

## **FoodDrinkEurope comments on the Norwegian amendment to the Food Act and proposal for new Regulations on the prohibition of the marketing of certain foods and beverages aimed at children**

FoodDrinkEurope, the organisation representing the EU food and drink manufacturing sector, welcomes the opportunity to comment on the notification of the Norwegian amendment to the Food Act and proposal for new Regulations on the prohibition of the marketing of certain foods and beverages aimed at children ([2024/9015/NO](#)).

FoodDrinkEurope would like to highlight the following issues and concerns with regard to the proposed amendment and new regulations.

### **1. Non-compliance with article 34 of the Treaty on the Functioning of the European Union (TFEU) and article 11 of the European Economic Area agreement (EEA)**

FoodDrinkEurope welcomes the government's acknowledgement that a marketing ban on packaging and wrapping would create barriers to trade and would entail a risk that many products would no longer be sold in Norway. Such Regulation would be problematic according to EEA legal obligations, ultimately affecting consumer choice. FoodDrinkEurope is however concerned about the caveats to the packaging exemption provided under Article 6 c) and Section (4)(e).

The suitability and appropriateness of this caveat to the packaging exemption has not been evidenced and does not demonstrate that it will achieve the intended public health goal. Meanwhile, stickering or repackaging products specifically for Norway, as suggested by the [consultation document](#), would create disproportionate barriers to trade and a distortion of competition within the European Single Market.

According to established case law on the impact of different on-pack labelling requirements, laws that require country-specific communications on packaging must be regarded as barriers to intra-EU trade in that they directly affect the product and thus trade within the EU.<sup>1</sup> This is true even if the measures apply indistinctly to all producers and all products, regardless of their origin. This becomes particularly relevant as other countries in the EEA region/ EU have not introduced restrictions on packaging-related marketing communications for food and beverage products. Re-packaging products or requiring prohibited element on-pack to be hidden by a sticker would therefore distort competition and impose a significant burden on manufacturers, presenting a technical barrier to trade, at a time when competitiveness, growth and reinforcing the Single Market are key political priorities for the European economy.

The proposed caveat to the packaging exemption is highly problematic as many companies operating within the internal market and EEA use shared packs for a group of several EU, EEA and third countries and it creates an uneven playing field for non-

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<sup>1</sup> See, for instance, judgment of 24 November 1993, Keck and Mithouard, Joined Cases C-267/91 and C-268/91, ECLI:EU:C:1993:905, para. 15; judgment of 5 April 2001, Bellamy and English Shop Wholesale, Case C-123/00, ECLI:EU:C:2001:214, para. 18; judgment of 26 October 1995, Commission v Germany, Case C-51/94, ECLI:EU:C:1995:352, para. 30; judgment of 16 January 2014, Juvelta, Case C 481/12, ECLI:EU:C:2014:11; judgment of 16 December 1980, Fietje, Case 27/80, ECLI:EU:C:1980:293, para. 15; judgment of 14 February 2008, Dynamic Medien, Case C-244/06, ECLI:EU:C:2008:85, para. 27; Case C-51/94, Commission v Germany, ECLI:EU:C:1995:352, para. 30.

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Norwegian producers. The government effectively suggests that non-Norwegian producers would have to incur extra costs to enter the Norwegian market by either adapting or 'stickering' their packaging.

Adapting packaging for Norway will entail costs for manufacturing new print cylinders, managing double packaging raw materials stocks and multiple data sets. It also increases changeover complexity in manufacturing operations, which has repercussions on operational efficiency. Indicative costs per artwork change are approximately €1000 to €2000. When a few thousand Stock Keeping Units (SKUs) are put on the market, this can represent a potential one-off cost of a few million euro for a single company, even before any ongoing costs for separate production of packaging executions for a single country like Norway.

Stickering could potentially inflate the cost of producing some products by around 10% relative to the retail price. Moreover, applying stickers to certain products can create quality problems. Delicate items might get damaged or misplaced during the stickering process and stickers can cover crucial information, leading to confusion among Norwegian consumers (notably for smaller packages/wrappers). Such increased production costs, logistical and quality challenges also risk disproportionately affecting smaller and medium sized companies who may lack the resources compared to larger companies. Such measures would also generate important packaging waste and could go against the objectives set out in the Packaging and Packaging Waste Regulation (as this will lead to additional plastic placed in the market which may not be recyclable).

This increased cost of producing Norway-specific packaging, stickering or repackaging for Norway is likely to make non-Norwegian products less competitive than Norwegian products, so non-Norwegian companies making products for many European countries are likely to get pushed out of the Norwegian market. This would significantly reduce consumer choice in Norway, and people may turn to cross-border shopping or online shopping to access some of their favorite brands if it were to become a *de facto* product ban.

Considering all of the above, requirements to be met by imported products in regard to the Norwegian regulation will force manufacturers and importers to adapt the products in question to the rules in force in Norway. By working to the disadvantage of imported products, the requirement qualifies as a measure having equivalent effect to a quantitative restriction on imports within the meaning of Art. 34 TFEU. Therefore, a full exemption of packaging is needed to be compliant with internal market requirements.

## **2. Non-compliance with article 36 of the Treaty on the Functioning of the European Union and article 13 of the EEA agreement**

The current proposal is problematic in at least three broad respects, disproportionately affecting substantially more marketing than necessary. *First*, the proposed measures are nominally aimed at protecting children, but they also overly restrict adult-directed marketing (in numerous ways as discussed elsewhere in this paper), thereby going too far and constituting a disproportionate restriction on commercial free speech.

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*Second*, the proposed measures also affect more marketing than necessary to achieve the stated goal because they restrict ads for numerous nutrient-dense food and beverage products, including those that provide important nutrient and food group contributions to the diet, the consumption of which is associated with balanced diets and body weights. This aspect of the proposal not only restricts more speech than necessary, but it is also counterproductive to the public health goal.

*Third*, the proposal ignores alternative measures that could be just as effective in reducing child exposure without the problematic governmental intrusion on free speech. For instance, the proposal does not appear to have considered the dramatic impact that self-regulation, both by the food and beverage industry as well as digital players such as Google<sup>2</sup>, has already had (and will continue to have) on child exposure to “high in fat, sugar and salt” (HFSS) food and drink ads. As outlined below, such exposure levels are quite small and dropping quickly, the decline being accelerated as children abandon television and move to digital media where age-targeting techniques allow advertisers to avoid children (and reach exclusively their intended adult audience) more effectively. Watershed bans, and vague standards that only allow ads that somehow manage to appeal to adults without appealing to older teens, are overly broad and outdated measures when compared with alternatives that harness the power of today’s digital targeting capabilities to reduce child exposure. Accordingly, self-regulation and changing media habits, together with digital age-targeting capabilities, are already reducing child “HFSS” ad exposure to negligible levels and stand as an alternative means of achieving the government’s goals without the legally problematic impact on speech.

Therefore, the measures are not evidenced enough and would disproportionately affect the food and beverage industry, and alternative measures have not been considered adequately, therefore being in breach of the Treaty on the Functioning of the European Union and the EEA agreement as they are not justified. The Norwegian government has not looked enough at alternative measures that would have been less restrictive and in line with the TFEU and the EEA agreement.

### **3. Marketing & advertisement considerations**

Any measure constituting a restriction to free movement of goods must be suitable and necessary to achieve the objective pursued. Please find below additional considerations that should be taken into account and carefully considered.

- Age threshold U18: Foods should not be regulated in the same way as gambling

When it comes to setting the age threshold for children, both government policies and industry self-regulatory standards around the world tend to set the age of a child, in the context of food marketing restrictions, somewhere between under 13s and under 16s. Global industry standards, such as those endorsed by the International Chamber of Commerce, the International Food and Beverage Alliance and the EU Pledge, apply restrictions to children under the age of 13. Although the World Health Organization has recommended policies to address food marketing to children under 18, such policies

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<sup>2</sup> Google’s [advertising policy](#) on HFSS food and beverages.

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remain quite rare and many of them are applied on TV only (Ireland, South Korea, Taiwan).

Most academic reviews recognize that by the age of 12 children develop their behavior as consumers, effectively recognize advertising and can adopt critical attitudes towards it. A landmark review by Sonia Livingstone<sup>3</sup> found no justification for why older children, e.g., those above 12 years of age, should be targeted for restrictions on food advertising. She concluded:

- Before the age of four or five, children regard advertising as simply entertainment.
- Between four and seven, they begin to be able to distinguish advertising from programs.
- By the age of eight, the majority has generally grasped the intention to persuade.
- After eleven or twelve they can articulate a critical understanding of advertising.

This is confirmed by other studies which have had similar findings.

FoodDrinkEurope would caution against expanding food ad restrictions towards older teens. Setting the age threshold at under 18 would be disproportionate. It places “HFSS” foods in the same category as gambling. In addition, teenagers over the age of 16 in Norway are allowed to babysit, to start practice driving, to open a bank account and even to carry firearms. It is quite difficult to suggest that youth who are old enough to do these things are still too young to see a food or beverage ad.

The age cut-off for these restrictions is critically important, particularly given the proposal to ban ads that “may appeal” to children. Almost anything that appeals to adult audiences will also appeal to someone who is 16 or 17. In our view, there is no way to impose such restrictions up to age 18 without having a massive impact on adult-directed advertising.

- Adults should not be considered vulnerable consumers

The draft proposal suggests prohibiting the marketing of products listed in the proposed Annex I if it is done in a way that encourages adults to purchase the products for their children (Art. 4 (4)). This measure could in practice prohibit depicting a family breakfast setting or gathering around the dinner table, in connection to marketing many or most of common household products. This approach appears too restrictive and paternalistic, potentially infringing on personal freedoms and undermining parental responsibility. **Since such a law has not been applied anywhere else in the world, to our knowledge, we believe it would reflect a seriously disproportionate impact on adult-directed commercial expression.** As with setting the age limit for these restrictions at 18 (versus the more common approach of “under 13” or “under 16”), this part of the proposal would have a highly problematic effect on ads directed solely at adults.

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<sup>3</sup> Sonia Livingstone is a leading British scholar on the subjects of children, media and the Internet. She is Professor of Social Psychology and former head of the Department of Media and Communications at the London School of Economics and Political Science.

- Audience thresholds are more effective than time-based bans (watersheds)

The draft regulation suggests that any films, shown in cinema before 18:30 should be considered as aimed at children (Art. 4 §2 a)). In addition, for TV and social media, an assessment based on “time and place” of marketing should take place to understand if the ad is aimed at children (Art. 4 §3 c)).

Using audience thresholds that more effectively target restrictions at media settings where children constitute an important proportion of the audiences, instead of time-based restrictions would be preferable. In fact, audience thresholds should be used for all media outlets subject to legislations, not just broadcast media. This reflects the WHO’s recommendations to reduce children’s HFSS marketing exposure.<sup>4</sup>

- Restrictions should apply to ads that appeal primarily to children

We support the view that commercial communications should not be designed in a way that speaks primarily to children. Appeal rules are especially important when it comes to media where there is limited data on the presence of children and where age-targeting is less sophisticated. The EU Pledge, for instance, has detailed guidance on creative execution and avoiding “HFSS” ads appealing primarily to children. Other industry-wide standards, such as those in place in Australia, New Zealand, the Netherlands, Belgium, and the UK, also use primary appeal elements to define what commercial communication is targeted to children. None of these governments have been able to define what appeals to a 17 vs 19-year-old, pointing out the lack of evidence of raising the age of a child to above 16 years old.

The proposed regulation outlines different aspects of the marketing prohibition on marketing “aimed” or “directed” at children (Art. 4 (2) & (3)). In the assessment of whether certain marketing is “aimed” or “directed” at children, the element of what “primarily appeals” to children should be of central importance. But we are concerned that the proposal does not consistently employ this standard. For example, the operative language in the proposal turns on “whether the marketing has a form of presentation, content or design that may appeal to children, for example due to language, colors, effects, use of imagery, use of animation or drawn characters.” This is quite concerning because nearly anything “may appeal” to children, especially if children are defined to include people up to age 18. This is why the modifier “primarily” should always be used with “appeal” in rules such as this. When designing advertising policies aiming to protect children, it is important to carefully separate advertising targeted at general audiences versus advertising targeted at children. Language such as “may appeal”, as included in the text, is far too broad to make that careful separation.

Appeal criteria, such as the ones defined by the EU Pledge, are robust to ensure that the design of ads for products which do not comply with the nutrition criteria will not be primarily appealing to children across media, and in particular where the audience cannot confidently be identified (i.e. non-measured media through e.g. print).

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<sup>4</sup> Set of recommendations on the marketing of foods and non-alcoholic beverages to children, World Health Organization, 2010.



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FoodDrinkEurope recommends considering the question of “primary appeal” according to the MFU and EU Pledge creative execution guidance. The wordings “may appeal” should be removed due to its unclear nature.

- Economic impact

Far-reaching restrictions would also negatively impact the economy. Ad bans constitute a significant barrier to market access and are likely to freeze existing market shares by limiting the possibility for new market entrants to differentiate themselves from national competitors and impact a broader economic system.

Advertising does not only provide income and employment for those within the industry, and fund content and media. By generating extra consumer expenditure and economic activity, it also supports the wider economy. Several studies have looked at the relationship between advertising spend and economic activity such as in the EU, a Deloitte study from 2016<sup>5</sup> quantified that 1 euro invested in advertising generates 7 euros to European Union GDP.

When the UK worked on its online advertising ban, a study<sup>6</sup> assessing the Government’s cost-benefit analysis showed the potential negative consequences for limited benefits. Indeed, the reduction in calories from a ban on “HFSS” advertising online is likely to be about 0.13 calories per child per day (or 48 calories per year) with a negative net benefit of £2,328m for companies, according to the study. This data demonstrates that while the benefits for children is limited of an advertising ban, it has important negative consequences for companies.

The draft legislation, if enacted, would also negatively impact Europe’s competitiveness, even though the [Competitiveness Compass](#) has been announced as the first major priority for the new European Commission, building on the Draghi report.

Overall, we could conclude that the food and beverage sector and related marketing is a significant contributor to economic growth. Restricting advertising to different audiences, be it adult or children, without due consideration of the benefits of such a regulation versus its economic consequences, would not be proportionate.

- Self-regulatory initiatives and voluntary commitments have proved to have a significant impact on children’s exposure to audiovisual communications of “HFSS” food

FoodDrinkEurope members are committed to responsible advertising practices to children, which includes promoting a balanced diet and healthy lifestyle. Many food and drink companies have made specific, voluntary commitments to limit marketing to children, via the [EU Pledge](#) and national pledges. The EU Pledge is the main EU-wide self-regulatory initiative on responsible food and beverage marketing to children and has raised the bar for food marketing standards in Europe. It is a commitment by 23 leading food and

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<sup>5</sup> Value of Advertising

<sup>6</sup> [SLG Economics for the Advertising Association, ISBA, IAB and IPA, December 2020](#)

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beverage companies, representing an estimated 80%+ of EU food and beverage marketing spend, to change what they advertise to children across Europe.

Based on extensive annual third-party audits, the EU Pledge has been able to report not only high levels of compliance, but also a significant impact on children's exposure to audiovisual communications for these foods and beverages, notably an 83% reduction in children's exposure in and around children's programmes, and a 48% reduction in children's exposure overall, across all programmes.

Companies are also working through national self-regulatory pledges, such as the Matbransjens faglige utvalg (MFU) in Norway (the food sector code of conduct), as well as strict adherence to national, regional, and European regulatory frameworks, such as the European Commission's Audiovisual Media Services Directive. In addition, some companies have also developed marketing initiatives that support parents in their efforts to promote healthy lifestyles to their children.

The draft regulation does not take into account enough measures that are already existing and are more proportionate and could achieve the goal of the legislators, such as self-regulatory pledges and commitments.

- Transition period

FoodDrinkEurope points out to the very short transition period with the expectation to comply within 6 months. This is practically difficult due to the long lead time for content production and media planning. Specifically, changes to packaging and packaging labels require 2 to 5 years depending on the extent of the changes. A longer transition period of 24 months should be fully considered.

In light of the above, we respectfully ask the European Commission to consider the detrimental impact that the proposed provisions would have on the functioning of the EU Single Market and ask the Norwegian government to revise its proposal. We thank you for taking our comments into consideration and we remain at your disposal for any additional information or clarifications needed.

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