

Impact assessment

1. Introduction

Since 2013, a self-regulation scheme for the marketing of unhealthy food and beverages, has been in place in Norway. Evaluations have shown that this scheme has weaknesses. The scheme only prohibits marketing of unhealthy food and beverages aimed at children *under 13 years old*. The main problem is, however, that the scheme only handles specific *complaints* (i.e. no active supervision) and that violations of the guidelines are not subject to any *sanctions*. In recent years, several actors outside the traditional grocery stores have expressly violated the guidelines, stating that it has no consequences for them.

To protect the health of children and promote public health, the Ministry have therefore deemed it necessary to enact mandatory legislation prohibiting marketing of unhealthy food and beverages aimed at children. The draft Marketing Regulations are based on the current self-regulatory scheme, the 2023 recommendations from the World Health Organisation [*Policies to protect children from the harmful impact of food marketing: WHO guideline*](#), scientific knowledge on marketing and healthy nutrition, experiences from other countries and the rights of the child.

The WHO recommends stronger policies to protect children from the harmful impact of food marketing. Furthermore, the European Parliament in a resolution of 16 February 2022 on strengthening Europe in the fight against cancer – towards a comprehensive and coordinated strategy (2020/2267(INI)), emphasized the role of a healthy diet in preventing and limiting the incidence and the recurrence of cancer. In this regard, the Parliament “supports Member States in revising the relevant provisions to restrict the advertising of sweetened beverages and processed food products high in fats, salt and sugar, including advertising on social media” (point 19).

2. Norwegian policy and health challenges

In 2010, the World Health Assembly endorsed recommendations for regulating the marketing of food and beverages to children, urging member states to take the necessary measures to implement the recommendations. In July 2023, the WHO launched a revised guideline on policies to protect children from the harmful impacts of food marketing. The guidelines emphasize the need to protect all children against such marketing and that this must be seen in the context of children's rights. WHO recommends that member states implement regulatory measures to restrict the marketing of food high in saturated fat, trans fat, sugar and/or salt, to which children are exposed. Further, that such measures should (1) be mandatory, (2) protect children of all ages, (3) employ a nutrient profile model established by public authorities, (4) be sufficiently comprehensive to minimize the risk of marketing being shifted to other channels, to other areas of the same channel or to different age groups, and (5) limit the influence of food marketing.

The Ministry consider it important to adhere to WHO's recommendations to protect children from the marketing of unhealthy food and beverages. This is also in line with Norway's obligations under the Convention on the Rights of the Child, in light of the interpretations of the Committee on the Rights of the Child.

In the government's White Paper on Public Health (Meld. St. 15 (2022–2023)), it was stated that the current self-regulatory scheme to protect children from marketing of unhealthy food and beverages, is not sufficient, and that the government would consider “various measures” to better protect children from such marketing. When the White paper was deliberated in the parliament in June 2023, the government was requested to adopt a prohibition against the marketing of unhealthy food and beverages aimed at children under the age of 18. The current draft Marketing Regulations are the government's follow-up of the parliamentary request.

The Norwegian population, including children, does not eat in accordance with the Norwegian dietary guidelines. The intake of saturated fat and salt is significantly higher than recommended. Intake of added sugar is also higher than recommended. Surveys among children and adolescents in Norway show the same challenges. Children and adolescents eat too little vegetables, fruit and fish, and consume too much sugar, salt and saturated fat. The surveys also show that there are socioeconomic differences in diet. The intake of food and beverages with a high content of sugar, fat and/or salt shows a clear social gradient across the socioeconomic groups, with the more frequent intake among the lower socioeconomic groups.

An unhealthy diet is, both in Norway and in the rest of the world, one of the most important risk factors for non-communicable diseases such as heart attack, stroke, type 2 diabetes and several cancers and premature death. In Norway, diet is the most important modifiable risk factor for disease and premature death, after tobacco use. Diet also plays an important role in three other risk factors that contribute to disease and premature death: high fasting blood sugar, high blood pressure and overweight including obesity. Children with obesity are at increased risk of type 2 diabetes, asthma, breathing difficulties, musculoskeletal disorders, risk factors for cardiovascular disease, including high blood pressure and high levels of cholesterol and triglycerides (harmful lipids) in the blood, insulin resistance and mental health challenges. Furthermore, there is a strong link between having overweight or obesity as a child and having overweight or obesity as an adult. Because eating habits tend to persist into adulthood, it is important that children establish good dietary habits from a young age. Foods high in fat (especially saturated fat and trans-fat), sugar and/or salt, hereon referred to as unhealthy food, contribute to unhealthy diet and diet-related illness, including overweight and obesity. Diet is also linked to dental health. Foods with added sugar increase the risk of caries and beverages with a low pH increase the risk of tooth erosion. Based on the effects that diet has on health, it is desirable that the population eats in line with the national dietary recommendations.

Studies show that marketing of unhealthy food and beverages negatively impacts children's food choices or intended food choices, diet and children's requests to parents, as well as the development of children's food consumption norms. Studies show a wide use of marketing techniques, such as use of celebrities, gifts/incentives, games, colours, animations, child-like language, etc. and that such marketing also takes place in Norway. Moreover, a total of 40 per cent of parents with children under the age of 16 state that they are worried that their own children are exposed to a lot of advertising for food and beverages and experience that this affects their children. In addition, placement of products at points of sale also affect intake, thus health. The Ministry has in recent years seen a development with increased sales of candy in toy stores, and also an increase of specialist candy stores.

Norway is not reaching the goals in the National Action Plan for a Healthier Diet (2017–2023). The current measures and interventions do not seem to have the desired effect on the population's diet. For this reason, additional measures must be implemented to promote healthy diets.

All children are entitled to good health. Structural measures are important instruments to promote a healthy diet and facilitate a healthy food environment because they affect the population's food choices and thus the risk of disease. Experience and knowledge from other areas of public health, such as alcohol and tobacco, also indicate that there is a clear association between marketing, demand and consumption. It is therefore important that children are protected against the marketing of unhealthy products.

Restricting marketing of unhealthy food and beverages is over time expected to decrease consumption of such products among children. This could improve overall diet and other health outcomes such as diet-related diseases, improve dental health and decrease risk of overweight and obesity.

The Ministry takes a holistic approach to challenges related to diet-related diseases, including overweight and obesity. Regulation of the marketing of unhealthy food and beverages is only one of several policy tools, and part of a broader package of measures. Cooperation with the food industry through the Public-Private partnership for a healthier diet, targeted information and other measures aimed at, for example, kindergartens and schools, are also important. The measures are complementary and should collectively contribute to a healthy diet and a healthy food environment. The Ministry believes that it is particularly important to regulate the marketing of unhealthy food and beverages to children as part of the policy concerning diet. This will help reduce children's demand for unhealthy products and in the long run contribute to a better diet in the population. Limiting the marketing of unhealthy food and beverages to children can also be regarded as a less invasive than several other dietary measures. In addition, the WHO, OECD, and an expert group from Norway have all mentioned restricting marketing of unhealthy food and beverages as a cost-effective measure.

3. The proposed legislation on food marketing

The draft Marketing Regulations have their legal basis in the Norwegian Food Law Section 10 (marketing ban) and the proposed new Section 26 a (infringement fines). The Ministry is of the opinion that Section 10 second paragraph already today gives the Ministry sufficient statutory authority for the draft Marketing Regulations, but to avoid any uncertainty, the government has proposed to amend the provision and add a third paragraph which clearly states that such regulations may be adopted.

3.1. Objective

The objective of the draft Marketing Regulations Section 1 is to promote public health by promoting a healthy diet, thus preventing obesity and diet-related diseases in the population, through a prohibition on the marketing of unhealthy food and beverages aimed at children.

3.2. Scope

Since the legal basis for the draft Marketing Regulations is the Norwegian Food Law, this means that the subjects who must adopt their marketing practice to the new rules, are the ones that produce, sell and conduct marketing of foodstuffs in Norway or specifically directed at Norwegian consumers.

The Ministry proposes in the draft Marketing Regulations Section 4 that marketing of unhealthy products aimed at children shall be prohibited. In line with Norwegian law, children are everyone under the age of 18 years. For the sake of clarity, this is also defined in Section 3 a).

The term “marketing” is defined in the draft Marketing Regulations Section 3 as “any form of communication or action for marketing purposes. Marketing purposes exist if the aim of the communication or action is to promote sales to consumers”.

Some types of marketing should always be considered to be aimed at children, and thus prohibited, see the listing in draft Marketing Regulations Section 4 second paragraph. For other types of marketing, a suggested list of assessment criteria is listed in draft Marketing Regulations Section 4 third paragraph. The list is not exhaustive.

Also marketing of products covered by Annex I which is directed at adults and encourages them to buy such products to children, is covered by the prohibition, cf. draft Marketing Regulations Section 4 fourth paragraph.

In the draft Marketing Regulations Section 4 fifth paragraph, there is a general request for business operators to take into account that all advertising may be seen or heard by children, and caution should therefore be executed when marketing products covered by Annex I to adults.

Displays and placement of products is an important marketing technique. Therefore, Section 5 of the draft Marketing Regulations specifies that products covered by Annex I “shall not be displayed at points of sale in connection with other products and services that appeal to children, such as toys, children's books, games and the like.” The rule only applies to sales in stores.

3.3. Products covered by the draft Marketing Regulations

The types of food and beverages which are covered by the prohibition, are specified in an annex to the draft Marketing Regulations. These are food and beverages of which the intake should be limited and that should not constitute a large part of the diet. Products commonly referred to as unhealthy, such as candy, soft drinks, chocolate, snacks, ice cream, cakes etc. should not at all be marketed to children, see Annex I category 1 to 6. For other products, e.g. milk, cereals, yoghurt, and fast food, nutrient thresholds are used to include only the unhealthiest products within these categories, see Annex I category 7 to 11. For example, only yoghurt and cereals with a high content of sugar are covered by the draft Marketing Regulations.

In outlining which food and beverages should be regulated by the draft Marketing Regulations, the following have been taken into consideration: the Nordic Keyhole Label, updated WHO nutrient profile model (2023), and the product list used in the current Norwegian self-regulatory scheme that has been in place since 2013. Overall, the food and beverages covered by Annex I are high, or relatively high, in fats, sugars, sweeteners, energy, or salt, and/or contain little dietary fibre. In addition, the list in Annex I should be easy to use for the industry.

3.4. Exemptions to the prohibition

The marketing prohibition also includes sponsorship of products covered by Annex I, and the use of their name and logo. Sponsorship which only refers to the company name or logo is not covered by the prohibition, cf. draft Marketing Regulations Section 6 a). However, the Ministry has requested input from the public consultation on whether this exemption should only apply when the company name is not the same as a product name covered by Annex I.

The aim of the legislation is to regulate marketing practices, not to prohibit any specific products. Thus, Section 6 b) of the draft Marketing Regulations specifies that the marketing prohibition does not include “the design of the product”. For instance, a product shaped as a famous cartoon character popular among children will not breach the marketing prohibition.

Further, the draft Marketing Regulations Section 6 c) exempt packaging and wrapping, unless it uses luring effects as specified in Section 4 third paragraph (e), or is of such a nature that the product is secondary. The effects listed in Section 4 third paragraph e) are “the use of gifts, toys, coupons, discounts, collectibles, contests, or games that may particularly appeal to children”. Thus, the draft Marketing Regulations will apply to marketing that exploits packaging and wrapping to tempt children into purchasing unhealthy food and beverages.

There are also exemptions from the prohibition for the general display of products at the point of sale and neutral/factual product information on websites and at the point of sale. This is specified in the draft Marketing Regulations Section 6 d) and e).

3.5. Supervision and transitional period

The Norwegian Directorate of Health will supervise the new legislation, while appeals will be handled by the Market Council, cf. Section 7 of the draft Marketing Regulations.

The Directorate may give sanctions such as coercive fines or infringement fees, cf. the draft Marketing Regulations Sections 8 and 9.

It is also proposed that the industry is given a transitional period of six-month to adapt to the new legislation, cf. the draft Marketing Regulations Section 10.

4. The rights of the child

According to Section 104 of the Norwegian Constitution, the best interests of the child should be imperative when it comes to actions and decisions concerning children. The best interest of the child is a principle which should guide the actions of public authorities, the determination of applicable laws, and the interpretation of standards of the legal system. This follows from

Article 3.1 of the Convention on the Rights of the Child (CRC), ratified by Norway on 8 January 1991:

“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.”

Further, according to Article 24 of the CRC, the child has the right “to the enjoyment of the highest attainable standard of health”. This right should also be seen in relation to the rights provided for in Article 6, which states that “States Parties recognize that every child has the inherent right to life”, and that “States Parties shall ensure to the maximum extent possible the survival and development of the child.”

Concerning advertising, of particular interest is General Comment 15 (2013) of the UN Committee on the Rights of the Child, on the right of the child to the enjoyment of the highest attainable standard of health. The comment emphasizes in point 47:

“States should also address obesity in children, as it is associated with hypertension, early markers of cardiovascular disease, insulin resistance, psychological effects, a higher likelihood of adult obesity, and premature death. Children’s exposure to “fast food” that are high in fat, sugar or salt, energy-dense and micronutrient-poor, and drinks containing high levels of caffeine or other potentially harmful substances should be limited. The marketing of these substances – especially when such marketing is focused on children – should be regulated and their availability in schools and other places controlled.”

Of interest is also General Comment 16 (2013) on State obligations regarding the impact of the business sector on children’s rights. This comment refers to Article 6 of the CRC, i.e. the inherent right to life and ensuring to the maximum extent possible the survival and development of the child, which can limit some business activities. In particular, the comment emphasizes the following in point 19:

“The marketing to children of products such as cigarettes and alcohol as well as food and drinks high in saturated fats, trans-fatty acids, sugar, salt or additives can have a long-term impact on their health.

And further in point 20:

“Measures for implementing article 6 with regard to the business sector will need to be adapted according to context and include preventive measures such as effective regulation and monitoring of advertising and marketing industries”.

5. Assessment of EEA law

5.1. Introduction

The draft Marketing Regulations must comply with the legal framework laid down in harmonised regulations incorporated into the EEA Agreement. In areas where no harmonised rules have been laid down, national rules may be introduced under certain conditions. However, such national rules shall not prevent trade in goods and services between the EEA

Member States. Exceptions may be made if the national regulation meets the public interest, is suitable for achieving the purpose and does not go beyond what is necessary, and is non-discriminatory.

5.2. Harmonised EEA regulations

Directive 2005/29/EC regulates *unfair business-to-consumer commercial practices* in the internal market. It is not possible to adopt national rules on marketing that deviate from the Directive within its scope. However, the Directive only covers actions that are likely to harm the economic interests of consumers, and does not harmonise regulations laid down for health reasons, cf. the Directive Article 3(3), cf. preamble 9. Thus, the Directive does not preclude Norwegian rules on the marketing of certain foodstuffs aimed at children.

Directive 2010/13/EU on *audiovisual media services* contains rules on advertising on television, on-demand audiovisual services and video-sharing platform services. The purpose of the Directive is, among other things, to ensure the free movement of audiovisual media services in the EEA, to protect consumers and to promote cultural diversity and media freedom.

The Directive is a minimum directive. This means that Member States may formulate stricter or more detailed rules in areas regulated by the Directive in relation to providers of audiovisual media services and video-sharing platforms under their jurisdiction, if this is in line with EEA law in general.

The fundamental principle of the Directive is the “country of origin-principle”. This is to ensure that broadcasters and providers of on-demand audiovisual services can offer their programmes throughout the EEA, without having to comply with rules in the harmonised areas other than those in force in the country from which they are broadcasting. However, the Directive allows for partial exceptions. According to the Directive Article 4(3), it is possible to take appropriate measures against a service provider if the actor in question has established itself in another EEA state in order to circumvent stricter national rules. It is a prerequisite that consultation with the sending country does not yield satisfactory results. Measures taken in such cases must be objectively necessary, applied in a non-discriminatory manner and proportionate to the objectives to be achieved.

According to the Directive Article 9(4), Member States are to encourage the use of co- and self-regulation through standards of conduct for audiovisual commercial communication in or in connection with children's programmes, for food and beverages that "contain nutrients and other substances with a nutritional or physiological effect, in particular fats, trans fatty acids, salt or sodium and sugar, which, according to the recommendations, should not constitute an excessive part of the overall diet". The same applies to video-sharing platforms, cf. Article 28b(2). In Norway, there is a total ban on broadcasting advertising in connection with children's programmes or advertising that are specifically aimed at children in broadcasting or audio-visual on-demand services. It is therefore not necessary to consider such co-regulation for commercial communication of unhealthy food and beverages in children's programmes.

As the Directive is a minimum directive, Member States may formulate stricter or more detailed rules in areas regulated by the Directive in relation to providers of audiovisual media services under their jurisdiction. The draft Marketing Regulations are mainly aimed at other actors than those regulated by the Directive. It follows from Directive (EU) 2018/1808 preamble 10 that, in accordance with the case law of the Court of Justice of the European Union (ECJ), it is possible to restrict the right to provide services for overriding reasons in the public interest, provided that such restrictions are justified, proportionate and necessary. Therefore, a Member State should be able to take certain measures to ensure consumer protection as long as those measures do not fall within the areas harmonised by Directive 2010/13/EU.

Thus, the Ministry considers that the Directive does not preclude the draft Marketing Regulations, and refers to the Ministry's assessment of justifications below.

Directive 2000/31/EC regulates *information society services*. The purpose of the Directive is to ensure the free movement of information society services between Member States. Examples of information services are electronic contracting, e.g. in the form of purchases in an online store. Marketing over the internet or in social media also constitutes an information service.

The Directive is based on a “country of establishment-principle”, cf. Article 3(1) and (2). This means that Member States cannot restrict services sent from other states. However, Article 3(4) provides for the possibility of restricting or regulating services provided from other Member States, inter alia to protect public health.

Thus, the Ministry considers that Directive 2000/31/EC does not preclude the draft Marketing Regulations and refers to the Ministry's assessment of justifications below.

Directive 2006/123/EC regulates the provision of *cross-border services*. The Directive regulates services in general, including marketing services. According to the Directive, there shall in principle be no restrictions on the freedom of providers established in other Member States to offer their services. However, it is possible to make exceptions under certain conditions, such as the protection of public health, cf. the Directive Article 16.

It is clear that a marketing ban on certain foodstuffs will constitute a restriction on the free movement of advertising services, cf. Articles 36 of the EEA Agreement. Even if a measure is considered to be a restriction, the measure may still be lawful if it is justified in the public interest and meets the requirements for proportionality, cf. EEA Article 33. See the Ministry's assessment of justifications below.

Regulation (EC) No. 178/2002 lays down requirements for *food legislation*. The Food Law Regulation shall ensure a high level of protection of human health and consumer interests, cf. Article 1. Article 16 of the Food Law Regulation states the following:

"Without prejudice to more specific provisions of the food legislation, consumers shall not be misled by the labelling, advertising and presentation of foods and feed, including their shape, appearance or packaging, the packaging materials used, the way they are arranged and the environment in which they are displayed, as well as the information provided about them, regardless of the medium."

According to its wording, this provision covers "information provided about" foodstuffs "regardless of the medium". This means that the marketing of food and beverages, e.g. in the form of TV advertising, is covered by the provision. The provision only applies to misleading marketing, cf. the wording that consumers shall not be "misled by the labelling, advertising and presentation of foodstuffs".

The marketing bans proposed in the draft Marketing Regulations will regulate matters other than misleading marketing. The assessment topic there is that unhealthy food marketed to children contribute negatively to children's health. The proposal thus entails regulation of an area that is not covered by the Food Law Regulation. This Regulation therefore does not prevent the establishment of the rules proposed in the draft Marketing Regulations.

Regulation (EU) No. 1169/2011 is intended to ensure consumer protection with regard to *information about food*, and contains a number of requirements for "food information". Pursuant to Article 38 of the Food Information Regulation, Member States may not make national regulations on matters harmonised by the Food Information Regulation, unless permitted by EU/EEA law. Article 38(2) emphasises that Member States may introduce national rules on matters that are not harmonised in the Food Information Regulation, as long as such rules do not prohibit, prevent or restrict the free movement of goods that are in line with the Food Information Regulation. Article 39 sets out valid reasons for additional national rules, such as the protection of public health or consumers. Any national rules should not prevent the free movement of goods that are in line with the Food Information Regulation, cf. preamble 49.

The term "food information" is defined as follows in Article 2(2)(a) of the Regulation:

"Information about a food that the end consumer receives in the form of a label, other enclosed material or in other ways, including modern technological tools or oral communication"

It follows from the wording that "food information" includes "labelling". This term is defined in Article 2(2)(j) of the Food Information Regulation. The definition includes information that is physically linked to a specific food product, e.g. by being indicated on the product's packaging. Furthermore, it includes information that is provided in other ways in physical connection with the product, e.g. in connection with notices in stores.

The Food Information Regulation distinguishes between the three terms "food information", "advertising" and "presentation", so that the latter two terms are not covered by the term "food information". This is clarified in recital 20 and Article 7(1), which states that "food information" shall not be misleading, as it follows from Article 7(4)(a) and (b) that this prohibition also applies to "advertising" and "presentation of foodstuffs". Most of the provisions of the Food Information Regulation are explicitly aimed at "food information". In addition, it follows from certain provisions that they also apply to "presentation" and "advertising". The rules in the Food Information Regulation thus only apply to "presentation" and "advertising" where this is specifically stated in specific provisions.

The presentation of foodstuffs includes the shape and packaging of the product, cf. the following clarifications in Article 7(4)(b): "in particular the shape, appearance or packaging of the foodstuffs, the packaging material used, the manner in which the foodstuffs are arranged and the conditions under which they are presented". Other rules on "presentation" deal with how food information is to be presented, e.g. how the nutritional content and claims are to be stated on the product. The regulation does not have any special rules on marketing or on how the products can/must be presented, beyond the above. The term "advertising" is defined as follows, cf. the reference in Article 2(1)(g) to the definition in Article 2(a) of Directive 2006/114/EC concerning misleading and comparative advertising:

"any form of representation in connection with business, industrial, craft or professional activities, in order to promote the supply of goods or services, including real estate, rights and obligations"

The Food Information Regulation's rules on advertising are limited to rules stating that the marketing of foodstuffs must not mislead the consumer.

The design of the packaging is covered by the rules on presentation in the Food Information Regulation, in addition to the fact that the labelling on the packaging is covered by the rules on food information. Any national requirements for changes to the design of the packaging must not prevent the companies from meeting the requirements of the Food Information Regulation. Furthermore, national requirements may not be introduced that require a change in the product's brand/name, cf. Article 17 on the name of the foodstuff.

In E-2/12 *HOB-Vin*, the EFTA Court ruled that attempts to ban a product because of the design of the packaging fell under the former Labelling Directive's rules on labelling and not presentation. The case is still relevant as the definition of what is considered labelling is similar in the Food Information Regulation. The case concerned offensive content on alcohol packaging. The Court concluded that the then Trademark Directive did not contain rules on offensive content, and that the situation was therefore in principle non-harmonised (see paragraphs 64-67). Furthermore, the exclusion of the product due to the design of the packaging was considered to be a barrier to trade as the labelling otherwise satisfied the requirements of the Labelling Directive (see paragraphs 68-71). The Court then assessed whether the trade barrier was justified, and concluded that the trade barrier could not be justified in terms of protecting consumers. The case is relevant to the clarification of the scope for action for national rules that impose restrictions on packaging which fall under labelling or presentation, as the latter is less regulated in the Food Information Regulation.

The provision on advertising in the Food Information Regulation only applies to misleading marketing. The marketing bans proposed in the draft Marketing Regulations will regulate matters other than misleading marketing. The assessment topic there is that unhealthy food marketed to children contribute negatively to children's health. The proposal thus entails regulation of an area that is not covered by the Food Information

Regulation. This Regulation therefore does not prevent the establishment of the rules proposed in the draft Marketing Regulations.

Article 38(2) of the Food Information Regulation emphasises that Member States may introduce national rules on matters that are not harmonised by the Regulation, as long as such rules do not prohibit, prevent or restrict the free movement of goods that are in line with the Regulation. The Ministry is of the opinion that the draft Marketing Regulations will not impede the free movement of goods in line with the Food Information Regulation. The proposal does not entail requirements for changing packaging in a way that indicates that the products cannot comply with the rules on packaging in the Food Information Regulation, nor does it impose a change in the product's brand/name, cf. Article 17 on the name of the food.

Regulation (EC) 1924/2006 contains special rules on *nutrition and health claims* in connection with the labelling, presentation and advertising of food. The use of nutrition and health claims shall not mislead, raise doubts about the safety and/or nutritional adequacy of other food, or encourage overconsumption of a food.

The same assessment as for the Food Law Regulation and the Food Information Regulation on claims related to misleading marketing applies to the Nutrition and Health Claims Regulation. Furthermore, the Ministry considers that the draft Marketing Regulations will not impede the free movement of goods in line with the Nutrition and Health Claims Regulation's other rules on presentation and advertising. The proposal does not entail requirements for changes to presentation or advertising in a way that indicates that the rules in the Nutrition and Health Claims Regulation cannot be followed.

Pursuant to **Regulation (EU) No 609/2013** and Article 10 of **Regulation (EU) 2016/127**, the *presentation, labelling and advertising of infant formulae* and follow-on formulae must be designed in such a way that breastfeeding is not discouraged. In particular, there shall be no advertising of infant formulae in retail outlets, and there shall be no distribution of samples or any other form of sales promotion directly to the consumer at retail level, such as special exhibitions, discount coupons, prizes or sales promotions, loss-making offers and enticement offers. Article 8(5) of **Regulation (EU) 2016/128** on *foodstuffs for special medical purposes* imposes similar requirements on the advertising of such medicinal products at retail outlets.

The Ministry is of the opinion that the draft Marketing Regulations will not impede the free movement of goods in line with the abovementioned regulations' rules on presentation and advertising. The proposal does not entail requirements for changes to presentation or advertising in a way that the rules in the regulations cannot be followed.

5.3. General EEA law – the EEA Agreement Articles 11 and 13

National rules restricting the marketing of legal products, and that limit the design of the products' packaging or presentation, may be trade-restrictive measures contrary to the EEA Agreement Article 11 and Article 36. If so, the question is whether the measure is nevertheless justified according to the EEA Agreement Articles 13 and 33.

According to the *Dassonville* doctrine, all rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions.¹

However, according to the *Keck* doctrine, the application to products from other Member States of national provisions restricting or prohibiting “certain selling arrangements” is not such as to hinder directly or indirectly, actually or potentially, trade between Member States, so long as those provisions apply to all relevant traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other EEA States.² Provided that those conditions are fulfilled, such rules fall outside the scope of EEA Article 11.

As regards marketing prohibitions, the ECJ in *Leclerc-Siplec* considered an advertising prohibition to be a “selling arrangement”³.

The Ministry is of the view that the proposed prohibitions in the draft Marketing Regulations will apply equally to all relevant traders and in the same manner affect the marketing of domestically produced products and products from other EEA countries. If anything, the foreign products may be at an advantageous position, since they will still be able to advertise to children outside Norwegian jurisdiction, which may also influence Norwegian customers. The Ministry therefore considers that there are no discriminatory effects of the proposal.

The selling arrangement doctrine applies especially to the draft Marketing Regulations Section 5 regarding how products covered by Annex I may be sold, i.e. not next to products and services that appeal to children such as toys.

As regards EEA Article 36, the Ministry assumes that the draft Marketing Regulations will somewhat affect service providers with the marketing industry, such as advertising agencies, influencers etc. It is however unclear what the impact may be for those actors, since there are only certain categories of food and beverages that it will be prohibited to market and also only towards a narrow customer group (children). Products covered by Annex I may still be freely marketed towards the rest of the population and the producers, importers and retailers may freely market other food products than those covered by Annex I.

Regardless, the Ministry is of the view that the draft Marketing Regulations, if they are considered contrary to EEA Article 11 and 36, may still be justified according to Articles 13 and 33.

5.3.1. Assessment of justifications

Trade-restrictive measures may in certain cases be permitted pursuant to EEA Articles 13 and 33, provided that it is justified on grounds of public health. Human life and health are a weighty consideration pursuant to Articles 13 and 33. As stated by WHO and others, the marketing of unhealthy food and beverages towards children contributes to unhealthy

¹ Case 8/74 Procureur du Roi v Dassonville, para. 5

² C-267/91 and C-268/91 Keck and Mithouard (para. 16)

³ C-412/93 Société d'Importation Edouard Leclerc-Siplec v TF1 Publicité SA and M6 Publicité SA

diets and thus serious health risks. The draft Marketing Regulations aim to prevent these adverse health consequences and to protect children's health in line with the obligations pursuant to CRC.

A marketing prohibition can be justified on grounds of public health. This has been established in previous decisions from the ECJ and the EFTA Court. Reference is made, for example, to case C-34-36/95 *De Agostini* and case E-16/10 *Phillip Morris*.

There can be no doubt that the proposal for a prohibition on the marketing of unhealthy food and beverages aimed at children is justified by public health considerations. The purpose of the measure is to "promote health through the prevention of diet-related diseases in the population by protecting children from health-related unwanted marketing", cf. Section 1 of the draft Marketing Regulations.

It is clear case law that it is up to the Member States to determine the level of protection of public health and how this protection is to be achieved. This means that the Member States have a certain margin of discretion, but nevertheless such that this margin of discretion must be safeguarded within the framework of the principle of proportionality. In the closer assessment, account must be taken of the fact that the isolated effect of the proposed marketing ban is difficult to measure, that the effect will occur over some time and that the measure is part of a comprehensive package of measures which underpin and reinforce each other.

It is not sufficient that the measure has a legitimate objective. The measure must also "be suitable for achieving the objective, and furthermore the same objective must not be achieved as effectively by measures that to a lesser extent hinder trade within the EEA", cf. the EFTA Court's opinion in Case E-4/04 *Pedicel*, para. 56. The proportionality test thus consists of two main elements: suitability and necessity.

5.3.2. Suitability assessment

The first question in the proportionality assessment is whether the measure in question is an appropriate measure to ensure the objective of protecting public health. The requirement for suitability means that it must be "reasonable to believe that the measure could contribute to protecting human health", cf. case E-16/10 *Philip Morris*, para. 83. This applies even if there is some scientific uncertainty about the suitability and necessity of the measure. The EFTA Court has also accepted that the effects of a measure may occur over time. It is the Ministry's opinion that there is reason to believe that the assessment of the prohibition of the marketing of unhealthy foodstuffs aimed at children must be considered in the same way as similar measures in the area of tobacco control. In the *Philip Morris* case, which concerned a prohibition on the visible display of tobacco products at retail outlets, the Court found a presumption of suitability, cf. paragraph 84:

"In this context, the Court finds that a measure prohibiting the visible display of tobacco products, which is the subject of this case, by its very nature appears to be capable of restricting, at least in the long term, the consumption of tobacco in the EEA State concerned. In the absence of clear evidence to the contrary, a measure of this type can thus be seen as suitable to protect public health."

The measure at hand must also effectively pursue the objective of protecting public health in a coherent and systematic manner.

The purpose of the draft Marketing Regulations is, as mentioned, to promote public health by promoting a healthy diet, thus preventing obesity and diet-related diseases in the population, through a prohibition on the marketing of unhealthy food and beverages aimed at children. In order to assess whether the measure is suitable, it is necessary to look at the challenges in Norway related to children's diets and negative health effects of this. In this connection, the Ministry refers to point 2 above, describing that the diet of Norwegian children is not in line with the national dietary guidelines and the serious health effects this may entail in both the short and long term. The Ministry also refers to WHO's guidelines, documenting the challenges with the marketing of unhealthy food and beverages to children.

The Ministry considers that the prohibition on marketing of the products in Annex I aimed at children is a measure that, together with other measures, will help to prevent children's consumption of unhealthy food and beverages, i.e. food that should not constitute a large part of their diet, and in the long run negative health, including obesity and diet-related diseases. The marketing restrictions will be part of a larger package of policy measures such as information and labelling.

Studies show that marketing influences food choices, preferences, norms and intake, and thus the children's diet, which they often take with them into adulthood. Diet can affect the children's future health. The Ministry therefore considers that a ban on the marketing of unhealthy food and beverages towards children is an appropriate measure to improve public health. In addition, the Ministry would like to emphasise that a marketing ban is recommended by the WHO and by a Norwegian expert group that has proposed cost-effective measures to promote healthy diets. Furthermore, the Ministry is obliged to protect children's health. The WHO has made clear recommendations to regulate the marketing of unhealthy food and beverages to children, based on the CRC. This is also supported by UNICEF and the Committee on the Rights of the Child's general comments. The draft Marketing Regulations are also particularly important to avoid social inequalities in health.

The Ministry also notes that Portugal and the United Kingdom have already introduced national marketing prohibitions on unhealthy food and beverages, and that this is also in process in Germany.

On this basis, the Ministry assumes that the measure meets the suitability requirement pursuant to Articles 13 and 33 of the EEA Agreement.

5.3.3. Necessity assessment

The next question is whether the measure is necessary to achieve the objectives, or whether they can be achieved just as effectively with less intrusive measures. The decisive factor is whether all the objectives can be achieved equally effectively with alternative measures. This means that there can be no other, less intrusive measures that would have the effect of fully protecting the objective(s), up to the chosen level of protection.

The Ministry is aware that a prohibition on the marketing of certain food aimed at children may in principle be regarded as an intrusive measure. However, this is modified by the fact that the industry themselves has already introduced such a prohibition through the self-regulation scheme. Thus, only those parts of the draft Marketing Regulations that go further than the scheme will in practice be intrusive for the industry.

The Ministry is of the opinion that there are no other, less intrusive measures that can equally effectively achieve the objective of protecting children against such marketing. The Ministry is of the opinion that a self-regulatory scheme is not sufficient because it does not provide the opportunity for active supervisory activities or effective sanctions. In the Ministry's view, the need for effective supervision and the experience with the scheme indicate that a self-regulation scheme is not suitable for achieving adequate protection of children against the marketing of unhealthy food and beverages. The Ministry notes that even with a self-regulation scheme in place, which has worked for ten years, children are currently exposed to unwanted marketing of unhealthy food and beverages.

The Ministry would also like to emphasise that the draft Marketing Regulations does not entail a ban on products or that certain products cannot be sold on the Norwegian market. The proposal is therefore not considered to restrict the freedom of goods to a large extent. Furthermore, the rights of the children to be protected from harmful marketing must outweigh the market interference of the prohibition, which only inflicts what products may not be marketed to children.

The proposal must not be regarded as an alternative to other measures in the area of diet, but as a supplement to these. The measures work together and over time. Measures such as communication to the public, taxes, labelling of products etc., cannot replace a marketing prohibition.

Against this background, the Ministry is of the opinion that there are no other, less intrusive measures that will achieve the same purpose as a marketing ban. The draft Marketing Regulations are therefore considered necessary.

5.3.4. Conclusion

The draft Marketing Regulations are considered to be an important tool to protect the health of children in Norway. The Ministry is of the opinion that the proposal is both suitable and necessary to achieve the level of protection of public health that Norway has set. The Ministry therefore concludes that the draft Marketing Regulations are not in conflict with EEA law.