Ministry believes that only the parts of the proposed regulation that go beyond the MFU scheme will be perceived as intrusive by the industry. We interpret the Ministry's position as meaning that the industry has already adapted to the measure. We believe this is a fundamentally incorrect starting point for the assessment. It is of lesser importance how well *Norwegian* actors have adapted, because the necessity assessment must focus on the group being discriminated against. In our case, it is *foreign* enterprises, particularly new actors wishing to market their products in the Norwegian market, that are being discriminated against. As mentioned, the Ministry has not acknowledged this distinction, instead assuming that the measure is not discriminatory. Therefore, the Ministry has not assessed how the measure affects this group.
- (61) *Secondly*, the Ministry argues that the self-regulation scheme is insufficient because it does not allow for effective supervision and sanctions. A central point in the proposed regulation is the need for "active supervision" (cf. consultation paper p.22, 28, 29, 30 og 56, petition resolution Innst. 398 S (2022-2023) s. 26 and Folkehelsemeldingen s. 55). However, supervision can also be established voluntarily, and supervision can focus on other, more concrete measures than an absolute and general ban. The Ministry could have elaborated more on why public regulation is necessary. The MFU scheme is preventive while also handling complaints. *Collaboration with the industry* on limiting the marketing of certain foodstuff products would be a much less restrictive intervention than a ban and limitations on placement. We therefore miss a more thorough assessment of what active supervision specifically entails, and the resources required to carry it out properly. Without sufficient

---

<sup>28</sup> See *inter alia* Case C-34-36/95 De Agostini, C-405/98 Gourmet, Case E-4/04 Pedicel and E-16/10

frameworks, this could undermine both the legitimacy and function of the supervision. This is also illustrated by the fact that the EU has not proposed harmonizing legal rules regarding the marketing of "unhealthy" food and beverages to children, and in several contexts has referred to self-regulation as an appropriate measure.<sup>29</sup> The Ministry has not sufficiently demonstrated that the desired objective cannot be achieved through a modification of the current self-regulation scheme.

- (62) *Thirdly*, the Ministry emphasizes that the ban is a supplement to other measures in the area of diet. Measures to promote healthy eating will work together over time and will reinforce each other. Therefore, the marketing ban is just one of several measures. This statement shows that the Ministry is starting at the wrong end by introducing the most intrusive measure first. In our view, the measures, in light of the necessity requirement under EEA law, should be assessed as a whole. The assessment of whether the most intrusive measure, a marketing ban, is necessary, will be difficult to make before the scope and design of the other supporting measures are known. We therefore believe that the entire "package" of measures must be part of the necessity assessment in the consultation paper.
- (63) In our assessment, all the alternative solutions discussed in section 6.4 of the consultation paper could be both relevant and less intrusive measures.
- (64) *On the one hand*, drastic measures can be envisaged directly aimed at the ingredients that the legislature wants less of in children's diets, i.e. fat, sugar and salt. Rules can be given on maximum values, tax rules or bans on the unhealthiest products. This measure is more targeted, and in sum probably less intrusive since the marketing ban applies more widely.
- (65) *On the other hand*, clearer rules can be introduced on labelling, product information and health risks, as seen with tobacco products for example.<sup>30</sup> Such measures will be more targeted at the risk of damage that each individual product can pose. They will require some scientific documentation that shows a connection between the products and the information and labeling given about them. The measures will probably be less restrictive in that they do not affect all products on the list equally, and do not prevent the consumer himself (the guardian or the young person) from making an informed choice.
- (66) Based on this, we believe it is not sufficiently well-documented that there are no other, more targeted measures that are at least equally suitable but less restrictive on trade. This is in line with the EFTA Court's assessment in Case E-4/04 Pedicel (paragraph 56), where it was emphasized that the measure should not be more intrusive than necessary.

#### **4.5 The Measure is Not Proportional**

- (67) If the requirements of suitability and necessity are met, it must be assessed whether the measure is proportionate. This involves a balance between the state's interest in achieving a concrete legitimate goal, and the common interest in the EU and EEA area to ensure the free movement of goods and services. The measure must be in a reasonable relationship to the objective it is to achieve, without imposing unnecessary restrictions on trade and the

---

<sup>29</sup> See, inter alia, directive 2013/13/EU (AMT Directive) Article 9 no. 4.

<sup>30</sup> See measures implemented by the EU, such as the EU's Beating Cancer Plan for measures and the legislative work on front-of-pack labeling under the "Farm to Fork" strategy.



provision of services.

- (68) The Swedish Market Court assessed the proportionality of a Swedish alcohol advertising ban in Case 2003:5 (Gourmet International) and found it to be *disproportionate*.<sup>31</sup> The Court argued that the advertising ban in print media was less effective than other measures in Swedish alcohol policy. It was pointed out that alcohol advertising still reached Sweden through other channels, such as the internet and foreign TV broadcasts. It was also noted that Sweden had other tools at its disposal to protect public health, such as the state monopoly on alcohol sales (Systembolaget). The advertising ban was considered to play a limited role in relation to these measures. Additionally, it was emphasized that there was already a requirement for "moderation" in the type of alcohol advertising allowed, a precautionary standard intended to help keep alcohol consumption low.
- (69) The case has several transferable points to the proposed advertising ban on unhealthy foodstuff products. First, children will continue to be exposed to marketing targeted at them by unhealthy foodstuff products through, among other channels, social media and the internet, as discussed in sections 4.2 and 4.3 above. Second, Norway already has many other types of measures that could be implemented to protect public health, which are less intrusive, as outlined in section 4.4 above. Third, there is already a strict regulatory framework in Norway designed to safeguard and protect against unwanted marketing targeted at children. This includes both bans on advertising in certain media and a general precautionary standard. It is possible to strengthen supervision and sanctions for violations of these rules without introducing a general marketing ban.
- (70) The circumstances suggest that the protection against diet-related diseases achieved through the measure is modest. Since the benefit of the measure is small, there is a disproportion between Norway's interest in protecting public health and the impact the measure will have on trade between states. As already pointed out in section 4.1 above, the measure will represent a significant interference in trade, without the Ministry seemingly having assessed in more detail the negative consequences a regulatory measure would have on trade. It will affect a range of products from the EU and EEA area and make it difficult for new producers and products to enter the Norwegian market. The placement ban, for example, will present a particular challenge for foreign actors. As is well-known, Norwegians are drawn to already familiar brands, as demonstrated by the failed attempts by Lidl, Iceland, and Picard to establish themselves in the grocery sector. Due to high barriers to entry in the grocery sector and difficult access to shelf space, foreign actors wishing to enter the market often have to start through other chains such as Nille, Deli de Luca, or Normal to build their brand. This is in addition to the fact that the proposed law is too vague and unclear, providing a lack of legal predictability for the already established businesses—which is an issue in itself.<sup>32</sup> Therefore, the measure constitutes a disproportionate intervention in the freedom of goods and establishment relative to the measure's objective.

---

<sup>31</sup> Den svenske Marknadsdomstolen case 2003:5.

<sup>32</sup> See section 4.6 below.

- (71) Furthermore, the ban poorly aligns with the responsibility we otherwise assign to youth, such as the criminal age of responsibility, sexual consent age, digital media age limits, and children's right to self-determination, among other factors. On a broader level, public health and consumer protection legislation should reflect the overall responsibility society assigns to young people. The Ministry does note that consideration was given to setting a lower age limit but briefly refers to the importance of protecting children and the fact that young people can be an attractive target for marketing, as stated in the consultation paper, p. 39. We miss a more thorough discussion of which age limit might be appropriate, and why. Age limit considerations are complex, as evidenced by the sources the Ministry relies on, which sometimes refer to MFU having discussed a total ban up to the age of 16, while different countries have age limits ranging from 13 to 18 based on specific evaluations and considerations. The higher the age limit is set, the harder it becomes to draw a clear distinction between young adults and children, and the more intrusive the ban becomes for individuals who, in principle, have increasing and eventually full legal autonomy. A slightly lower age limit could make it easier to distinguish between children and (young) adults, and thus potentially be less restrictive, as marketing could be directed at young adults.
- (72) This point of view also has some support in case law: In connection with a French ban on adding caffeine to beverages above a certain limit, the European Court of Justice ruled that *“appropriate labelling, informing consumers about the nature, the ingredients and the characteristics of fortified foodstuffs, can enable consumers who risk excessive consumption of a nutrient added to those products to decide for themselves whether to use them”*.<sup>33</sup> The ECJ found that the ban on adding caffeine above a certain threshold was not the least intrusive measure available and therefore not necessary to achieve effective consumer protection.
- (73) The case illustrates an important distinction between prohibiting on behalf of the consumer and protecting the consumer by providing information. The Ministry has repeatedly emphasized that the marketing ban is different from a ban on misleading advertising. EU/EEA regulations on foodstuff and unfair commercial practices aim to enable consumers to make informed choices. This is central to EU/EEA consumer law in general: An informed consumer is able to make their own assessment. At the same time, there are bans on certain types of marketing to shield consumers. In our view, a sufficient balance has not been found between these two aspects, either from a consumer protection perspective or from a broader legislative standpoint.

#### **4.6 Is Public Health the Genuine Justification for the Measure?**

- (74) In the consultation paper section 6.4.4, the Ministry assumes that the marketing ban is justified on public health grounds under Article 13. The Ministry refers to the fact that Member States have the right to set the level of protection for public health in areas where the rules are not harmonized. The justification cites Case C-34-36/95 Consumer Ombudsman v. De Agostini. However, we emphasize that the De Agostini case concerns a Swedish ban on advertising aimed at children under twelve years old. This was a marketing ban justified on *consumer protection* grounds, not public health.

---

<sup>33</sup> Case C-24/00 Commission v France, paragraph 75.

- (75) We agree that the protection of human life and health is an important consideration, but we question whether it is the *genuine* consideration in this case. As mentioned in section 5.2, the causal link between foodstuff products and diet-related diseases is more complex than for harmful products such as alcohol and tobacco. For marketing directed at children, this link, as noted above, is even more indirect.
- (76) We refer to Case C-317/92 (paragraph 17) *Commission v. Germany*, where the Court found that the restriction in question, which Germany claimed was based on public health grounds “*does not constitute, in itself, a measure capable of protecting public health*”. Similarly, it can be questioned whether the marketing ban is truly a measure that can protect public health, or if it is actually intended to protect consumers (both children and adults purchasing for children).
- (77) It is the state that has the burden of proof that a measure that prevents trade has been taken on the basis of the right exception (EEA Article 13 or overriding public interest). The intensity of judicial review in the EU Court of Justice and the EFTA Court varies with the considerations invoked. As a starting point, the threshold for legal exemption will be higher for measures based on consumer considerations than public health.

#### 4.7 The Measure May Be in Conflict with the Principle of Legal Certainty in EEA Law

- (78) Even if the introduction of national legislation is considered to constitute a suitable, necessary and proportionate restriction of the fundamental freedoms, EEA law's principle of legal certainty must also be respected for the measure to be legal.<sup>34</sup> This principle is outlined, among other cases, by the European Court of Justice in joint cases C-72/10 and C-77/10 *Costa and Cifone*. The case concerned whether national legislation on the licensing of gambling constituted an unlawful restriction on the freedom of establishment. In paragraph 74, the Court states generally that:

*“The principle of legal certainty requires, moreover, that rules of law be clear, precise and predictable as regards their effects, in particular where they may have unfavourable consequences for individuals and undertakings (see, to that effect, Case C-17/03 VEMW and Others [2005] ECR I-4983, paragraph 80 and the case-law cited)”*

- (79) Similarly, we find in the EFTA Court in case E-9/11 *ESA v. Norway*. The case concerned the question of whether a limitation in ownership and voting rights constituted an illegal restriction of, among other things, the freedom of establishment. In section 99 it is stated:

*“In addition, the Court recalls that for a restriction on a fundamental freedom to be justified, the measures must satisfy the principle of legal certainty. This is a general principle of EEA law (see, inter alia, Case E-1/04 Fokus Bank [2004] EFTA Ct. Rep. 11, paragraph 37). In a case where the acquisition of shareholdings and the exercise of voting rights above a certain threshold are based on exceptions to main rules that provide for an outright ban, legal certainty calls for those exceptions to be sufficiently clear and precise”*

- (80) The principle requires that national exemption provisions are clear, precise and predictable with regard to their effect. This is particularly important when the legislation gives

---

<sup>34</sup> Whether this is an independent requirement or is included in the proportionality assessment is not relevant.

authority to impose an "unfavourable consequence" on companies, which in this case is an administrative fine, which under Article 6 of the European Convention on Human Rights (ECHR) constitutes a penalty.

- (81) It is not difficult to imagine that there will be significant challenges for businesses in distinguishing between adolescents and young adults in marketing. The result may, in practice, be a stricter restriction that effectively impacts young adults, as advertisements aimed at 19-year-olds and older may also appeal to 17-year-olds. Although boundaries will always arise, as mentioned, this distinction is presumptively less significant between children and adults than between adolescents and young adults.
- (82) Section 4, third paragraph of the regulation allows for a broad, overall assessment of non-exhaustive factors in the marketing ban. The listed factors are vague, such as the assessment of whether marketing "can appeal to children" through the use of "colors, effects, images," and similar elements. A specific example is the question of whether marketing that includes animated animals, like the well-known "Stratos cow," would automatically fall under the ban. In reality, cows are neither blue nor animated, and such depictions could potentially be perceived as targeted at children.
- (83) This also applies to Section 4, fourth paragraph, of the regulation, which requires that marketing must not "occur in a way that encourages adults," and Section 5, which states that products must not be placed "in connection with" other products and services. The wording of these provisions is vague and open to interpretation, making it difficult for businesses to comply with the bans. In our view, the delineation in the regulations is not sufficiently clear. For example, marketing of "Saturday candy" is not prohibited according to the consultation paper, but it is unclear whether the same applies to the marketing of Grandiosa for a children's birthday/class party—or in a family setting where children are present.
- (84) Furthermore, it is stated that the proposal's Section 5 on placement is intended to target toy stores. This raises questions regarding the scope of the ban, particularly whether hybrid stores like Nille, etc., are included, and how the ban should be applied at smaller retail locations such as kiosks and gas stations. The consultation paper provides no further guidance on how the delineation should be made. A specific example is whether the ban applies to Leos Lekeland, Dyreparken (the Zoo) in Kristiansand, and Tusenfryd (amusement park), and how sports and cultural events should be assessed, including international events (also) held in Norway. A clearer and more predictable regulation could have been a ban on placing certain products at checkout counters.
- (85) Based on this, we assess that the proposed rules are so unclear and open to interpretation that they may be in conflict with the EEA law's requirements for legal certainty, particularly in light of the uncertain effect the rules actually have in reducing the consumption of health-harming foodstuff.

## **5 THE MEASURE MAY BE IN CONFLICT WITH CERTAIN RULES IN SECONDARY LEGISLATION**

### **5.1 Overall**

(86) In the consultation paper point 6.6.2, the ministry assumes that secondary legislation does not prevent the issuing of rules prohibiting the marketing aimed at children of more or less unhealthy food and drink based on public health/health considerations.

(87) Although there is no general regulation on the marketing of unhealthy food and beverages specifically targeted at children in secondary legislation in the EU/EEA, the proposed law affects rules in secondary legislation.

### **5.2 The Measure May Hinder the Free Movement of Goods in Violation of Regulation (EU) No. 1169/2011**

(88) The introduction of national legislation should not hinder the free movement of products that comply with the Food Information Regulation (EU) No. 1169/2011.

(89) The Ministry seems to believe that national legislation can impose requirements on the design of packaging, even if the packaging complies with the regulation. In the consultation paper (p. 64), it is suggested that producers could use stickers or similar methods to cover elements that conflict with the proposed rules. According to the Ministry, this would not constitute a barrier to the free movement of goods that meet the requirements of the regulation.

(90) The marketing ban is designed in such a way that the product's packaging and wrapping are generally considered as permitted marketing. However, this does not apply if the packaging/wrapping uses gifts, toys, coupons, collectibles, or similar elements in a way that encourages children to purchase the product, or if the packaging is of such a nature that the product becomes secondary. This suggests that producers may need to create special packaging for Norway or use temporary solutions to cover elements deemed problematic. This could lead to additional production costs and more.

(91) The starting point according to the regulation is that national legislation can be introduced as long as legal foodstuffs in line with the regulation can be traded freely. If manufacturers have to incur an additional cost linked to the design and packaging of the products, this could prevent the free flow of goods and thus be in breach of the regulation's article 38 (2).

### **5.3 The Measure May Conflict with Regulation (EU) No. 609/2013 and (EU) No. 2016/127, (EU) No. 2016/128**

(92) Article 4 (3) of Regulation (EU) No. 609/2013 on foodstuffs, including infant formula and baby food, establishes that Member States cannot "restrict" the marketing of food products that meet the requirements of the regulation due to their "composition, manufacture, presentation or labeling."

(93) The Ministry concludes that the marketing ban does not mean that the regulation's requirements for presentation or advertising "cannot be followed" (p. 65). However, the proposed rule that packaging may be prohibited in certain cases under Regulation § 6, letter c), could potentially conflict with the regulation's requirements, in the same way as

discussed under the Food Information Regulation in section 5.2 above.

- (94) It is also noted that these regulations will take precedence in the event of a conflict with the proposed marketing ban (pp. 64-65), without including a provision explicitly stating this precedence. This could be problematic for at least two reasons. First, it is not good regulatory practice, as the regulation does not necessarily ensure that the rules will be applied correctly in all cases. Second, the lack of such a provision may constitute a breach of the duty of loyalty outlined in EEA Agreement Article 3, as it does not adequately ensure the application and effectiveness of EEA law.<sup>35</sup>

## **6 THE MARKETING BAN IS NOT SUFFICIENTLY ASSESSED AND JUSTIFIED**

- (95) When introducing Norwegian "special rules" that restrict the free movement of goods within the EEA, it is important to conduct a thorough assessment of the consequences for market actors from other EEA countries.
- (96) Instructions on the assessment of state measures (Instruks om utredning av statlige tiltak) states that the relationship with EEA law must be investigated. If the measure concerns fundamental questions, the assessment should "discuss these in a balanced, systematic, and comprehensive manner," according to the instruction section 2-2.
- (97) As mentioned above, the Ministry has not discussed the indirect discriminatory effect of the proposed ban.<sup>36</sup> This is a significant weakness of the investigation, especially when there is coherent and clear case law from the EU and EFTA Court dealing with marketing bans. In our assessment, the consequence of the lack of assessment of the restrictive effect, seen in the context of the overall assessments of suitability, necessity and proportionality, is that the ministry has not investigated the measure sufficiently to meet the requirements of the instruction.
- (98) We refer to the report from an interdepartmental working group, which was set up to investigate how the ministries can work better with EEA matters (on the basis of the NAV case regarding the receipt of social security benefits in EEA countries). The report emphasizes the importance of the ministry having a good overview of case law in the EU Court of Justice and the EFTA Court.<sup>37</sup>
- (99) We emphasize that an adequate investigation of EEA legal issues in nationally initiated rulemaking requires that national authorities recognize that a measure may raise EEA legal issues, and that a thorough evaluation of the measure is carried out in light of the principle of proportionality under EEA law. It is the Norwegian authorities who have the burden of proof that the measure is legally justified.
- (100) It is useful to have an overview of how restrictions on marketing targeted at children are regulated both in the EU and EFTA pillars, as well as in our Nordic neighboring countries, Denmark and Sweden. This provides a relevant backdrop for discussions on what

---

<sup>35</sup> See the EFTA Court's case E-7/97 paragraph 16.

<sup>36</sup> See section 4.1.

<sup>37</sup> [Departementenes EØS-arbeid - Rapport fra interdepartemental arbeidsgruppe - juni 2021, s. 139.](#)

restrictions should be introduced into Norwegian legislation. Therefore, it is common practice to refer to experiences and regulations in our neighboring countries during the legislative process. However, this is omitted in the consultation paper. Neither Sweden nor Denmark has introduced a similar ban. It is striking that this has not been addressed in the consultation paper. We believe that such a comparison is a natural part of the basis for the assessment and, in our view, is a deficiency in the process.<sup>38</sup>

- (101) The MFU scheme is also insufficiently assessed by the Ministry. See our comments on the scheme in sections 2.2 and 4.4 above. In the Ministry of Justice and Public Security's "Law Technique and Law Preparation, Guidelines on Legislation and Regulation Work" (page 13), it states that "*The choice of measure should always be based on a conscious assessment. An issue should not be attempted to be solved through legal regulation without first considering whether the desired effect can be achieved more effectively or simply through the use of other measures.*" This has also been pointed out by the Norwegian Better Regulation Council (Regelrådet) in their consultation statement, where they concluded that the proposal has not been sufficiently assessed.<sup>39</sup>
- (102) The marketing ban is intrusive for businesses, and the Ministry has proposed that the rules be issued in the form of regulations. This deviates from the usual regulatory structure in Norway and creates a fragmented and somewhat complicated legal framework. Such regulations can easily become "invisible," which increases the risk of violations. Regulations also do not come with preparatory works, making it difficult for businesses and others who apply the regulations to understand how the rules should be interpreted. It is particularly important that national rules restricting trade within the EEA include thorough legislative preparatory works that discuss the relationship to EEA law.
- (103) The complexity of the regulation's structure and the unclear wording in key provisions will likely result in significant resource use for both businesses and the supervisory authority. For example, reference is made to Section 6, which outlines a number of exceptions to the marketing ban, where letter c provides an exception to the exception. This is not good legislative technique.
- (104) The marketing ban is intrusive and of such a nature that the Norwegian Parliament (Stortinget) should decide on it. This means it should be regulated in formal law and not left to regulation, as outlined in the aforementioned guidance from the Ministry of Justice and Public Security (page 23).
- (105) Finally, we note that the proposed legislation states that the Norwegian Directorate of Health will be given three full time equivalent (FTE) to carry out inspections (cf. consultation paper p. 84). The calculations are based on data from 2012. This raises questions as to whether the calculation is still relevant for today's needs, especially considering that the media and marketing landscape in 2024 has changed significantly compared to over a decade ago. Limited resources can lead to arbitrary case allocation,

---

<sup>38</sup> As also pointed out by Regelrådet: <https://regelradet.no/2024/11/13/forskrift-om-forbud-mot-markedsforing-av-visse-naeringsmidler-rettet-mot-barn-og-ny-hjemmel-i-matloven-om-overtredelsesgebyr/>.

<sup>39</sup> Ibid.



where the simplest cases – often those that receive media attention or involve larger players – are prioritized. This can result in supervision that is neither effective nor fair. MFU is not similarly affected by such resource limitations - all complaints received are processed.

---000---



---

Svein Terje Tveit  
Partner – Arntzen de Besche



---

Margrét Gunnarsdóttir  
Specialist Counsel – Arntzen de Besche



---

Ida Henriette Toftner  
Associate – Arntzen de Besche