Message 961

Communication from the Commission - TRIS/(2024) 2911

Procedure for the provision of information EC - EFTA

Notification: 2024/9015/NO

Forwarding of the response of the EFTA surveillance authority to request for supplementary information (INFOSUP) / comments (5.2) from the European Union

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1. MSG 961 IND 2024 9015 NO EN 03-01-2025 29-10-2024 NO ANSWER 03-01-2025

2. Norway

3A. Royal Ministry of Trade, Industry and Fisheries

3B. Royal Ministry of Health and Care Services

4. 2024/9015/NO - X40M - Labelling and advertising

5.

6. European Commission
Directorate-General for Health and Food Safety
1049 Bruxelle/Brussel
BELGIUM

Your ref

Our ref
24/3660-
Date
29 October 2024

Notification 2024/9015/NO – Request for supplementary information

The Norwegian Ministry of Health and Care Services refers to the request for supplementary information from the Commission dated 17 October 2024, related to notification 2024/9015/NO of 2 October 2024 concerning draft Regulations on the prohibition of the marketing of certain foods and beverages aimed at children.
The Ministry will below attempt to reply to your questions.

Question 1: The Norwegian authorities are kindly requested to clarify whether the proposed ban:

a. Would apply to audiovisual commercial communications as defined in Article 1(1)(h) of the Audiovisual Media Services Directive 2010/13/EU, as revised by Directive (EU) 2018/1808, and

b. Would apply to providers of video-sharing platform services or on-demand audiovisual media services as defined in Article 1(1)(aa) and Article 1(1)(g) of the Audiovisual Media Services Directive 2010/13/EU, as revised by Directive (EU)

2018/1808.

As for question 1a, the Ministry has proposed that the marketing prohibition should cover all forms of marketing of unhealthy food and beverages towards children, cf. the definition of marketing in the draft Regulations Section 3 b:

“Marketing: Any form of communication or action for marketing purposes. Marketing purposes exits if the aim of the communication or action is to promote sales to consumers.”

Thus, also marketing of such products in the form of audiovisual commercial communications will in principle be covered by the prohibition. The draft wording is based on the current definitions and applications of the Norwegian advertising prohibitions for alcohol and tobacco products.

However, pertaining to question 1b, the statutory authority for the draft regulations is Section 10 of the Norwegian Food Act (hereafter NFA) of 19 December 2003. In connection with the drafting of the Regulations on the prohibition of the marketing of certain foods and beverages aimed at children, the Ministry looked into the question of which actors the new prohibition would apply to. In general, the NFA applies to “enterprises”, defined in the NFA Section 4(1) as “any private or public-sector business undertaking or private individual engaged in any of the activities mentioned in Section 2, first paragraph, except for activities for private and non-commercial purposes”. The NFA Section 2 relates to the substantial scope of the act, and its first paragraph states:

“This Act applies to all factors pertaining to the production, processing and distribution of intermediate inputs at the level of primary production and of food, including drinking water. The Act also applies to all factors pertaining to the production of materials and articles that are intended to come into contact with or that may have an effect on intermediate inputs and food. Furthermore, the Act applies to all use of intermediate inputs.”

The term «all factors pertaining to production, processing and distribution” has been interpreted as covering all actors involved from production to the end sale to consumers, including the marketing of those products.

As explained in the notification, the Ministry has proposed a new third paragraph to Section 10 of the NFA, simply for clarification purposes. In the bill proposing this provision, Prop. 120 L (2023–2024) Endringer i matloven mv. (forskriftshjemmel for å fremme helse), point 4.4, the following is stated (unofficial translation):

“Since marketing is considered an activity covered by the scope of the Food Act cf. § 2, this means that everyone who is responsible for the commercial marketing of a product covered by the Food Act is subject to obligations under the Act. Orders can therefore be directed directly against them, not just against the manufacturer or the seller of the product. A different understanding would allow circumvention of the various provisions on marketing. Actors who [merely] contribute technical solutions to publish and convey marketing messages, which others are behind and have designed, will not be subject to obligations under the Act. This applies, for example, to newspapers, websites and other media platforms that contribute with systems that make such messages available. However, it is not only pure food companies' activities towards consumers, in terms of promotion and advertising of food and beverages, that are covered. Other actors will also be considered as subject to obligations under the Food Act, if they market products covered by the act, such as e.g. influencers, celebrities, PR agencies, etc. Only activity and statements made for marketing purposes will be covered.”

Based on the above, the Ministry is of the opinion that providers of audiovisual communications, video-sharing platform services and on-demand audiovisual media services are not themselves subject to the prohibition. The supervisory authority can target producers, importers, distributors, retailers of unhealthy food and beverages in Norway and other actors involved in the marketing of such products directed at children, such as marketing agencies.

For example, if the supervisory authority finds that a producer of an unhealthy food product, covered by the draft regulation Annex I, has paid for advertising of this product directed at children to be communicated on a video-sharing platform, the authority would direct its orders to stop the marketing towards the producer.

To summarize; the draft prohibition will apply to all forms of marketing, including audiovisual commercial communications. However, the providers of such services are not subject to the draft regulation, this will only apply to the advertiser.

Question 2: In the affirmative, the Norwegian authorities are requested to clarify whether:

c. The proposed ban is also applicable to providers of video-sharing platform services or on-demand audiovisual media services not established in the territory of Norway; and

d. The proposed ban is addressed to video-sharing platform providers regardless of whether the concerned audiovisual commercial communication is marketed, sold or arranged by the video-sharing platform or not.

The Ministry refers to our answers to question 1 and assumes that question 2, in light of our answers, is not relevant.

Question 3: The Norwegian authorities are kindly invited to clarify whether the provisions in the notified draft are intended to apply to providers of information society services as per the meaning of Directive 2000/31/EC. In the affirmative, the Commission services would like to receive further information on:

a. whether the notified draft would apply to providers of information society services established in the territory of Member States other than Norway;
b. what would be the obligations applicable to those service providers resulting from the notified draft;
c. whether the Norwegian authorities have identified those providers or what would be the basis for identifying them;
d. how do the Norwegian authorities intend to comply with the requirements set out in Article 3(4) of Directive 2000/31/EC, in particular in view of the CJEU judgement in case C-376/22;

The Ministry emphasizes that the draft Regulations in question do not cover any actions towards providers of information society services. As explained above, the prohibition will only apply to actors falling under the scope of the NFA, i.e. producers, importers, distributers, retailers etc. of unhealthy food and beverages covered by Annex I to the draft Regulations, and actors providing marketing content for those (i.e. the advertiser). The latter does not include the information society service providers themselves.

The Ministry hopes that these explanations answer your questions.

Yours sincerely

Bodil Blaker
Deputy Director General

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Assistant Director General

This document is signed electronically and has therefore no handwritten signature

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