

Mapping and analysis of the current self- and co-regulatory framework of commercial communication aimed at minors

A research report in the framework of the AdLit SBO project



This document forms part of the 'AdLit' (Advertising Literacy) research project. AdLit is a four-year interdisciplinary research project on advertising literacy, which is funded by VLAIO (Flanders Innovation & Entrepreneurship). The main goal of the AdLit project is to investigate how we can empower children and youth to cope with advertising, so that they can grow up to be critical, informed consumers who make their own conscious choices in today's new media environment.

The AdLit consortium comprises of the following partners:

University of Ghent: Research group CEPEC, Department Education and Research Group CJS

University of Antwerp: Research group MIOS and Department Marketing

KU Leuven: Research group Centre for IT and IP Law (CiTiP)

Free University Brussels: Research group CEMESO

For more information in relation to the project, visit our website (www.AdLit.be) or visit us on Facebook (www.facebook.com/reclamewijs) or Twitter (@AdLitSBO).

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EXECUTIVE SUMMARY

AIM. As the advertising sector has been very active in self-regulating commercial communication aimed at children, a patchwork of different rules and instruments exist, drafted by different self-regulatory organisations at international, European and national level. In order to determine the scope and contents of these rules, and hence, the actual level of protection of children, a structured mapping of these rules is needed. As such, this report aims to provide an overview of different categories of Alternative Regulatory Instruments (ARIs), such as self- and co-regulation regarding (new) advertising formats aimed at children. This report complements the first legal AdLit research report, which provided an overview of the legislative provisions in this domain.

METHODOLOGY. The analysis in this report is based on desk research. Relevant legal texts, texts related to Alternative Regulatory Instruments, policy documents, decisions of self-regulatory organisations, doctrine and research reports at the international, European and national level (i.e. United Kingdom, Belgium and the Netherlands) have been studied in order to develop a descriptive-evaluative and comparative overview of the research subject of this report.

IMPORTANT RESULTS. The mapping of international, European and national legislative (legal research report 1) and self-regulatory (legal research report 2) provisions has confirmed that a myriad of obligations are imposed on advertisers, first and foremost with regard to the identification of commercial communications, but also with regard to the content of the commercial message. Important to note is that the multitude of rules and obligations does not mean that, automatically, the level of protection and empowerment of minors is high.

First, both the legislative and self-regulatory principles are often formulated in a **general or abstract manner** (“commercial communications must be recognisable as such” or “marketing communications should not be intended to primarily appeal to minors”), and guidelines for the implementation in practice thereof are often lacking. Our study showed that self-regulatory codes, especially in the Netherlands and the United Kingdom try to formulate more specific rules or guidelines, often for certain specific products (food, alcohol), sometimes for specific formats (e.g. in the Dutch Code for Advertising directed at Children and Young People). It remains unclear, however, whether this provides enough guidance for advertisers that use new advertising formats aimed at minors, and, hence, whether this influences the level of compliance.

Second, the application and enforcement of the existing legislative and self-regulatory provisions will always be assessed on a case-by-case basis: first, it will be determined whether a specific provision is applicable to a certain message, and second, it will be determined whether the commercial message – the content, the identification or other elements – infringes the provision in question. However, certain definitions in legislative or self-regulatory instruments are formulated in a manner that leads to **uncertainty as to their scope of application** for new, digital advertising formats. Moreover, **no uniform definition** on what constitutes a ‘child’ exists. Indeed, children are regarded *inter alia* as

‘anyone under 18’, ‘anyone under the legal purchase age as regards alcohol advertisements’ or ‘12 years or under in relation to online behavioural advertising’. Whereas of course different commercial messages may be inappropriate for children of different ages, the variety of ages that are relevant for the application of different provisions may lead to confusion, not only for advertisers, but also for parents and children.

Third, although different regulators (both government regulatory bodies, such as, in Flanders/Belgium, the Flemish Media Regulator and the Privacy Commission, and self-regulatory bodies, such as the Jury for Ethical Practices in Advertising) are competent to enforce the existing provisions, in practice **few decisions with regard to commercial communications, minors and new advertising formats** have been issued in recent years. This provides both advertisers (and researchers) with little guidance on how the (often general) provisions should be implemented in practice. It is unclear which causes underlie this finding. Possible reasons could be a lack of awareness of citizens that complaints with regard to digital advertising formats may be submitted, for instance to the JEP; uncertainty for regulators whether specific rules are applicable to new advertising formats; lack of resources of regulators to instigate investigations on their own initiative; or compliance by advertisers with regard to this topic.

Fourth, with regard to advertising formats that collect and process children’s personal data, different legislative and self-regulatory obligations and principles, which run in parallel, apply. First, there needs to be a legitimate ground for such processing, this means that there must be consent given, depending on the age of the child, by the parents or by the parents and the child. Several self-regulatory documents include the general requirement that consent should be verified, but there is no actual guidance with respect to appropriate verification mechanisms. Second, a number of important data protection principles must be adhered to: for instance, the personal data of children need to be processed fairly and lawfully, the data can only be collected for specified, explicit and legitimate purposes and must not further processed in a way incompatible with the initially specified purpose(s), and only adequate, relevant and non-excessive data can be collected and/or further processed. Important to note is that according to the ICC and IAB Europe, **behavioural advertising should not be aimed at children 12 years or under**. However, at the same time, in an environment in which personalised advertising is increasingly pervasive, this also means that **additional guarantees might be necessary for the use of such methods aimed 13 to 18 year olds** as well.

RECOMMENDATIONS. From the first two legal research reports of the AdLit Project, the following initial recommendations may be derived:

RAISE AWARENESS. First of all, **more awareness** is needed among citizens regarding the available **complaint mechanisms**. Policy makers and regulatory bodies should provide citizens with clear and accessible information on how to file complaints against unlawful digital advertising formats.

NEED FOR MORE COORDINATION. **A better coordination between existing regulatory bodies**, i.e. in Belgium the Jury for Ethical Practices in Advertising, the Flemish Media Regulator and the Privacy Commission (for instance in relation to behavioural advertising) is needed. Through improved dialogue and joint consultations, more concrete guidelines and common

recommendations on the implementation of the often general or abstract principles of the regulatory framework and their application to new advertising formats could be developed.

PROMOTE CHILDRENS RIGHTS IMPACT ASSESSMENTS. Advertisers should be encouraged to carry out **children's rights impact assessments** when developing commercial messages or campaigns. The Child Rights Self-Impact Assessment Tools developed by Unicef provides useful guidance in this respect.

NEED FOR MORE EMPIRICAL RESEARCH. Considering the important role of the identification principle in the current regulatory framework (i.e. both the legal and self-regulatory framework require commercial communication to be clearly identifiable as such), **more empirical research on current implementation of the principle is needed**. This includes research on the effectiveness of **advertising cues or labels**.

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LIST OF ABBREVIATIONS

| | |
|-------|---|
| ARI | Alternative Regulatory Instrument |
| ASA | Advertising Standards Authority |
| AVMSD | Audiovisual Media Services Directive |
| BCAP | Broadcast Committee of Advertising Practice |
| BWSP | Beer Wine and Spirits Producers |
| CAP | Committee of Advertising Practice |
| CRBP | Children's Rights and Business Principles |
| DGP | Digital Guiding Principles |
| EASA | European Advertising Standards Alliance |
| EDAA | European Interactive Digital Advertising Alliance |
| FEDMA | Federation of European Direct Marketing |
| FEVIA | Federation for the Food Industry |
| GDPR | General Data Protection Regulation |
| IARD | International Alliance for Responsible Drinking |

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|----------|--|
| ICC | International Chamber of Commerce |
| ICC Code | International Chamber of Commerce Consolidated Code on Advertising and Marketing |
| ICTI | International Council of Toy Industries |
| JEP | Jury for Ethical Practices in Advertising |
| LPA | Legal Purchase Age |
| OBA | Online Behavioral Advertising |
| OECD | Organisation for Economic Co-operation and Development |
| OFT | Office of Fair Trading |
| RAC | Responsible Advertising and Children |
| SRO | Self-Regulatory Organisation |
| TIE | Toy Industries of Europe |
| UBA | Union of Belgian Advertisers |
| UNCRC | United Nations Convention on the Rights of the Child |
| WFA | World Federation of Advertisers |
| WHO | World Health Organisation |

CHAPTER 1 – CONTEXT OF THE REPORT

1. Aim, scope and notions

AIM. The wide array of rules that address commercial communication aimed at minors in a fragmented manner, currently cause uncertainty, which may not only hamper advertisers' compliance, but also threatens to disempower children and parents. This report provides a comprehensive overview of self- and co-regulatory rules that currently govern commercial communication aimed at minors. The overview includes instruments at international, European and national level (including Belgium, the United Kingdom and the Netherlands). It is a necessary second step in the analysis of the type of regulation, of the safeguards that need to be adopted, and of the type of oversight and enforcement that is necessary to achieve the goal of protecting and empowering minors with regard to new advertising formats.

DELINEATION. Many Alternative Regulatory Instruments (hereafter "ARI's"), such as self- and co-regulation, are used in the context of advertising on the one hand, and of the protection of children in the digital context on the other hand. Against this background, this report **focuses on those ARI's that regulate commercial communication aimed at children and related risks** such as privacy infringement by means of behavioural targeting.

TERRITORIAL SCOPE. Geographically, this report will focus on ARI's at the international, European and national (i.e. Belgium/Flanders, the Netherlands and the United Kingdom) level. Where relevant, it will consider other non-EU countries to illustrate current practices, or new developments not yet integrated in the EU framework.

NOTIONS. For the purpose of this report, the notions 'child', 'minor' and 'youngster' will be used interchangeably. Where the age is of particular importance to the topic that is discussed this will be emphasised and explained. Moreover, the notions 'commercial communication' and 'advertising' will be used according to the specific ARI's that are discussed. Furthermore, the terms Alternative Regulatory Instruments and self- and co-regulation (hereafter SRCR) will be used interchangeably. Although no generally agreed upon definition of self-regulation exists,¹ in the context of this report, self-regulation should be looked at as *"the regulatory process whereby an industry-level (as opposed to a governmental or firm-level) organisation sets rules and standards (codes of practice) relating to the conduct of firms in the industry"*². Moreover, such an organisation should also carry the responsibility for the implementation and the enforcement of these rules and standards. The

¹ E. LIEVENS (2010). Protecting Children in the Digital Era. Leiden; Martinus Nijhoff.

² N. GUNNINGHAM AND J. REES (1997). Industry self-regulation: an institutional perspective. Law & Policy, Vol. 19, No. 4, 364-384.

³ E. LIEVENS (2010). Protecting Children in the Digital Era. Leiden; Martinus Nijhoff, 208.

⁴ J.P. MIFSUD BONNICI (2008). Self-Regulation in Cyberspace. The Hague: Asser Press, 15.

concept of co-regulation, on the other hand, is a regulatory strategy which mixes elements of state regulation and elements of self-regulation.³ More specifically, it can refer to variously constructed types of regulatory mechanisms, including (1) top-down mechanisms where the legislative authority sets the objectives but delegates the implementation thereof⁴ or (2) bottom-up mechanisms where the rules stem from self-regulation but where the legislative authority validates and supervises them.⁵

FUTURE REPORTS WITHIN THE ADLIT-PROJECT. A third AdLit legal research report will assess the applicability of the current legal framework to new advertising formats such as product placement, split-screen advertising, in-game advertising, advergames, etc. (“Assessment of the applicability of the current regulatory framework to new advertising formats”). This assessment will include a discussion on the varying competences of the legislators (both material and territorial) and it will focus in particular on the efficiency of enforcement of regulation in the online environment. Based on the findings, the main challenges and gaps in the current framework will be identified. Finally, a fourth report will develop a blue print for a future-proof regulatory framework for commercial communication aimed at minors, with an important emphasis on empowerment (“Toward future-proof regulation of commercial communication aimed at minors”). The research results of this task will be translated into policy guidelines and recommendations.

2. Methodology

DESCRIPTIVE-EVALUATIVE-COMPARATIVE. The analysis in this report is based on desk research. Relevant legal texts, texts related to alternative regulatory mechanisms, policy documents, decisions of self-regulatory organisations, doctrine and literature at the international, European and national (i.e. UK, Belgium and the Netherlands) have been studied in order to produce a **descriptive-evaluative and comparative overview** of the research subject of this report.

3. Structure

STRUCTURE OF THE REPORT. The analysis is divided into three different chapters. The first chapter is an introductory chapter, with an explanation of the context of the report, the historical background of self- and co-regulatory mechanisms with regard to commercial communication, the notions and methodology. The report then continues with the mapping of the self- and co-regulatory instruments in relation to commercial communication aimed at children. Chapter 2 is subdivided into three different levels: the international, the European and the national level. Each subsection discusses the content and organisation of the major self- and co-regulatory instruments, its main actors and the complaint-handling mechanisms. For each level, a short conclusion is provided, which will eventually feed into the final conclusion (Chapter 3).

³ E. LIEVENS (2010). Protecting Children in the Digital Era. Leiden; Martinus Nijhoff, 208.

⁴ J.P. MIFSUD BONNICI (2008). Self-Regulation in Cyberspace. The Hague: Asser Press, 15.

⁵ MANDELKERN GROUP ON BETTER REGULATION (2001). Final report. Accessed at http://ec.europa.eu/smart-regulation/better_regulation/documents/mandelkern_report.pdf on 21.20.2016; E. LIEVENS (2010). Protecting Children in the Digital Era. Leiden; Martinus Nijhoff, 163.

CHAPTER 2 – THE SELF- AND CO-REGULATORY FRAMEWORK

1. Background

1.1 History of advertising self-regulation

THE RATIONALE BEHIND ADVERTISING SELF-REGULATION. The advertising industry has traditionally actively participated in the regulatory process at national, European and international level, leading to a variety of self- and co-regulatory initiatives, some more general, some specifically across different sectors (e.g. food⁶, alcohol⁷, cosmetics, toys),⁸ and formats. As quoted by BURLETON, The Times already emphasised the role of advertising agencies in regulating commercial communication in 1909 by suggesting that

*“The best modern advertising has the publication of facts for its basis. The day of successful claptrap and vulgarity, still more the day of exaggerated and deceptive misrepresentation, is quickly passing away. So far from these being fostered by advertising agents, the whole tendency of the best and most successful agents is to repress them.”*⁹

According to MICKLITZ et al. ARI’s are more prevalent in the area of advertising than in other areas of consumer law.¹⁰ The significant role of the advertising sector in regulating commercial communication results from different factors, the first of which is the importance of consumer trust and a company’s reputation.¹¹ More specifically, the profit of traders is heavily dependent on the consumer’s trust in the products and services they promote.¹² Additionally, as traditional advertising formats (e.g. television commercials) are highly visible and identifiable often using the company or

⁶ Such as the EU Pledge, for more information see <http://www.eu-pledge.eu/>.

⁷ Such as the Covenant on advertising and marketing of alcohol drinks issued by the Belgian Brewers, Signed on 25 January 2013, accessed at <http://www.belgianbrewers.be/nl/verantwoordelijkheid/arnoldus-groep-convenant/> on 17.10.2016.

⁸ L. WILKS, G. ROSS, E. DOUGLAS and S. MACASKILL (2009). Mapping Exercise Report on self-regulation. Prepared for the European Commission DG SANCO Institute for Social Marketing. The Open University & University of Stirling.

⁹ E. BURLETON (1982). The Self-regulation of Advertising in Europe. Journal of Advertising I, 333.

¹⁰ H. MICKLITZ and M. DUROVIC (2016). Internationalization of Consumer Law – A Game Changer. SpringerBriefs in Political Science, 26.

¹¹ P. VERBRUGGEN (2011). Case Study Report – Transnational Private Regulation in the Advertising Industry. Conducted within the framework of the Research Project Constitutional Foundations of Transnational Private Regulation, accessed at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2256043&download=yes on 28/11/2016.

¹² F. WEBER (2014). The Law and Economics of Self-regulation in Advertising. Journal of European Consumer and Market Law, 3.1, pp 5-16.

brand names, any shortcomings are more readily detectable and traceable.¹³ Therefore, the sector has a strong interest in safeguarding fair advertising and sanctioning misleading or aggressive forms of commercial communication, as such practices would be detrimental to advertising's overall acceptance and effectiveness.¹⁴ In addition, the advertising sector is characterised by a strong degree of organisation by its main actors, who have set up many associations and meta-associations at various levels (e.g. international, European and national). Through these associations all kinds of codes of conduct for different forms of commercial communication have been developed. A final incentive lies in the desire to avoid government regulation. In this regard, VERBRUGGEN mentions that "pressures by the government to undertake legislative or executive action have been crucial for the adoption and further development of these codes".¹⁵ In this context, the United Nations Committee on the Rights of the Child has highlighted the **important role of the State in providing adequate incentives for the private sector** to adopt such fair advertising practices. More specifically, the Committee recommends the following:

*States should ensure that marketing and advertising do not have adverse impacts on children's rights by adopting appropriate regulation and encouraging business enterprises to adhere to codes of conduct and use clear and accurate product labelling and information that allow parents and children to make informed consumer decisions.*¹⁶

BROAD VARIETY OF INITIATIVES. As mentioned, ARI's regulating commercial communication can be found at different levels (i.e. international, regional, national) and the scope of the rules contained in them may vary (e.g. applicable to all advertising formats, applicable to specific formats or to certain products). As early as 1937, the most important international self-regulatory organisation (hereafter "SRO"), the International Chamber of Commerce (hereafter "ICC"), adopted the first International Code of Advertising and Marketing Communication Practice¹⁷, which served as a basis for most self-regulatory codes worldwide and even for national legislation in more than 35 countries. However, as VERBRUGGEN points out, different legal traditions and market structures have led to major differences in the adoption of the provisions in the national context.¹⁸ Indeed, ARI's regulating commercial

¹³ J.J. BODDEWYN (1989). Advertising Self-Regulation: True Purpose and Limits. Journal of Advertising, vol. 18, 2, 20.

¹⁴ J.J. BODDEWYN (1989). Advertising Self-Regulation: True Purpose and Limits. Journal of Advertising, vol. 18, 2, 20.

¹⁵ P. VERBRUGGEN (2011). Case Study Report – Transnational Private Regulation in the Advertising Industry. Conducted within the framework of the Research Project Constitutional Foundations of Transnational Private Regulation, accessed at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2256043&download=yes on 28/11/2016.

¹⁶ UNITED NATIONS COMMITTEE ON THE RIGHTS OF THE CHILD (2013). General Comment No. 16 on State obligations regarding the impact of business on children's rights, 16.

¹⁷ ICC (2006). Advertising and Marketing Communication Practice. Accessed at [http://www.iccwbo.org/Advocacy-Codes-and-Rules/Document-centre/2011/Advertising-and-Marketing-Communication-Practice-\(Consolidated-ICC-Code\)/](http://www.iccwbo.org/Advocacy-Codes-and-Rules/Document-centre/2011/Advertising-and-Marketing-Communication-Practice-(Consolidated-ICC-Code)/) on 17.10.2016.

¹⁸ P. VERBRUGGEN (2011). Case Study Report – Transnational Private Regulation in the Advertising Industry. Conducted within the framework of the Research Project Constitutional Foundations of Transnational Private Regulation, accessed at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2256043&download=yes on 28/11/2016.

communication do have a strong regional character.¹⁹ In Europe, the European Advertising Industry began coordinating the efforts of national SRO's in the early nineties, by setting up the European Advertising Standards Alliance (hereafter "EASA") in 1992. Furthermore, certain sectors have been particularly active in adopting ARI's regulating commercial communication aimed at children. For instance, driven by the global problem of child obesity, several pledges by the food sector to change food and beverages marketing to children have emerged over the years. These initiatives and several others will be further discussed in sections 1-3 of this chapter.

1.2 Evolving regulatory context in the digital environment

MOVE FROM CLASSIC STATE REGULATION TOWARDS SELF-REGULATION IN THE EU. The changes in the use of various types of commercial communication take place in an evolving regulatory context. Traditionally, regulation was a centred concept, with the state as the only regulatory actor, resulting in command-and-control regulation.²⁰ According to LIEVENS, the most discernible characteristic of classic state regulation is that fact that the state performs all regulatory tasks (i.e. the creation of legislation, the implementation and monitoring of this legislation and finally enforcement).²¹ As such, it is a centred type of regulation, where the state takes on the roles of both commander and controller.²² At the end of last century, however, a shift has taken place towards a more decentred concept of regulation, enabling other actors such as industry players to participate in the regulatory process.²³ This surge in self-regulatory mechanisms was caused by a number of reasons. According to GUNNINGHAM and REES, this is partly due to the broader problem of regulatory overload.²⁴ The continuing use of highly detailed prescriptive regulation became problematic and even counterproductive. In this evolving regulatory context, alternative regulatory instruments began to emerge in relation to environmental politics and consumer protection, and across different sectors such as the chemical sector and the energy sector.²⁵

INTERNATIONAL POLICY AGENDA ON DIGITAL COMMERCIAL COMMUNICATION AIMED AT CHILDREN. The development of ARI's regulating commercial communication aimed at children in the digital environment forms part of the current international policy agenda. In its 2012 Recommendation on the Protection of Children Online, the OECD recognised that children face significant consumer risks when surfing

¹⁹ H. MICKLITZ and M. DUROVIC (2016). Internationalization of Consumer Law – A Game Changer. SpringerBriefs in Political Science, 36.

²⁰ J. BLACK (2001). Decentring regulation: understanding the role of regulation and self-regulation in 'post-regulatory' world. *Oxford Journals Law*, 103-146.

²¹ E. LIEVENS (2010). *Protecting Children in the Digital Era*. Leiden; Martinus Nijhoff, 147-148.

²² J. BLACK (2002). Critical reflections on regulation. *Australian Journal of Legal Philosophy*, 27.

²³ E. LIEVENS (2010). *Protecting Children in the Digital Era. The Use of Alternative Regulatory Instruments*. Leiden: Martinus Nijhoff Publishers; EUROPEAN COMMISSION (2001). *European Governance – a white paper*, COM(2001) 428 final, accessed <http://aei.pitt.edu/1188/> on 17.10.2016.

²⁴ N. GUNNINGHAM AND J. REES (1997). Industry self-regulation: an institutional perspective. *Law & Policy*, Vol. 19, No.4, 364.

²⁵ C. PAVILLON (2012). The Interplay Between the Unfair Commercial Practices Directive and Codes of Conduct. *Erasmus Law Review* Vol. 5, Issue 4; N. GUNNINGHAM and D. SINCLAIR (1999). Regulatory Pluralism: Designing Policy Mixes for Environmental Protection. *Law and Policy* Vol. 21, No. 1; N. KEOHANE, R. REVESZ and R. STAVINS (1998). The choice of regulatory instruments in environmental policy. *Harvard Environmental Law Review* Vol. 22.

online (related to *inter alia* embedded ads, privacy-invasive practices, age-inappropriate content). To protect children against such risks, most countries have implemented multi-layered policies, which entail (1) legal measures, (2) self- and co-regulation, (3) technical measures and (4) awareness-raising and education. In this regard, the OECD stresses that those who are best placed to protect children in a concentrated market with substantial network effects (such as social networks or search engines) are the largest providers themselves.²⁶ Any ARI's in this context would be most effective if they are consolidated (i.e. have overarching principles that are applicable across sectors, for instance for the definition of a child) and independently evaluated.²⁷

1.3 ARI's and the current EU legislative framework for commercial communication aimed at minors

The European legislator has also recognised the potential of ARI's to regulate different forms of commercial communication aimed at minors, by specifically encouraging the Member States to consider or adopt such mechanisms.

AVMS DIRECTIVE. First, ARI's are explicitly mentioned in the Audiovisual Media Services Directive (hereafter "AVMSD") as a means to regulate the fields coordinated by the Directive.²⁸ More in particular, Article 4.7 of the AVMSD obliges Member States to encourage the development of co-regulatory and/or self-regulatory mechanisms to the extent permitted by their legal systems. Such mechanisms have to fulfil two major requirements: (1) representativeness, meaning that the main stakeholders should broadly accept them and (2) effectiveness, meaning that the Member States should provide for effective enforcement. The rationale for this support for ARI's in the AVMSD is explained in Recital 44. The idea is that measures aimed at achieving public interest objectives in the audiovisual media services sector would be more effective if they are supported by the service providers themselves. However, it should be noted that the EU legislators did not see self-regulation as a substitute for the obligations of the national legislator. It is rather a complementary mechanism to the legislative, judicial and/or administrative mechanisms in place.²⁹ As such, any ARI regulating audiovisual commercial communication should be in line with the national legal framework implementing the AVMSD. Aside from the general encouragement for ARI's in the AVMSD, Article 9.2 obliges Member States to encourage media service providers to develop codes of conduct regarding inappropriate advertising of unhealthy foods.

²⁶ OECD (2012). Recommendation on the Protection of Children Online, 42-43, accessed at https://www.oecd.org/sti/ieconomy/childrenonline_with_cover.pdf on 12.10.2016.

²⁷ *Ibid.*

²⁸ For example, Recital 44 of the AVMSD stresses '*that a careful analysis of the appropriate regulatory approach is necessary, in particular to establish ... whether alternatives such as co-regulation or self-regulation should be considered.*

²⁹ Recital 44, second paragraph Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive).

UNFAIR COMMERCIAL PRACTICES DIRECTIVE.³⁰ Second, the EU legislators have recognised that codes of conduct are a means to promote fair business practices.³¹ Article 10 of the Directive³² states that Member States may encourage the use of code of conducts, and allows recourse to code owners (i.e. self-regulatory organisations) by consumers against unfair commercial practices such as misleading or aggressive advertisements. Important to note, however, is that such a complaint mechanism should not be deemed the equivalent of foregoing a means of judicial or administrative recourse.³³

E-COMMERCE DIRECTIVE.³⁴ Third, the E-Commerce Directive explicitly mentions codes of conduct at Community level as the best means to regulate professional ethics in relation to commercial communication in an online environment.³⁵ As such, Member States, the European Commission and professional associations and bodies are encouraged to develop codes of conduct for instance regarding the practical implementation of the information requirements for advertisers.³⁶ Immediately after the adoption of the Directive, several associations developed sector-specific codes and trustmark schemes at both the European (e.g. Fedma Code for Direct Marketing infra section 3.1.3) and national level. However, after this initial boom the activity in this area appeared to slowed down.³⁷

GENERAL DATA PROTECTION REGULATION (hereafter "GDPR").³⁸ Finally, in the context of the processing of personal data, the EU legislator has explicitly recognised in the GDPR, which will apply from 25 May 2018 onwards, that codes of conduct can be a means to contribute to the proper application of the data protection principles. Considering the broad variety of processing sectors and the specific needs of micro, small and medium-sized enterprises, codes of conduct could provide more specific and

³⁰ Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market (Unfair Commercial Practices Directive). Accessed at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:149:0022:0039:EN:PDF> on 17.10.2016.

³¹ EUROPEAN ECONOMIC AND SOCIAL COMMITTEE (2007). Enterprises and industry – Self- and co-regulation. Accessed at <http://www.eesc.europa.eu/?i=portal.en.smo-database&fiche=91> on 17.10.2016.

³² For a more detailed discussion of this instrument, see V. VERDOODT, E. LIEVENS and L. HELLEMANS (2015). Mapping and analysis of the current legal framework of commercial communication aimed at minors. Accessed at www.adlit.be/output on 16.10.2016.

³³ Article 10, second paragraph Directive 2005/29/EC (Unfair Commercial Practices Directive).

³⁴ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'). Accessed at <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32000L0031> on 21.10.2016.

³⁵ Recital 32 Directive 2000/31/EC (E-Commerce Directive). For a more detailed discussion of this instrument, see V. VERDOODT, E. LIEVENS and L. HELLEMANS (2015). Mapping and analysis of the current legal framework of commercial communication aimed at minors. Accessed at www.adlit.be/output on 16.10.2016.

³⁶ Article 8 §2 Directive 2000/31/EC (E-Commerce Directive).

³⁷ EUROPEAN COMMISSION (2003). First Report on the application of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), 16-17, accessed at [http://www.europarl.europa.eu/RegData/docs_autres_institutions/commission_europeenne/com/2003/0702/COM_COM\(2003\)0702_EN.pdf](http://www.europarl.europa.eu/RegData/docs_autres_institutions/commission_europeenne/com/2003/0702/COM_COM(2003)0702_EN.pdf) on 13.10.2016.

³⁸ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation). Accessed at http://ec.europa.eu/justice/data-protection/reform/files/regulation_oj_en.pdf on 23.10.2016.

concrete guidance on the application of the Regulation. In the context of commercial communication, this could for instance lead to the development of a specific code of conduct on the collection of children’s personal data for behavioural advertising purposes, guidelines for the implementation of parental consent and verification mechanisms.

2. SRCR initiatives at the international level

2.1 General codes

2.1.1 International Chamber of Commerce - Consolidated Code of Advertising and Marketing 2011

INTERNATIONAL CHAMBER OF COMMERCE (“ICC”). The ICC is a business organisation, which brings together numerous enterprises of different sectors all over the world. The main activities of the organisation are setting rules, resolving disputes and policy advocacy. The ICC collaborates with the United Nations, the World Trade Organisation and several other bodies. The organisation has been offering guidance on marketing and advertising ever since 1937 and its Code on Advertising Practice (“ICC Code”) has been the foundation of many self-regulatory initiatives of the advertising sector.³⁹ Moreover, its provisions have also served as a basis for the development of the Directive on misleading and unfair advertising in 1987 as well as the predecessor of the AVMSD, the Television without Frontiers Directive, with respect to television advertising in 1984.⁴⁰ More specifically, it is based on the general principles of honesty, legal compliance, truthfulness and decency of ads by providing ethical guidelines that create a level playing field for advertisers across different sectors and using different advertising formats. As such, the ICC believes that there is less of a need for legislative action.⁴¹ The Code aims at enhancing harmonisations and coherence of the rules, however, the ICC itself does not have any powers to require national SRO’s to adopt or implement the Code in a uniform way.⁴²

COMMISSION ON MARKETING AND ADVERTISING. Each national ICC Committee or group may appoint delegates to take part in meetings of the ICC Commission on Marketing and Advertising, which convenes twice a year to examine marketing- and advertising- related policy issues of interest to

³⁹ H. MICKLITZ and M. DUROVIC (2016). Internationalization of Consumer Law – A Game Changer. SpringerBriefs in Political Science, 36.

⁴⁰ EUROPEAN AUDIOVISUAL OBSERVATORY (2003). Co-regulation of the media in Europe, 91, accessed http://www.obs.coe.int/documents/205595/2284366/LA_COREGULATION_EN.pdf/affe5af0-5266-4218-bb3c-065d7a8ed546 on 12.01.2016.

⁴¹ ICC (2014). ICC and the Code. Retrieved from <http://www.codescentre.com/about-us.aspx>.

⁴² P. VERBRUGGEN (2012). Enforcement of transnational private regulation of advertising practices: decentralizations, mechanisms and procedural fairness in F. CAFAGGI, Enforcement of Transnational Regulation: Ensuring Compliance in a Global World. Edward Elgar Publishing; Cheltenham, 304.

world business.⁴³ More in particular, the Commission revises drafts of codes, rules and opinions and outlines strategies for the future.

A. Scope

SCOPE. The ICC Code applies to:

All advertising and other marketing communications for the promotion of any kind of goods and services, corporate and institutional promotion included”.

More specifically, it applies to commercial communications in their entirety, including all words, music, images, etc. The revised Code covers both traditional and new forms of commercial communication, following the ICC policy decision of 2006. It also includes a chapter on digital interactive media techniques (Chapter D) on all kinds of platforms or devices. Moreover, the Code contains specific provisions regulating the use of online behavioural advertising.

DEFINITION OF A CHILD. As there are significant differences in defining the term “child” across different countries, the provisions of the ICC Code that apply when advertising is aimed at children should be interpreted according to *local rules*. Important to note is that in the context of the data protection rules (e.g. rules on behavioural advertising), there are specific provisions of the Code that are applicable to children 12 years and under (e.g. the parental consent requirement). In this regard, the ICC has clarified in its Statement on Code Interpretation (2016) that the **Code distinguishes between children (under 13s) and youngsters (under 18s)**. The ICC opted for this distinction because of the following reasons:

*“the very real differences in teens’ interests as compared to children, the practical impediments to obtaining parental consent where data collection from teens is concerned, sensitivities about teen privacy rights, and respect for freedom of commercial communications where the principal audience is adults”.*⁴⁴

Moreover, the ICC recognises the different cognitive abilities and stresses that rules that try to treat teenagers like children are simply unworkable.

REASONABLE CONSUMER. The provisions of the ICC Code should be interpreted in light of the advertising format used and its potential impact on the ‘reasonable consumer’. Accordingly, regard must be had for the characteristics of the targeted consumer group, including their knowledge, experience, but also cultural, social and linguistic factors. This is of particular importance when the targeted consumer group consists of children, as their natural credulity and inexperience should be kept in mind.⁴⁵

⁴³ ICC (2014). Commission on Marketing and Advertising. Retrieved from <http://www.iccwbo.org/about-icc/policy-commissions/marketing-and-advertising/>.

⁴⁴ ICC (2016). Statement on Code Interpretation – ICC Reference Guide on Advertising to Children. Retrieved from <http://www.iccwbo.org/News/Articles/2016/ICC-releases-statement-on-age-considerations-for-marketing-and-advertising-to-children-and-teens/> on 20.12.2016.

⁴⁵ Article 18 ICC Code; ICC (2014). Interpretation. Retrieved from <http://www.codescentre.com/icc-code/general-provisions.aspx#gen1> on 20.12.2016.

B. All formats

The following subsections will provide an overview of the provisions that are applicable to all advertising formats (so including *inter alia* television ads, digital ads such as advergames and personalised ads). It includes both general principles as well as principles that are only applicable if the commercial communication is aimed at children.

B1. General principles

BASIC PRINCIPLES. Article 1 of the ICC Code lists the basic principles upon which all the other provisions are built. First of all, commercial communication needs to be **honest** and it should not abuse the trust of consumers. More specifically, it must not exploit consumers' lack of experience or knowledge, which in relation to children could be of particular importance. Furthermore, commercial communication should be **decent** (Article 3) and **truthful** (Article 5).

IDENTIFICATION. A crucial requirement for traditional and new forms of commercial communication is the identification requirement of **Article 9** of the ICC Code. This provision requires that:

*Marketing communications should be **clearly distinguishable** as such, whatever their form and whatever the medium used.*

In particular, the Code stresses that in cases where the advertisement appears on a medium which contains news or other editorial content, the ads should be portrayed in such a way that it is readily recognisable as such and that the identity of the advertiser is also apparent. Similarly, commercial messages should not be disguised as for example private blogs, user-generated content or independent reviews.

B2. Principles regarding children and commercial communication

SPECIAL CARE FOR CHILDREN. Of particular relevance to commercial communication targeted towards children and young people is **Article 18** of the ICC Code. This article requires special care and the advertisers or marketers should comply with certain additional requirements. More specifically, (1) such ads should not undermine positive social behaviour, lifestyles and attitudes; and (2) products that are unsuitable for them should not be advertised in media targeted to them, or ads targeted towards children should not appear on media where the editorial content is not suitable for children (e.g. an online wineshop). In addition, the ICC Code highlights three **important aspects which advertisers or marketers need to take in to account**:

| Article 18 ICC Code – Children and young people | |
|---|---|
| Attention Point | |
| Children's inexperience and credulity | <ul style="list-style-type: none"> ✓ When demonstrating a product's performance and use: <ul style="list-style-type: none"> - Do not understate the skill needed to produce the result shown; - Do not exaggerate the true characteristics of the product (e.g. size, value, durability); - Provide sufficient info if additional products are needed. ✓ Enable children to be able to distinguish between reality and fantasy. ✓ Ensure that commercial communications directed to children should be clearly distinguishable to them as such. |
| Avoidance of harm | <ul style="list-style-type: none"> ✓ Do not use any statement or visual treatment that could harm children mentally, morally or physically; ✓ Do not portray children in unsafe situations or encourage them to engage in harmful actions. |
| Social values | <ul style="list-style-type: none"> ✓ Do not suggest that possession or use of the product will give physical, psychological or social advantages over other children (or that not possessing the product would result in a disadvantage); ✓ Have regard for parents' authority and respect social and cultural values; ✓ Do not include a direct appeal to children to persuade their parents to buy the specific product; ✓ Present the price in such a way that children have a realistic perception of the value of the product (e.g. do not imply that the product is within reach of the family budget); ✓ When inviting children to contact the marketer, encourage them to obtain parental consent. |

Table 1 : ICC provisions in relation to children and young people (Source: Article 18 ICC Code).

B3. Principles regarding data protection and privacy

GENERAL DATA PROTECTION PRINCIPLES. Advertisers are collecting more and more personal data of consumers and personalise and tailor commercial communications to specific consumers based on this data. Specific self-regulatory principles in the context of data protection have to be taken into account by advertisers when they adopt such practices. In this regard, article 19 of the ICC Code determines the requirements that need to be kept in mind when processing personal data. In line with the current legislative framework (Directive 95/46/EC),⁴⁶ personal data should only be collected

⁴⁶ This directive will cease to apply from 25 May 2018, and will be replaced by the General Data Protection Regulation: for a more detailed discussion, see V. VERDOODT, E. LIEVENS and L. HELLEMANS (2015). Mapping and

for a specified and legitimate purpose; should be stored only for as long as needed to achieve the specified purpose; should be accurate and kept up to date; should be adequate, relevant and not excessive in relation to the purpose for which they are collected. Furthermore, adequate security measures should be in place and any third party to which the data is transferred should respect an adequate level of security.

CHILDREN'S PERSONAL DATA. Aside from the general data protection principles, Article 19 contains additional requirements for the collection of children's personal data. These requirements apply to children under 13 years. If, for example, a website provider (i.e. the data controller) collects children's personal data, he/she will have to offer **guidance to parents or legal guardians** about ways to protect their children's privacy (if feasible). Moreover, children should be stimulated to request their parents' permission before providing their personal data via digital interactive media. This requirement entails that a **parental consent** mechanism should be in place, with a reasonable degree of verifiability. However, the ICC Code does not mention any specific consent nor verification mechanisms. Accordingly, it will be up to each individual data controller to install an appropriate mechanism. Parental consent is also required for using children's data for addressing marketing communications to the parents or other family members as well as for any transfer of data to third parties.

C. Format-specific

C1. Sales promotion

PROTECTION FROM HARMFUL MATERIALS. A sales promotion is defined as a marketing technique to make products more attractive by offering some type of promotional item.⁴⁷ When this technique is used, Article A5 of the Code demands that reasonable steps are taken in order to prevent unsuitable or inappropriate materials from reaching children.

C2. Direct Marketing

DIRECT MARKETING. Chapter C of the Code contains specific provisions regulating **direct marketing** (i.e. *all communication activities with the intention of offering goods or services or transmitting commercial messages, presented in any medium and aimed at informing and soliciting a response from the addressee, as well as any service directly related thereto*). If consumers indicate their wish not to receive such communications in the future, the advertiser should respect this. Moreover, if an advertiser sends direct marketing communications via electronic media, the consumer should be able to express his wish not to receive future solicitations via a clear and transparent mechanism (Article C15). However, no further guidance on the specific features or functionality of the mechanism is offered.

TELEMARKETING. The ICC Code also contains a specific requirement in relation to **telemarketing**, which falls under the category of direct marketing and is defined as *all marketing done by voice via telephone, landline, mobile or other device*.⁴⁸ In case marketers make use of telemarketing and they notice that a child is on the phone, Article C16 requires them to politely terminate the call, unless permission from an appropriate adult to proceed with the call is obtained.

C3. Advertising and Marketing Communications Using Digital Interactive Media

I. GENERAL PRINCIPLES

DIGITAL MARKETING COMMUNICATIONS. As mentioned, the revised ICC Code contains specific rules on digital interactive marketing communications. According to the ICC Code, **digital marketing communications** are to be considered *“marketing communications, using digital interactive media intended primarily to promote products or to influence consumer behaviour”*. When marketers want to make use of this marketing technique, they will have to take into account the following additional rules:

| Attention Point | Articles D1-D6 ICC Code |
|--------------------------------|---|
| Identification | <ul style="list-style-type: none"> ✓ Whenever such commercial communications are <u>addressed to an individual</u>¹, the subject descriptor and context should make this clear. ✓ <u>Product endorsements or reviews</u> that are created by marketers should be clearly indicated and not presented as being from an individual consumer or independent body (identification principle). ✓ Marketers have to take appropriate steps to ensure that the commercial nature of the content or <u>social network site</u> under his/her control is clearly indicated and that the rules and standards of acceptable commercial behaviour are respected (identification principle). |
| Clarity | <ul style="list-style-type: none"> ✓ <u>Inform the consumer</u> beforehand of the steps leading to the placing of an order, a purchase, the concluding of a contract or any other commitment. ✓ Allow the consumer to check the <u>accuracy</u> of the data they provide themselves. |
| Public groups and review sites | <ul style="list-style-type: none"> ✓ Respect the <u>terms and conditions</u> when posting marketing communications in public meeting places (e.g. news groups, fora, blogs, bulletin boards, wiki sites). |

⁴⁸ Chapter C, ICC Code: the context of digital marketing communications (Source: Article D1-D6 ICC Code)

| | |
|--|---|
| Unsolicited, individually addressed digital marketing communications | <p>Only use such digital marketing communications if:</p> <ul style="list-style-type: none"> ✓ You have reasonable grounds to believe that the consumer has an interest in the subject matter; AND ✓ Include a clear and transparent mechanism allowing the consumer to express his wish not to receive future solicitations. |
|--|---|

Table 2: ICC provisions in relation to digital marketing communications (Source: Article D1-D6 ICC Code).

II. PRINCIPLES REGARDING CHILDREN AND COMMERCIAL COMMUNICATION

DIGITAL MARKETING COMMUNICATIONS AND CHILDREN. THE ICC Code also specifies certain rules for advertisers who direct their digital ads at children (**Article D5**). First of all, those advertisers have to encourage parents and/or guardians to participate and supervise their children’s interactive activities. It does not specify how this should be done, or what tools could be used. The wording which is used seems rather weak (“encourage”) and hard to put into practice. Furthermore, advertisers need to obtain **parental consent** if they want to disclose personal data of children to third parties. Finally, advertisers need to ensure the **appropriateness and suitability** of the digital commercial content and install age restrictions where needed (e.g. ads on alcoholic beverages, gambling).

III. PRINCIPLES REGARDING DATA PROTECTION AND PRIVACY

PROVISIONS FOR ONLINE BEHAVIOURAL ADVERTISING (OBA). Aside from the rules described above, the revised version of the ICC Code includes certain provisions which are specifically applicable to online behavioural advertising. According to **Article D7**, OBA includes “*the practice of collecting information over time on user’s online actions on a particular device across different unaffiliated websites⁴⁹ in order to create interest segments or to allocate such viewing behaviour against interest segments for the purposes of delivering advertisements to and by that web user’s interests and preferences.*” However it does not include advertising based on the viewing behaviour of a user’s current visit to a website. Important to note in this regard is that, following the Code:

segments specifically designed to target children 12 and younger for OBA purposes should not be created.

This is in line with the Article 29 Working Party⁵⁰ opinion 02/2013, in which it stressed that, in the best interest of the child, companies “*should not process children’s data for behavioural advertising*

⁴⁹ These *third parties* that engage in OBA on non-affiliated websites should be seen in contrast to a website operator or *first party*, who is the owner, controller or operator of the website, including affiliated sites with which the web user interacts, see Article D7 ICC Code.

⁵⁰ The Article 29 Data Protection Working Party is an independent advisory body, which comprises of representatives of the Data Protection Authorities of the different EU countries, the European Commission and

purposes, neither directly nor indirectly, as this will be outside the scope of a child's understanding and therefore exceed the boundaries of lawful processing".⁵¹ However, a distinction should be made between three different steps:



In that sense, Article D7 does not imply a prohibition of the processing of personal data of children (step 1), but rather prohibits the creation of segments (step 2) and targeting the child with OBA (step 3).

For OBA targeted at *children over 12* (or adults), the ICC Code requires third parties to adhere to the principles of notice and choice. This entails that consumers should not only be informed about the collection and use of their personal data for OBA purposes, but also be enabled to opt-in or opt-out.

| Principles | D7-D8 ICC Code |
|-------------------|---|
| Notice and choice | <ul style="list-style-type: none"> ✓ Clearly describe the types of data and use practices, e.g. mechanisms like: <ul style="list-style-type: none"> ○ an icon that links to a disclosure either in or around the advertisement delivered on the web page where data for OBA purposes is collected or some- where else on the web page; ○ through a web link to an industry- developed website(s) where third parties are individually listed. ✓ Provide a mechanism for web users to exercise their choice with respect to the collection and use of data for OBA purposes and the transfer of such data to third parties for OBA. ✓ Explicit consent of the user is required if: <ul style="list-style-type: none"> ○ data will be <u>harvested from all or substantially all websites</u> traversed by a particular computer or device across multiple web domains, and that data will be used for OBA (have an easy to use mechanism in place for users to withdraw their consent). ○ OBA segments relying on the use of <u>sensitive data</u> (as defined under applicable law) are used. |

the European Data Protection Supervisor. Its main tasks are to provide expert advise and promote the uniform application of EU Data Protection legislation.

⁵¹ ARTICLE 29 DATA PROTECTION WORKING PARTY (2013). Opinion 02/2013 on apps on smart devices. WP 202, 27 February 2013, 26, accessed at http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2013/wp202_en.pdf on 17.10.2016.

| | |
|----------------|---|
| Data security | <ul style="list-style-type: none"> ✓ Delete the data as soon as they are no longer relevant or necessary to achieve the business purpose. ✓ Have in place appropriate physical, electronic, and administrative safeguards to protect the data. |
| Responsibility | <ul style="list-style-type: none"> ✓ Anyone involved in the planning, creation or execution of OBA will be partly responsible, commensurate with their respective role in the process and within the limits of their respective functions. |

Table 3: Provisions for Online Behavioural Advertising of the ICC Code (Source: Article D7-D8 ICC Code)

C4. Native Advertising

GUIDANCE. The ICC has issued guidelines for advertisers on the use of native advertising (ad formats that allow the user to experience ads organically as part of the content), due to its rapid uptake by the advertising industry.⁵² Whereas the mere appearance of a brand or product does not automatically qualify certain content as advertising, the ICC stresses the importance of transparency and consumer trust. Nevertheless the Guidance does not contain any concrete practical measures for implementation of the Code’s principles. Instead, it merely reiterates the main principles of the ICC Code that need to be kept in mind in the context of native advertising to ensure transparency and consumer trust:

1. Consumers should be able to recognise when something is an ad (Art. 9, B1 & D1);
2. The identity of the advertiser should be easily ascertainable (Art. 10 & 12 ICC Code);
3. Disclosures should be prominent and understandable to consumers (Art. 3 ICC Code).

D. Complaint mechanisms

The ICC Code is enforced by the national self-regulatory organisations (hereafter “SRO’s”). The competences and tasks of SRO’s may vary from country to country, and include some or all of the following: complaints handling, monitoring commercial communications, launching their own investigations, offer advice or recommendations. For instance in Belgium, the Jury for Ethical Practices in Advertising (JEP) is responsible for the enforcement of the provisions of the ICC Code (see below, section 4.1).

⁵² ICC Guidance on Native Advertising (2015). Doc. No. 240-712, retrieved from <http://www.iccwbo.be/wp-content/uploads/2012/03/20150506-ICC-Guidance-on-Native-Advertising.pdf> on 13 June 2016.

2.1.2 Children's rights and business principles

CORPORATE SOCIAL RESPONSIBILITY FOR RESPECTING CHILDREN'S RIGHTS. Promoting corporate social responsibility for human rights has been on the policy agenda for quite some time.⁵³ An important milestone in the business and human rights debate is the unanimous endorsement by the United Nations Human Rights Council of the 'Guiding Principles on Business and Human Rights'.⁵⁴ This instrument contains a set of guidelines for States and companies to prevent, address and remedy human rights abuses committed in business operations.⁵⁵ However, certain academics⁵⁶ and children's rights organisations felt the need for stronger visibility of children's rights. According to COLLINS, the challenge was to articulate values and develop policies and practices that respect children's rights in business in a meaningful, convincing and effective way.⁵⁷ In response to this need, several children's rights organisations joined forces to develop a similar instrument from a children's rights perspective.⁵⁸ In 2012, the 'Children's rights and business principles' (hereafter "CRBP") were released, which form the basis of actions companies can take in terms of their corporate social responsibility to respect children's rights.⁵⁹ The CRBP were an important precursor and complement to the United Nation's Committee on the Rights of the Child's General Comment 16.⁶⁰

A. Scope

SCOPE. The principles are applicable to all businesses, in the context of children's rights. In this regard, the definition of a child in the United Nations Convention on the Rights of the Child should be kept in mind, i.e. *"every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier"*.

⁵³ T. M. COLLINS (2014). The relationship between children's rights and business. The International Journal of Human Rights, 583.

⁵⁴ The development process of this instrument marks a shift towards a new "rights-based approach", supporting the human rights principle of participation. More specifically, according to COLLINS, the guiding principles *"were developed following long consultations and tested extensively before release to ensure effectiveness. There were 47 international consultations on all continents and site visits to businesses and local stakeholders in over 20 countries by January 2011 as well as practical testing of the non-judicial grievance mechanisms in five different sectors in five countries, and the due diligence provisions by 10 companies and involvement of corporate law experts from over 20 countries."* This participatory development process was then taken up by the UN Committee in its General Comment 16 (2013) On State obligations regarding the impact of business on children's rights. See T. M. COLLINS (2014). The relationship between children's rights and business. The International Journal of Human Rights, 588.

⁵⁵ For more information see <https://business-humanrights.org/en/un-guiding-principles>.

⁵⁶ A. CRANE and B.A. KAZMI (2010). Business and Children: Mapping Impacts, Managing Responsibilities', Journal of Business Ethics 91: 567–86, 567.

⁵⁷ T. M. COLLINS (2014). The relationship between children's rights and business. The International Journal of Human Rights, 583.

⁵⁸ The principles were developed through consultations led by UNICEF, Save the Children and the United Nations Global Compact.

⁵⁹ UNICEF (2012). UN Global Compact and Save the Children, 'Children's Rights and Business Principles' (*'Children's Rights and Business Principles'*).

⁶⁰ For more information see V. VERDOODT, E. LIEVENS and L. HELLEMANS (2015). Mapping and analysis of the current legal framework of commercial communication aimed at minors. Accessed at www.adlit.be/output on 16.10.2016.

LIMITATIONS OF THE INSTRUMENT. The CRBP were designed to guide companies “on the full range of actions they can take in the workplace, marketplace and community to respect and support children’s rights”.⁶¹ They were developed in light of existing standards and best practices in relation to business and human rights, but from a children’s rights perspective.⁶² The Principles, however, **do not create new international legal obligations**, but are derived from the internationally recognised human rights of children.⁶³ While instruments such as the Guiding Principles and the CRBP have been described as the authoritative UN normative documents on business and human/children’s rights, scholars have clarified that their normative **contribution predominantly lies in elaborating the implications of existing standards and practices for States and businesses**.⁶⁴ Against this background, certain authors have commented upon the CRBP and its potential lack of effectiveness. For instance COLLINS stresses that while recognising the value of articulating the commitments for business, there is the danger that the CRBP will not be fully appreciated or respected considering that it does not create new international legal obligations.⁶⁵ According to GERBER et al. the CRBP are ultimately a private initiative, without the authoritative status enjoyed by General Comments.

B. All formats

B1. General principles

NO ADVERSE EFFECT ON CHILDREN’S RIGHTS. The CRBP contains 10 principles which each have their own set of criteria for reviewing critical areas of potential or actual impacts on children’s rights. Of particular importance in the context of commercial communication is Principle 6, which states the following:

All businesses should use marketing and advertising that respect and support children’s rights.

This principle first of all entails that businesses have to ensure that the marketing and communication of their products or services does not have an adverse impact on children’s rights. This entails that commercial communication may not reinforce discrimination and must offer children and parents clear and accurate information so that they can make informed decisions. To assess whether commercial communication has an adverse impact on children’s rights, certain factors may be taken into account, such as children’s greater susceptibility to manipulation, and the

⁶¹ UNICEF, UN Global Compact and Save the Children, 'Children's Rights and Business Principles' (Report, 2012) ('*Children's Rights and Business Principles*').

⁶² P. GERBER, J. KYRIAKAKIS and K. O'BYRNE (2013). General Comment 16 on State Obligations regarding the Impact of the Business Sector on Children's Rights: What Is Its Standing, Meaning and Effect. *Melbourne Journal of International Law*, 123.

⁶³ W. VANDENHOLE, E. DESMET, D. REYNAERT and S. LEMBRECHTS (2015). *International Handbook of Children's Rights Studies*, Routledge, 397.

⁶⁴ P. GERBER, J. KYRIAKAKIS and K. O'BYRNE (2013). General Comment 16 on State Obligations regarding the Impact of the Business Sector on Children's Rights: What Is Its Standing, Meaning and Effect. *Melbourne Journal of International Law*, 125.

⁶⁵ T. M. COLLINS (2014). The relationship between children’s rights and business. *The International Journal of Human Rights*, 583.

effects of using unrealistic or sexualised body images and stereotypes.⁶⁶ Furthermore, the corporate responsibility to respect this principle also requires compliance with the standards of business conduct in World Health Assembly instruments related to marketing and health. Finally, companies are also encouraged to raise awareness of and promote children’s rights, positive self-esteem, healthy lifestyles and non-violent values through their own communication and marketing channels.

IMPLEMENTATION OF THE PRINCIPLES. A key element for the implementation of the corporate responsibility to respect children’s rights is conducting a **children’s rights impact assessment**. In this regard, UNICEF has developed a guide for implementing this principle in practice and for integrating children’s rights into impact assessments.⁶⁷ This tool contains the primary and supplementary criteria for assessment as well as recommended actions for companies. The criteria are subdivided into three categories: (1) policy, (2) due diligence and (3) remediation criteria. An important aspect of the assessment tool relates to the impact of marketing and advertising on children’s rights. In this context, the tool defines several primary and supplementary criteria that companies need to keep in mind when they decide to market or advertise their services to children.

POLICY CRITERIA. First of all, the assessment tool defines a checklist of primary and secondary criteria for marketing and advertising policies. In addition, the tool offers practical guidance to companies by providing concrete action points. These action points are real structural decisions or measures that companies can make or implement.

| | Policy criteria for marketing and advertising | Taking action |
|-------------------------------|---|--|
| PRIMARY CRITERIA | <p>Primary criterion 34 Does the company have a global responsible marketing and advertising policy in place that prohibits harmful and unethical advertising related to children?</p> | <p>Have a responsible marketing and advertising policy in place and adopt a broad view of what 'harmful' means for children. This requires making a conscious choice to refrain from direct marketing that is likely to harm children mentally, morally or physically.</p> <p>Ensure that the policy takes into account the effects of promoting behaviour that is unsafe or dangerous and violent content.</p> <p>If the company operates in an area where national law is weak, vague or non-existent, be proactive and implement a marketing policy that incorporates existing best practices for advertising to children. Support government initiatives to develop appropriate standards that protect the rights of children.</p> |
| SUPPLEMENTARY CRITERIA | <p>34a Does the policy take into account the minimum age for targeting advertising to children?</p> | <p>Policies for children’s advertising should consider scheduling, frequency and the type of marketing being conducted for various age groups.</p> <p>Age groups should be identified for specific stages of childhood, such as preschool, pre-teen and adolescence.</p> |

⁶⁶ UNICEF (2012). Children’s rights and business principles – Principle 6, accessed at <http://www.unicef.org/csr/195.htm> on 18.09.2016.

⁶⁷ UNICEF (2013). Children’s Rights in Impact Assessments. Accessed at http://www.unicef.org/csr/css/Children_s_Rights_in_Impact_Assessments_Web_161213.pdf on 18.09.2016.

| | | |
|--------------------------------|--|---|
| | <p>34b Does the policy take into account the effects on children of using unrealistic, unhealthy and sexualized body images?</p> | <p>Refer to relevant guidance on avoiding the commercialization and sexualization of children.⁹ Use the company's participation and influence within trade groups or business associations to push for principles or a code of conduct for the entire sector the business is part of to refrain from such practices.</p> |
| | <p>34c Does the policy take into account the evolving impacts specifically related to the use of digital media?</p> | <p>Regularly update the company's marketing and advertising policy to reflect the rapidly changing media landscape. This enables businesses to recognize and proactively address the adverse impact of digital media, including the use of personalized promotions aimed specifically at children.</p> |
| | <p>34d Does the policy stipulate unsuitable marketing locations and placements in stores?</p> | <p>Do not place advertisements in locations or venues that are foreseeably frequented or accessed by children of inappropriate age groups for the product. At a minimum, childhood settings such as schools, childcare and early childhood education facilities should be free from commercial promotions that specifically target children.</p> <p>Take adequate security measures to protect children in all Internet-marketing venues, including social media, chat sites, blogs and web pages. Carefully consider placement of products in stores, e.g., place unhealthy products on higher shelving and out of young children's sight lines.</p> |
| | <p>34e Does the policy make reference to national regulations or industry-specific codes of conduct regarding marketing to children, for example, compliance with World Health Organization and World Health Assembly regulations for the food industry?</p> | <p>Take a responsible approach to food marketing, advertising and labelling. Avoid marketing foods and non-alcoholic beverages that are high in saturated fats, trans-fatty acids, sugars or salt to children. Especially avoid marketing in settings such as nurseries, schools (including school canteens and vending machines), playgrounds and paediatric service locations, or during child-friendly sporting and cultural activities.</p> <p>Follow marketing practices that are consistent with the objectives set out in the World Health Organization's recommendations on food marketing.¹⁰</p> |
| <p>PRIMARY CRITERIA</p> | <p>Primary criterion 35 Does the company set clear standards for privacy and the collection of personal data on or from children?</p> | <p>Put in place an age verification mechanism as part of personal data collection. Always encourage young children to obtain their parents' and or guardians' permission before giving any information to a marketer, and make reasonable efforts to ensure that parental consent has been given.</p> |

Table 4: Policy criteria for marketing and advertising (Source: UNICEF, available at http://www.unicef.org/csr/css/Children_s_Rights_in_Impact_Assessments_Web_161213.pdf)

DUE DILIGENCE CRITERIA. A second category of criteria for companies that market and advertise their products or services to children are due diligence criteria. These criteria require a certain standard of care of the company when defining their advertising or marketing strategies. The concept of due diligence also plays an important role in the Framework of the Special Representative, where it is defined as *“the steps a company must take to become aware of, prevent and address adverse human rights impacts”*.⁶⁸ In this regard, PARKER and HOWE have argued that there is a need for a sufficiently coercive legal environment for due diligence policies to be effective. Otherwise there may be a risk that due diligence policies will merely be a sort of “greenwashing” of corporate action on human rights.⁶⁹

⁶⁸ UNITED NATIONS (GENERAL ASSEMBLY) (2008). Protect, respect, and remedy: a framework for business and human rights Doc A/HRC/8/5, 56, accessed at <http://www.ohchr.org/EN/Issues/TransnationalCorporations/Pages/Reports.aspx> on 18.10.2016.

⁶⁹ C. PARKER and J. HOWE (2012). Ruggie's Diplomatic Project and Its Missing Regulatory Infrastructure in Radu Mares (ed). The UN Guiding Principles on Business and Human Rights: Foundations and Implementation (Martinus Nijhoff, 2012) 273, 279.

| | Due diligence criteria for marketing and advertising | Taking action |
|------------------------|--|---|
| PRIMARY CRITERIA | Primary criterion 36 Is there a process in place to identify, assess and monitor risks to and impacts on children's rights related to content and visuals used in the company's advertising? | Regularly assess the impacts on children of the company's marketing content, taking into consideration the impacts on different age groups. This might be done through surveys or focus groups with parents or children. |
| SUPPLEMENTARY CRITERIA | 36a Does the company, through its marketing practices, consider how it can avoid discrimination and stereotyping based on gender, age, nationality, race, etc.? | Assess whether the company may be encouraging or condoning any form of discrimination, including based upon race, nationality, religion, gender, age, disability or sexual orientation through its marketing practices. |
| PRIMARY CRITERIA | Primary criterion 37 Has the company established guidelines for the use of children in advertising and marketing? | Companies should stipulate that when children are represented in advertising and marketing, permissions are gained; appropriate checks regarding safeguarding of children are undertaken; age appropriate contexts, content, setting, dress and time are observed; and images of children taken in the public realm are rendered unidentifiable. Do not hire children as 'brand ambassadors' or in peer-to-peer marketing at schools or on social networking sites. Children should be protected from being used and exploited as a 'marketing technique' to promote products of any type at schools or elsewhere. |
| | SUPPORT Primary criterion 38 Does the company follow evolving best practices with regard to marketing and advertising, including participation in voluntary marketing codes and standards? | Apply evolving best practices and join voluntary initiatives that establish marketing codes and standards. |
| | SUPPORT Primary criterion 39 Does the company support and promote positive and healthy behaviour among children through marketing, advertising and communication channels? | Develop and disseminate messages and advertising to children and parents that promote healthy behaviours and products. Such messages should be positive in tone and make a compelling case for healthy behaviour by providing both accurate information and appealing results. Join existing efforts or support government and national NGOs activities to promote healthy behaviour and products. Ensure that good practices for supporting children's healthy lifestyles are implemented in all markets. |

Tabel 5: Due diligence criteria for marketing and advertising (Source: UNICEF, available at http://www.unicef.org/csr/css/Children_s_Rights_in_Impact_Assessments_Web_161213.pdf)

UNICEF'S CHILD ONLINE SAFETY ASSESSMENT TOOL. Aside from the Children's Rights Impact Assessment, UNICEF has also developed a Child Online Safety Assessment tool (hereafter "COSA") for companies, which contains certain principles concerning children and commercial communication, as well as concerning children and data protection.⁷⁰ More in particular, a first criterion of the assessment demands companies to do the following:

- ✓ Ensure that all advertising, marketing and promotions are clearly identified as such;
- ✓ Establish clear limits for online advertising to children;
- ✓ All commercial content should be reviewed, including in forums, social networks and gaming sites;
- ✓ Follow national or international legislation and;
- ✓ Implement appropriate standards and rules to protect children from age-inappropriate advertising.

Furthermore, in relation to data protection, businesses are required to set clear standards for the collection and storage of children's personal data, as well as for requiring parental consent. In this regard, the guidance document accompanying the tool refers to the US COPPA as a benchmark.⁷¹

C. Complaint mechanisms

REMIEDIATION CRITERIA. Finally, the Children's Rights and Business Principles require that a formal complaint mechanism is in place, which should be accessible to children or their representatives. In this regard, UNICEF's children's rights impact assessment contains certain remediation criteria that companies should take into account.

⁷⁰ UNICEF (2016). Child Online Safety Assessment Tool. Accessed at http://www.unicef.org/csr/files/English_UNICEF_COSA.pdf on 12.10.2016.

⁷¹ UNICEF (2016). Mobile Operator Child Rights Self-Impact Assessment Tool. Accessed at https://www.unicef.org/csr/files/Guide_to_the_MOCRIA_English.pdf on 12.10.2016. For more information on the US Coppa see V. Verdoodt, E. Lievens, L. Hellemans (2015). Mapping and analysis of the current legal framework on commercial communication aimed at minors. Accessed at www.adlit.be on 10.10.2016.

| | Remediation criteria for marketing and advertising | Taking action |
|------------------|--|---|
| PRIMARY CRITERIA | <p>Primary criterion 40 Is there a formal mechanism in place for receiving, processing, investigating and responding to complaints from customers and the general public, including children, about content and visuals relating to children?</p> | <p>Inform employees, customers, suppliers, service providers and other stakeholders about the mechanism and available channels to report concerns.</p> <p>Ensure the mechanism is accessible to children and those who can report concerns on their behalf, such as community members, local NGOs and government officials. Phone hotlines and online channels for reporting concerns can be effective.</p> |

Table 6: Remediation criteria for marketing and advertising (Source: UNICEF, available at http://www.unicef.org/csr/css/Children_s_Rights_in_Impact_Assessments_Web_161213.pdf)

2.2 Sector-specific codes

2.2.1 Food

A. ICC Framework for responsible food and beverage marketing communication (2012)

Aside from the general rules on advertising and marketing communications, the ICC also set up frameworks that deal with specific advertising content. In this regard, the ICC recognises that children are an important target group for food and beverage marketing and because of their inexperience as consumers they deserve especially careful treatment by marketers.⁷² The ICC therefore demands of marketers to **promote and sell their products in a responsible manner, above and beyond compliance with legal requirements.**

All formats

PRINCIPLES REGARDING CHILDREN AND COMMERCIAL COMMUNICATIONS

The ICC framework for responsible food and beverage marketing communication offers guidance on how to implement the general provisions of the ICC code in the context of food and beverage communication.

⁷² ICC (2012). Framework for Responsible Food and Beverage Marketing Communications. Accessed at <http://www.iccwbo.org/Advocacy-Codes-and-Rules/Document-centre/2012/Framework-for-Responsible-Food-and-Beverage-Marketing-Communications-2012/> on 19.10.2016.

| ICC Code general provisions | Application To Food And Beverage Marketing Communications |
|--|---|
| <p>Article 1: All marketing communications should be legal, decent, honest, and truthful.</p> | <p>Nutritional information and claims should also be judged by the likely perception of the <u>reasonable consumer</u>, especially where children are concerned.</p> |
| <p>Article 18: Children and young people</p> | <p>Marketing communications directed towards children for food and beverage products should not create a sense of urgency, or inappropriate price minimisation.</p> <p>While fantasy, including animation, is appropriate in communication with younger as well as older children, care should be taken not to exploit a child’s imagination in a way that could mislead him/her about the nutritional benefits of the product involved.</p> |
| | <p>Food and beverage marketing communications should not mislead consumers about potential health or other benefits from the consumption of the advertised product. In marketing communications to children, this includes such things as <u>status or popularity with peers, success in school or sports, or intelligence</u>.</p> <p>Food product marketing communications should not undermine the role of parents and other adults responsible for a child’s welfare in guiding diet and lifestyle choices. Advertisements should <u>not include any direct appeal</u> to children to persuade their parents or other adults to buy advertised products for them.</p> |

Table 7: ICC Principles applied in the context of Food and Beverage Marketing (Source: <http://www.iccwbo.org/Advocacy-Codes-and-Rules/Document-centre/2012/Framework-for-Responsible-Food-and-Beverage-Marketing-Communications-2012/>)

B. World Health Organisation Recommendation on Food Marketing

WORLD HEALTH ORGANISATION (hereafter “WHO”). The World Health Organisation is a specialised agency of the United Nations that aims at improving the world population’s health. The WHO is financed by the United Nations Member States, whose contributions are calculated relative to the country’s wealth and population. Moreover, the WHO receives additional (voluntary) funding from the Member States and also from partner organisations (e.g. foundations and civil society). One of

the major agenda points of the WHO is ending childhood obesity. As part of its global strategy on diet, physical activity and health, the WHO developed a set of recommendations on the marketing of foods and non-alcoholic beverages to children.⁷³

B.1 Scope

AIM. The main goal of the recommendations is to assist Member States in developing or strengthening their policies on food advertising to children, particularly with regard to advertising of foods which are high in saturated fats, trans fatty acids, free sugars or salt.

SCOPE. The WHO recommendations are formulated as policy recommendations for Member States, they do not constitute legally binding obligations for advertisers. It is applicable to all forms of marketing of foods high in saturated fats, trans fatty acids, free sugars or salt.

B2. All formats

The most important **recommendations for governments** setting up a policy to reduce the impact of this type of marketing are the following:

- ✓ Consider different approaches (i.e. stepwise or comprehensive): In this regard, the WHO highlights that the policy does not necessarily have to be implemented through legislation, but it may also be done through a self- or co-regulatory mechanism;
- ✓ Set clear definitions for the key components of the policy, as this facilitates a uniform implementation;
- ✓ Settings where children gather should be free from all forms of marketing of foods high in saturated fats, trans fatty acids, free sugars or salt (i.e. schools, nurseries, playgrounds etc.);
- ✓ Take up a lead role, but may allocate certain roles to other stakeholders;
- ✓ Consider the most cost-effective approach;
- ✓ Cooperate and coordinate efforts with other Member States to reduce the impact of cross-border marketing;
- ✓ Specify enforcement mechanisms and establish systems for their implementation, include clear definitions of sanctions, a system of reporting complaints and a monitoring system to ensure compliance.
- ✓ Include a system to evaluate the impact and effectiveness of the policy;
- ✓ Support further research on the implementation and evaluation of similar policies.

Furthermore, the WHO offers certain examples of what such measures could be in practice. For instance with regard to the monitoring of compliance.

⁷³ WORLD HEALTH ORGANIZATION (2010). Set of recommendations on the marketing food and non-alcoholic beverages to children, retrieved from <http://www.who.int/dietphysicalactivity/marketing-food-to-children/en/> on 05.12.2016.

2.2.2 Alcohol

A. ICC Framework for responsible marketing communications of alcohol (2014)

Similar to the Framework for responsible food and beverage marketing communications, the ICC has set up a framework for responsible marketing communications of alcohol. This framework offers guidance on how to implement the general provisions of the ICC code in the context of alcohol marketing communications.

All formats

PRINCIPLES REGARDING CHILDREN AND COMMERCIAL COMMUNICATION

| ICC Code general provisions | Application To Alcohol Marketing Communications |
|--|---|
| <p>ARTICLE 18 (Children and young people)</p> <p>Products unsuitable for children or young people should not be advertised in media targeted to them.</p> <p>Material unsuitable for children should be clearly identified as such.</p> | <p>Marketing communications should be intended for persons of legal purchase age. Marketing communications should not be intended to primarily appeal to minors (i.e. making it more attractive to minors than to persons of legal purchase age). Therefore, marketing communications should <u>avoid featuring settings, music, games, language, characters or personalities, for example, that are primarily appealing to minors</u>. This does not preclude communications directed to a wider, adult audience that may have incidental or unintended appeal to persons under legal purchase age.</p> <p>Marketing communications should not show minors (or people likely to be perceived as such) drinking alcohol.</p> <p><u>Promotions, prizes or games linked to marketing alcohol</u>, including on digital media, <u>should not be open to minors</u>. Marketing communications of alcohol should be placed only in media where it is reasonably expected to meet applicable audience composition targets (i.e. where the audience composition can reasonably be expected to meet the agreed target of people that are not minors, those under legal purchase age as defined previously in this Framework)</p> |
| <p>(Digital and Interactive Media Marketing Communications Chapter Article D5)</p> <p>Websites devoted to products that are subject to age restrictions such as</p> | <p>Alcohol company controlled websites marketing alcohol should include age affirmation mechanisms, using reasonably available technology intended to limit access by minors.</p> |

| | |
|--|--|
| alcohol...should undertake measures to <u>restrict access</u> to such websites by minors | |
|--|--|

Table 8: ICC Principles applied in the context of Alcohol Advertising (Source: <http://www.iccwbo.org/Advocacy-Codes-and-Rules/Document-centre/2014/ICC-Framework-for-responsible-marketing-communications-of-alcohol/>)

B. Digital Guiding Principles

THE INTERNATIONAL ALLIANCE FOR RESPONSIBLE DRINKING. The International Alliance for Responsible Drinking (hereafter “IARD”) is a not-for-profit organisation that dedicates itself to promoting responsible drinking worldwide, to address the major public health issue of harmful drinking.⁷⁴ IARD works together with different stakeholders including governments, producers, retailers, consumers and civil society. Its members are the world’s leading beer, wine and spirits producers, who are signatories to the “Beer, Wine and Spirits Producers’ Commitments to Reduce Harmful Drinking” (hereafter “BWSP Commitments”).⁷⁵ One of the commitments relates to the protection of minors, as the signatories commit to reduce underage drinking.⁷⁶ In 2014, as part of the BWSP Commitments, a global set of guiding principles for beverage alcohol marketing in digital media was developed. The main objective of these guidelines was to require online marketers to live up to the same high standards that apply to traditional marketing activities. The IARD acts as Secretariat to these Commitments.

B1. Scope

DIGITAL MARKETING COMMUNICATIONS. The Digital Guiding Principles (hereafter “DGP”) are applicable to all branded alcohol beverage digital marketing communications (paid and unpaid). This includes *inter alia* advertising on websites like social network sites and blogs, advertising in mobile applications and mobile communications if marketers of alcohol beverage companies control the content of the latter. The DGP adopts the same definition of ‘marketing communications’ as the ICC Code: “Advertising as well as other techniques...and should be interpreted broadly to mean any form of communication produced directly by or on behalf of marketers”.⁷⁷

MINORS. The DGP uses the ‘legal purchase age’ (in the country of viewing) of youngsters as the norm (hereafter “LPA”).

⁷⁴ For more information see <http://www.iard.org/>.

⁷⁵ For more information see www.producerscommitments.org.

⁷⁶ B. COOPER (2013). Industry Engagement on Alcohol Harm & Responsible Consumption - Part I: A Critical Year for Industry Engagement. Just – Drinks global news.

⁷⁷ Appendix 1 Guiding Principles, accessed at <https://www.joomag.com/magazine/digital-guiding-principles-dgps/0643189001411494235?short> on 16.10.2016.

B2. *Format-specific*

DIGITAL MARKETING COMMUNICATIONS

The DGP contain (1) general principles on responsible consumption and transparency, (2) principles regarding children and commercial communication and (3) a principle on consumer privacy. This section focuses on the principles on children and commercial communication.

➤ *PRINCIPLES REGARDING CHILDREN AND COMMERCIAL COMMUNICATIONS*

AGE AFFIRMATION MECHANISM. One of the objectives of the DGP is to reduce underage drinking. To realise this objective, the DGP introduced the requirement of an **age-affirmation mechanism**, to check whether users who are actively engaged to interact directly with a brand, are over the legal purchase age.⁷⁸

IMPLEMENTATION GUIDELINES. The DGP offers guidance on the actual implementation of such an age-affirmation mechanism in practice.

- First of all, such a mechanism should be **based on a combination of date-of-birth and country of residence**. Such information can be asked directly from the user or through technical settings that automatically recognise both or either of these.
- Second, the mechanism may include a “**remember me**” option, but there needs to be an additional notice on the appropriateness of such an option.
- Third, if a user is denied access because he/she has not reached the legal purchase age, he/she should receive an appropriate message and/or should be **redirected** to a special website (on alcohol-related social aspects). It should be made difficult for users to go back to the website and re-enter another date of birth.
- Fourth, if the digital platform on which an alcohol advertisement is placed does not contain such a mechanism, three things should be kept in mind:
 - 70% of the audience of the platform in the country for which the ad is intended should be of LPA;
 - there should be an age disclaimer/statement;
 - the platform should provide a mechanism to remove or moderate inappropriate UGC.

CONTENT SHARING. Furthermore, the DGP contain a principle on the sharing and forwarding of content. If a digital platform has the functionality to allow such content sharing, alcohol beverage companies have to add a **Forward Advice Notice (FAN)** on the platform. This Notice should state that the content should not be shared to anyone under LPA in the country of viewing. In addition, the Notice should be **visible, or accessible through a visible link, on all alcohol beverage company-controlled**

⁷⁸ Digital Guiding Principles (2014). Self-Regulation of Marketing Communications for Beverage Alcohol, 8-9, accessed <https://www.joomag.com/magazine/digital-guiding-principles-dgps/0643189001411494235?short> on 17.10.2016.

platforms designed for content sharing, including social media pages, mobile applications and direct digital marketing communications.

2.2.3 Toys

Toys play an important role in children’s physical, social and emotional development. In this regard, the Toys Industry has taken self-regulatory initiatives for responsible toys advertising and marketing practices to children.

Guiding Principles for Advertising and Marketing Communication to Children

INTERNATIONAL COUNCIL OF TOY INDUSTRIES (hereafter “ICTI”). At the international level, the industry association for the global toy industry has developed Guiding Principles for Advertising and Marketing Communication to Children. ICTI’s members include national toy associations from 20 countries.⁷⁹ The industry association’s main aim is to maintain ethical standards in commercial communication aimed at children, across all media, while also adhering to national regulations.⁸⁰

A. *Scope*

NOT A CODE. Important to note is that the Guiding Principles are **not meant to be a code**. Its main objective is merely to ensure that the toy industry marketers develop a high sense of social responsibility in advertising and marketing aimed at children. Accordingly, the principles should be looked at in light of existing national and international codes or practices. It provides a base level of acceptable practice for the worldwide toy industry, rather than superseding other industry initiatives. Moreover, the principles may be amended locally if needed to conform to prevailing community standards.⁸¹

B. *All formats*

PRINCIPLES REGARDING CHILDREN AND COMMERCIAL COMMUNICATION

The Guidelines contain important principles that should be addressed by national or international codes of conduct for advertising and marketing towards children. The ICTI Principles below have been subdivided under four categories:

⁷⁹ For more information see toyassociation.org.

⁸⁰ ICTI (2013). Guiding Principles for Advertising and Marketing Communication to Children. Accessed at <http://www.toy-icti.org/info/communications-to-children.html> on 23.10.2016.

⁸¹ ICTI (2013). Guiding Principles for Advertising and Marketing Communication to Children. Accessed at <http://www.toy-icti.org/info/communications-to-children.html> on 12.10.2016.

| Category | Implementation guidelines |
|--|---|
| Content and placement | <ul style="list-style-type: none"> ✓ Advertising content and placement must be <u>suitable for the children</u> to whom it is directed. ✓ There must be <u>no sexualisation</u> of children. ✓ Presentation of products must be <u>factual and clear</u> to the children to whom it is directed. ✓ Products must be <u>appropriate and safe</u> for children of the age to whom they are directed. ✓ Situations depicted in advertising and marketing must be <u>socially appropriate</u>. ✓ <u>Parental authority</u> must be recognized and supported. ✓ Pricing, if indicated, must be accurate and clear to those parents and children to whom the advertising is directed. ✓ Competitors must be portrayed fairly. ✓ Any qualifying statements must be clear to those parents and children to whom they are directed. ✓ Popular personalities should be used appropriately. ✓ Premiums should be used and presented responsibly. There should be no sales pressure. |
| Privacy | <ul style="list-style-type: none"> ✓ Children’s privacy must be protected absolutely. ✓ Online advertising must indicate a clear, prominent and comprehensive <u>privacy policy</u> for websites or on-line services directed to children.” |
| Sector-specific: alcohol and food | <ul style="list-style-type: none"> ✓ There must be no reference to or association with alcohol related products/companies. ✓ A responsible lifestyle and consumption of food and beverages must be depicted. |
| Separation principle | <ul style="list-style-type: none"> ✓ Advertising must be clearly separated from programming. |

Table 9: Implementation Guidelines for the ICTI Principles. (Source: <http://www.toy-icti.org/info/communications-to-children.html>)

2.3 Other relevant organisations/initiatives

World Federation of Advertisers Responsible Advertising and Children Programme

WORLD FEDERATION OF ADVERTISING (hereafter “WFA”). The WFA is a global organisation that brings together marketers of different markets worldwide.⁸² More specifically, the members of WFA represent roughly 90% of global marketing communications spend. The WFA is based in Brussels, with offices in London and Singapore. The main objective of the WFA is to defend marketers’ interests, but it also sets standards for responsible marketing communications for its members. The WFA has non-governmental organisation status with UNESCO, observer status with the World Health Organisation and the Food and Agriculture Organisation, as well as a special consultative status with the Council of Europe.⁸³

RESPONSIBLE ADVERTISING AND CHILDREN PROGRAMME. The WFA recognises that children need a chance to learn how to decipher and critically process commercial communications aimed at them. As such, the WFA has set up a Responsible Advertising and Children (hereafter “RAC”) programme, in order to guide its members in understanding the current and evolving societal and parental perceptions of what constitutes responsible advertising aimed at children. The goal is to establish a global coalition among the advertising industry, to identify, share and promote best practices, which go beyond mere compliance with industry standards.⁸⁴ The RAC tries to achieve this goal by fostering continuous dialogue between its industry members, policy makers and the society at large.

PRINCIPLES REGARDING CHILDREN AND COMMERCIAL COMMUNICATIONS. Upon becoming a member of the RAC, recognition of the fact that commercial communication needs to be sensitive with regard to children and families. More specifically, all sectors need to take into account the following:

- *commercial communication may not mislead children or exploit their relative inexperience;*
- *marketing communications must reflect the fact that children do not mature at the same rate and acquire consumer skills gradually.*

Finally, members of the RAC Programme also recognise the importance of public health, especially in relation to child obesity and lack of physical activity. In this regard, members commit themselves to ensuring that commercial communication on food and beverages does not encourage unhealthy lifestyles or diets.

⁸² For more information see <http://www.wfanet.org/en>.

⁸³ A. MATTELART (2005). Advertising International: The Privatisation of Public Space. Routledge: London and New York, 111.

⁸⁴ WORLD FEDERATION OF ADVERTISING (2010). Advocacy issues. Accessed at <http://www.wfanet.org/en/advocacy/issues> on 18.10.2016. For more information see also: [Responsible Advertising & Children Programme.](#)

2.4 Conclusion

The most important code at the international level is the ICC Code, a consolidated global code of practice for advertisers that has been the basis of several self-regulatory and national legislative instruments. It contains general rules for all formats, specific provisions for specific formats (e.g. direct marketing, sales promotions) and specific rules for advertising aimed at children. Aside from the general ICC Code, several initiatives have been adopted by different sectors, such as the food and beverages sector, the alcoholic beverages sector, and the toy industry. Thus, a broad variety of initiatives exist containing the principles advertisers need to consider. Certain obligations are formulated in an abstract manner, certain instruments contain more detailed guidelines on the implementation of these rules.

Important instruments which are not legally binding, but do offer clear and practical guidance to advertisers at the international level are Unicef's Children's rights and impact assessment guidelines and the Children's Online Safety Assessment Tool, which offer clear criteria and action points that can serve as a useful checklist for companies when setting up their marketing programmes in line with children's rights.

3. SRCR Initiatives at the European level

3.1 General codes

3.1.1 The European Advertising Standards Alliance (“EASA”) Charter

THE ORGANISATION. In 1992, EASA was set up as a non-profit organisation promoting ethical standards in advertising through self-regulation.⁸⁵ It unites national self-regulatory organisations (“SROs”) and organisations representing the advertising industry in Europe and beyond. The organisation has assisted in the set up of several self-regulatory mechanisms in Europe and it has promoted self-regulation as an alternative to detailed legislation at the EU policy level. In 2002, EASA’s mission was expanded to include the adoption of Best Practice Recommendations to guide SROs, in order to strengthen and extend self-regulation in Europe.⁸⁶ EASA is funded by the membership fees paid by SROs and industry associations.

INTERNATIONAL CONNECTIONS. In 2008, EASA established the International Council of Advertising Self-Regulation, with member SRO’s from *inter alia* Australia, Brazil, Canada and India. Moreover, EASA has also become a member of the Commission on Marketing and Advertising, thereby taking up a more central role in the adoption and revision of the ICC Codes (cfr. *supra*).⁸⁷

A. Charter Principles

EASA ADVERTISING SELF-REGULATORY CHARTER. The members of EASA are all signatories to the Advertising Self-Regulatory Charter, which contains certain principles and standards of best practice. By signing the Charter, the members confirm their commitment to implement these principles and standards in the practical operation of self-regulatory mechanisms. The Charter contains principles and standards for the practical operations of self-regulatory mechanisms. In that sense, it is not a code of conduct for marketers, but rather a guiding document for industry players that want to set up self-regulatory initiatives. The aim of EASA is to create a level playing field for advertisers across the EU while safeguarding a high level of consumer protection.

CHARTER PRINCIPLES. The Charter contains the following 10 principles:

1. Comprehensive coverage by self-regulatory systems of **all forms of advertising** and all practitioners;
2. Adequate and sustained **funding** by the advertising industry proportionate to advertising expenditure in each country;

⁸⁵ For more information see <http://www.easa-alliance.org/>.

⁸⁶ P. VERBRUGGEN (2013). Gorillas in the closet? Public and private actors in the enforcement of transnational private regulation. *Regulation & Governance* 7, 516.

⁸⁷ P. VERBRUGGEN (2011). Case Study Report: Transnational Private Regulation in the Advertising Industry. Research Project Constitutional Foundations of Transnational Private Regulation, accessed at <http://www.hiil.org/data/sitemanagement/media/Hiil%20Case%20Study%20Advertising%20Executive%20Summary.pdf> on 05.12.2016.

3. Comprehensive and effective **codes** of advertising practice based on the globally accepted codes of marketing and advertising practice of the International Chamber of Commerce (ICC) applicable to all forms of advertising;
4. Broad **consultation** with interested parties during code development;
5. Due consideration of the involvement of **independent, non-governmental lay persons** in the complaint adjudication process;
6. Efficient and resourced **administration** of codes and handling of complaints thereon in an independent and impartial manner by a self-regulatory body set up for the purpose;
7. Prompt and efficient **complaint handling** at no cost to the consumer;
8. Provision of **advice and training** to industry practitioners in order to raise standards;
9. **Effective sanctions and enforcement**, including the publication of decisions, combined with efficient compliance work and monitoring of codes;
10. Effective **awareness** of the self-regulatory system by industry and consumers.

B. Complaint mechanisms

CROSS-BORDER COMPLAINTS. The national SROs which are part of EASA have agreed to handle cross-border complaints under the same conditions as national complaints. The complaints that fall under the scope of this mechanism are complaints from

1. a person in a certain country who has viewed an advertisement carried in media based in another country;
2. a person who has viewed an advertisement on holiday in another EU country.

Both persons can send their complaints directly to EASA, who will then forward the complaint to the correct institution.

3.1.2 EASA Best Practice Recommendation on Online Behavioural Advertising

BEST PRACTICE RECOMMENDATIONS. As mentioned, EASA has been mandated in 2002 to develop Best Practice Recommendations (hereafter “BPR”) for advertising practices. BPR’s can be divided in two subcategories, (1) operational BRP’s, which offer guidance regarding the operation, structure and procedures of SRO’s, and (2) blueprint BRP’s which provide guidance on the remit and codes of SRO’s.⁸⁸

⁸⁸ EASA (2016). Best Practice Recommendation on Online Behavioural Advertising, accessed at http://www.easa-alliance.org/sites/default/files/EASA%20Best%20Practice%20Recommendation%20on%20Online%20Behavioural%20Advertising_0.pdf on 05.12.2016.

A. Scope

ONLINE BEHAVIOURAL ADVERTISING. The BPR defines online behavioral advertising as:

*“the collection of data from a particular computer or device regarding web viewing behaviours over time and across multiple web domains not under Common Control for the purpose of using such data to predict web user preferences or interests to **deliver online advertising** to that particular computer or device **based on the preferences or interests inferred from such web viewing behaviours**. Online Behavioural Advertising does not include the activities of Web Site Operators (First Party), Ad Delivery or Ad Reporting, or contextual advertising (e.g. advertising based on the content of the web page being visited, a consumer’s current visit to a web page, or a search query).”⁸⁹*

The BRP can be categorised within this report as a general code (as opposed to sector-specific codes), but it recommends the same format-specific principles (i.e. for all types of online behavioural advertising) as the IAB Europe Framework, which will be discussed below (section 3.1.3).

B. Format-specific

B1. Principles regarding children and commercial communication

Similar to the ICC Code, the BPR standard requires that companies do not create segments that are specifically designed to target children using online behavioural advertising. However, what is not restricted is the collection of OBA data in order to market children’s products to parents or other adults.⁹⁰

B2. Principles regarding data protection and privacy

NOTICE AND CHOICE. According to the BPR, third parties that are engaged in OBA should have a clear privacy notice on their website about their data processing practices and provide a link to the OBA Consumer Choice Platform (see *infra* 3.1.3). Moreover, such companies have to provide an **enhanced notice** to internet users if they process data for OBA purposes on a website or mobile app that is not controlled by them.⁹¹ Moreover, they should implement a user-friendly mechanism (i.e. an icon linking to the OBA Consumer Choice Platform) that allows internet users to exercise their choice with regard to the processing of their data for OBA purposes.

C. Complaint mechanisms

EASILY ACCESSIBLE MECHANISMS FOR COMPLAINTS. Finally, the EASA recommends that easily accessible mechanisms for complaints should be developed, and these should be *inter alia* transparent, coordinated and consumers should be able to file complaints in their local language.⁹² Moreover, as a

⁸⁹ *Ibidem*, 10.

⁹⁰ Principle III – Sensitive Segmentation, A. Children’s Segmentation.

⁹¹ Principle I – Notice, A.2 Third Party Notice to Consumers.

⁹² Principle IV – Compliance and Enforcement Programmes.

minimum requirement, SROs should take appropriate action against persistent and repeated offenders, including the referral to appropriate legal authorities.

3.1.3 Interactive Advertising Bureau Europe EU Framework for Online Behavioural Advertising

INTERACTIVE ADVERTISING BUREAU EUROPE (hereafter “IAB” Europe). The IAB Europe is a European business organisation that develops industry standards, offers legal advice, education and training and conducts research for the European digital advertising industry. Its members include a large number of hard players of the advertising industry.⁹³ IAB Europe promotes self-regulation and has laid down a structure for codifying industry good practices on online behavioural advertising (hereafter “OBA”). Moreover, the framework establishes certain principles that aim at increasing transparency and choice for internet users within the EU.

EUROPEAN INTERACTIVE DIGITAL ADVERTISING ALLIANCE (EDAA). Another organisation that takes the IAB EU Framework as its guiding principles is the EDAA. The EDAA has been set up by a coalition of the European advertising industry, including advertisers, the advertising agency sector, the direct marketing sector, the advertising network sector and the media sector. Its main objective is to licence the “Online Behavioural Advertising Icon” to companies that are involved in the OBA business across Europe. This icon notifies consumers of data collection for OBA purposes and the delivery of OBA advertising to them. Moreover it is an interactive symbol that refers consumers to an online portal: www.youonlinechoices.eu, which offers easy-to-understand information on the practice of OBA. The portal also allows consumers to turn off OBA by some or all companies. When accessing the portal, the user will be asked to select his or her location. The user must then navigate to “Your Ad Choices”, at which point the site collects the users’ “status” from the participating companies. Once complete, the individuals can either “turn off” individual companies one by one or scroll down to the setting “turn off all companies”.⁹⁴ However, according to the Article 29 Data Protection Working Party, such an opt-out approach “is not an adequate mechanism to obtain average users informed consent” for purposes of online behavioural advertising.⁹⁵

A. Scope

⁹³ For more information see <http://www.iabeurope.eu/directory-member/adform/>.

⁹⁴ B. VAN ALSENOY, V. VERDOODT, R. HEYMAN, J. AUSLOOS, E. WAUTERS and G. ACAR (2015). From social media service to advertising network - A critical analysis of Facebook’s Revised Policies and Terms, 39, accessed at <https://www.law.kuleuven.be/citip/en/news/item/facebooks-revised-policies-and-terms-v1-3.pdf> on 17.10.2016. Nevertheless, research conducted by computer science researchers at KU Leuven discovered that non-Facebook users that visited the opt-out page received a long term identifying cookie from Facebook. For more information see G. ACARD , B. VAN ALSENOY, F. PIESSENS, C. DIAZ and B. PRENEEL (2015). Facebook Tracking Through Social Plug-ins, retrieved from https://securehomes.esat.kuleuven.be/~gacar/fb_tracking/fb_plugins.pdf at 05.12.2016.

⁹⁵ ARTICLE 29 WORKING PARTY (2010). Opinion 2/2010 on online behavioural advertising, WP171, 22 June 2010, p. 15.

AIM. The IAB Europe members that have worked jointly on and have signed the EU Framework for OBA commit to implementing the Framework's **consumer-friendly standards**, when making use of online behavioural advertising. The Framework is self-regulatory and creates obligations for any of the members that **self-certify their compliance with the principles**. The principles are intended to assist companies when designing their systems and contracts relating to online behavioural ads, to be compliant with the applicable law. The Framework does not, however, regulate the content nor the delivery of the online advertisements.⁹⁶

SCOPE. The Framework is applicable to OBA, which is defined as follows:

- *“the collection of data from a particular computer or device regarding web viewing behaviours over time and across multiple web domains not under Common Control for the purpose of using such data to predict web user preferences or interests to deliver online advertising to that particular computer or device based on the preferences or interests inferred from such web viewing behaviours.”*

Explicitly excluded from this definition are (1) the activities of website operators, (2) the actual ad delivery or ad reporting or (3) contextual advertising (i.e. based on the content of the webpage that is currently visited by the consumer or a search query).

B. Format-specific

PRINCIPLES ON OBA. The Framework establishes several principles and standards on OBA, which can be subdivided into one principle on children and the rest on data protection privacy.

B1. Principles regarding children and commercial communication

CHILDREN AND OBA. Important to note in the context of commercial communication aimed at children is that in line with the ICC Code, Principle 4.A of the Framework states that:

- *companies agree **not to create segments for OBA purposes** that are specifically designed to target children. For the purposes of this provision, children refers to **people age 12 and under**.*

In this regard, KING and JESSEN argue that the framework does not sufficiently protect vulnerable consumers above the age of 12 (such as teenagers), even though such profiling practices may have significant privacy implications for this category of internet users.⁹⁷

B2. Principles regarding data protection and privacy

⁹⁶ IAB Europe (2011). EU Framework for Online Behavioural Advertising. Accessed at http://www.iabeurope.eu/wp-content/uploads/2016/05/2013-11-11-IAB-Europe-OBA-Framework_.pdf on 23.20.2016.

⁹⁷ N. J. KING and P.W. JENSEN (2010). Profiling the Mobile Customer – Is Industry Self-Regulation Adequate to Protect Consumer Privacy When Behavioural Advertisers Target Mobile Phones? – Part II, retrieved from <https://ir.library.oregonstate.edu/xmlui/bitstream/handle/1957/19453/KingJessenProfiling.PartII.PostPrint2010.pdf?sequence=5> on 5.12.2016.

NOTICE AND CHOICE. The first two principles of the Framework deal with the concepts of notice and choice. Internet users must be given notice of the OBA data collection and use practices by the relevant third parties⁹⁸ as well as the website operator (i.e. of its OBA arrangements with third parties). Secondly, third parties have to provide internet users with a mechanism to exercise their choice regarding the use of their data for OBA purposes (Principle II). Important to note is that the minimum requirement is opt-out consent, with a more robust consent requirement for sensitive data (see below).⁹⁹ Moreover, according to KING and JENSEN in general the IAB principles do not offer consumers sufficient transparency nor do they ensure meaningful access to the information contained in the consumer profiles that are used for behavioral advertising purposes.¹⁰⁰ With the adoption of the General Data Protection Regulation, these principles require an update as Recital 32 clarifies that “consent should be given by a clear affirmative act establishing a freely given, specific, informed and unambiguous indication of the data subject’s agreement to the processing of personal data relating to him or her”.

EDUCATION. Aside from the information that is required for the notice and choice mechanism, companies that employ OBA and are committed to the Framework should inform individuals and businesses about OBA, including *inter alia* on how data is collected, how the user may exercise his choice regarding OBA and how data is used for OBA purposes (Principle V).

SECURITY. According to the security principle, companies can only retain the data obtained and used for OBA purposes for as long as it is necessary to fulfil a legitimate business need (Principle III.B). Furthermore, companies should implement appropriate ‘physical, electronic and administrative safeguards’ for the protection of the data collected and used for OBA purposes (Principle III.A).

SENSITIVE DATA. If companies want to collect and use sensitive data (other than children’s data) for OBA purposes, they will have to obtain the prior explicit consent of the internet user, in accordance with data protection legislation (Principle IV.B). However, the OBA Principles do not address situations where profiling may be so unfair or discriminatory that it should not be allowed, apart from the profiling of under 13s.

AUDITS. Finally, the Framework defines that companies shall submit to independent audits of their self-certification. Principle VI.C also establishes the minimum elements that should be demonstrated in an audit.

C. Complaint mechanisms

⁹⁸ The notice should include the following information of the third party: (a) their identity and contact details; (b) the types of data collected, (c) purposes for processing and recipients of the data, (d) an easy to use mechanism to exercise their choice, (e) the fact that the company commits to the Framework and finally (f) a link to the OBA User Choice Site. Accessed at http://www.iabeurope.eu/wp-content/uploads/2016/05/2013-11-11-IAB-Europe-OBA-Framework_.pdf on 06.09.2016.

⁹⁹ N. J. KING and P.W. JENSEN (2010). Profiling the Mobile Customer – Is Industry Self-Regulation Adequate to Protect Consumer Privacy When Behavioural Advertisers Target Mobile Phones? – Part II, retrieved from <https://ir.library.oregonstate.edu/xmlui/bitstream/handle/1957/19453/KingJessenProfiling.PartII.PostPrint2010.pdf?sequence=5> on 5.12.2016.

¹⁰⁰ *Ibid.*

REQUIREMENTS FOR COMPLAINT-HANDLING MECHANISMS. The OBA Principles also include requirements for complaint-handling mechanisms. First of all, consumers should be able to file complaints directly to the company. Secondly, consumers should have easy access to transparent and easily recognisable mechanisms for handling complaints through independent, alternative dispute resolution mechanisms (like national advertising self-regulatory organisations) in their own local language. To avoid multiple enforcement mechanisms, companies and alternative dispute resolution mechanisms should coordinate. Decisions of non-compliance should be published, including in the language of the country where the complaint was first launched.

3.1.4 FEDMA European Code of Practice for the Use of Personal Data in Direct Marketing

FEDERATION OF EUROPEAN DIRECT MARKETING (hereafter “FEDMA”). FEDMA is an organisation representing the Direct and Interactive Marketing sector at the European Level. Amongst its members are (1) national members, i.e. the national Direct Marketing Associations (hereafter “DMAs”) which represent users, service providers and media/carriers of direct marketing and (2) direct company members.¹⁰¹ At the moment, FEDMA reports to have around 400 direct members in more than 30 countries as well as nearly 10 000 indirect members (through their membership in national Direct Marketing associations).¹⁰² FEDMA’s main tasks are the promotion and protection of the Direct and Interactive Marketing sector at pan-European level, as well providing the sector with information, education and training. FEDMA is also a member of EASA.

A. Scope

AIM. The FEDMA Code of Practice for the Use of Personal Data in Direct Marketing is a European data protection code of practice for practitioners (i.e. direct marketers). More specifically, it is a self-regulatory initiative in the advertising sector to regulate data gathering for marketing purposes.¹⁰³ The Code was drafted in collaboration with the Article 29 Working Party¹⁰⁴ and provides an interpretation of the European Data Protection Directive in the context of direct marketing.¹⁰⁵ In this regard it should be kept in mind that any code of conduct submitted under Article 27 of the Data Protection Directive (like the FEDMA Code and Annex) has to be of “*sufficient quality and internal consistency and must provide sufficient added-value, in terms of being sufficiently focussed on the*

¹⁰¹ FEDMA (2010). European code of practice for the use of personal data in direct marketing. Accessed at <https://ec.europa.eu/digital-single-market/en/content/european-code-practice-use-personal-data-direct-marketing> on 04.10.2016.

¹⁰² M. MACENAITE (2016). Protecting children’s privacy online: a critical look to four European self-regulatory initiatives. European Journal of Law and Technology, vol. 7, no. 2.

¹⁰³ *Ibid*, 8.

¹⁰⁴ See ARTICLE 29 DATA PROTECTION WORKING PARTY (2010). Opinion 4/2010 on the European code of conduct of FEDMA for the use of personal data in direct marketing, accessed at http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2010/wp174_en.pdf on 12.10.2016.

¹⁰⁵ ARTICLE 29 DATA PROTECTION WORKING PARTY (2003). Opinion 3/2003, Document WP 77. Accessed at http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2003/wp77_en.pdf on 12.10.2016.

specific data protection questions and problems in the organisation or sector to which it is intended to apply and offers sufficiently clear solutions for those questions and problems". The Article 29 Working Party is of the opinion that the FEDMA Code and Annex fulfil these requirements. The FEDMA Data Protection Committee (see infra section C. Complaint mechanism) has to report annually to the Article 29 Working Party on the application of the Code. Additionally, for certain areas of practice, the Code recommends **higher standards of practice** than those established by the Directive. With the Code, FEDMA aims to create a general standard or custom and practice for the entire industry on the implementation of data protection rules in direct marketing.¹⁰⁶

SCOPE. FEDMA's national members have agreed that their national codes of practice shall at least offer the same level of protection for data subjects as provided by the FEDMA Code (or offer a higher level of protection). The Code is an instrument of best practice that is to be interpreted in accordance with the framework of applicable data protection legislation. The Code is designed to be applied by direct marketers within the EU and those non-EU countries with data protection legislation similar to EU legislation, when using personal data for their marketing practices. As such, it is an important instrument that can contribute to the spreading of the EU data protection standards across the globe.

NOTION OF DIRECT MARKETING. According to the FEDMA Code, direct marketing is to be understood as:

*"the communication by whatever means (including but not limited to mail, fax, telephone, on-line services etc...) of any advertising or marketing material, which is carried out by the Direct Marketer itself or on its behalf and which is **directed to particular individuals**".*

B. Format-specific

B.1 Direct Marketing - offline and online

PRINCIPLES REGARDING DATA PROTECTION AND PRIVACY

SCOPE. The Code contains, first of all, certain general principles on data protection applied to direct marketing. Secondly, there are certain specific provisions that apply to the processing of children's personal data. The Code defines children as "any individual aged **under 14 years** old unless otherwise defined in national legislation/self-regulation". Our report will only cover those provisions that specifically apply to children's personal data (Section 2.6 of the Code).

NOTICE AND CHOICE. Direct marketers that collect children's personal data are required to make 'every reasonable effort' to ensure that the concerned child and/or the parent are properly informed about the purpose(s) for processing the data. Such a notice should be **prominent, readily accessible and**

¹⁰⁶ FEDMA (2010). European code of practice for the use of personal data in direct marketing. Accessed at <https://ec.europa.eu/digital-single-market/en/content/european-code-practice-use-personal-data-direct-marketing> on 04.10.2016.1.

understandable by children. Direct marketers also have to obtain **parental consent** prior to the processing of the data, in accordance with applicable laws and self-regulation. Furthermore, they do not only have to obtain parental consent, but they also have to use every reasonable endeavour to verify whether the consent was actually given by the parent of the concerned child (and for instance not by the child himself).

DATA SUBJECTS RIGHTS. According to the Code, parents should be able to exercise their children's rights as data subjects. More specifically these rights are (in line with EU data protection legislation) the right to object to the processing of their child's data or to the disclosure of that data to a third party, the right to access and rectification, deletion of the data in case the processing does not comply with applicable data protection legislation.

GAMES. Finally, in relation to games, direct marketers should not demand more personal data than is strictly necessary when children want to participate in a game, when they may receive a prize or in relation to any other activity involving a promotional benefit.

B.2 Direct marketing – online

PRINCIPLES REGARDING CHILDREN'S DATA PROTECTION AND PRIVACY

SCOPE. Complementary to the provisions of the Code of Practice, FEDMA also adopted an Electronic Communications Annex that contains provisions specifically applicable to online direct marketing (or electronic mail marketing).¹⁰⁷ It aims at providing cross-border marketers with guidelines on how to behave when engaged in online marketing.¹⁰⁸ More specifically, the provisions of the Annex can be categorised as (1) general provisions for the processing of personal data and (2) provisions specific to the processing of children's personal data. This section only covers those provisions that specifically apply to children's personal data (Section 6 of the Annex).

PARENTAL CONSENT. Direct marketers will have to obtain **prior parental consent** for the processing of personal data of children who have not yet reached the age required by law to give their consent. Important to note is that parents may withdraw their consent at any point in time. For children that have reached this age, the Annex offers a model clause that direct marketers may use for obtaining the child's consent:

¹⁰⁷ FEDMA (2010). European Code of Practice for the Use of Personal Data in Direct Marketing - Electronic Communications Annex (the On-line Annex), accessed at http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2010/wp174_annex_en.pdf on 07.10.2016.

¹⁰⁸ ARTICLE 29 DATA PROTECTION WORKING PARTY (2010). Opinion 4/2010 on the European code of conduct of FEDMA for the use of personal data in direct marketing, accessed at http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2010/wp174_en.pdf on 12.10.2016.

3) Model Clause asking for the children's consent:

Here at [company name], we need your name and other details about you so that we can [purposes]. You can give us these details by filling out this form. Because you are under [x], we need to make sure that the people who look after you (like your parents or carer) are OK with us having information about you.

Remember, either you or someone who looks after you can ask us to see the information we have about you at any time. You can also ask us to correct it if it's wrong. You can also tell us to stop emailing you if you don't want to hear from us anymore.

If you want to email us about this (or anything else), use this email address (...@...).

Figure 1: Model clause for children's consent (Source: Annex p. 14, http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2010/wp174_annex_en.pdf)

AGE VERIFICATION MECHANISM. Direct marketers are also required to have an **age verification mechanism** in place. The mechanism should be able to guarantee that the age of the child as well as the authenticity of the parental consent has been effectively checked. The Annex does not provide any further guidance regarding the type of mechanism, but merely requires that direct marketers use “reasonable efforts”. In this regard, FEDMA also recognises that at the moment there is no universally accepted age verification system.

LIMITATIONS. Furthermore, the Annex contains certain limitations direct marketers need to keep in mind:

- Data of family members: These data cannot be collected from the child, without the permission of the person to whom the data refer.¹⁰⁹
- Sensitive data¹¹⁰: Direct marketers may not invite children to share this type of data without the prior consent of their legal representative.
- Incentivise children to share more data: Direct marketers may not incentivise children to provide their own personal data or personal data of a third party for marketing purposes, in exchange for a material or virtual reward.¹¹¹

¹⁰⁹ Nevertheless, data regarding the identity and address of the parent or legal representative may still be processed for authorisation and verification purposes. FEDMA (2010). European Code of Practice for the Use of Personal Data in Direct Marketing - Electronic Communications Annex (the On-line Annex), accessed at http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2010/wp174_annex_en.pdf on 07.10.2016.

¹¹⁰ Sensitive data are data revealing the racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, or the processing of data concerning health or sex life of the child, as well as the financial situation of the child or any third party such as their friends or family. FEDMA (2010). European Code of Practice for the Use of Personal Data in Direct Marketing - Electronic Communications Annex (the On-line Annex), accessed at http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2010/wp174_annex_en.pdf on 07.10.2016.

INFORMATION. Finally, direct marketers who want to process children's data will have to inform them about the processing. This information has to be expressed in **easily understandable language**.

C. Complaint mechanism

COMPLAINT HANDLING AT THE NATIONAL LEVEL. As the FEDMA Code is a European initiative, the establishment of mechanisms to handle complaints regarding the application of the Code is left to the national DMA's. Complaints are usually handled by special compliance boards, ethics committees or similar commissions established at the national level.¹¹²

CROSS-BORDER COMPLAINTS. If a national DMA is unable to solve the problem due to cross-border aspects, FEDMA can investigate the complaint itself. For these situations, the Code foresees that the investigation is conducted by the Data Protection Committee, which is an internal body of representatives of (1) national DMA's, (2) FEDMA and (3) companies that are direct FEDMA members. However, up until now, no cross-border complaints have been filed with the Data Protection Committee. According to MACENAITE, this may be due to practical difficulties related to the complaint mechanism.¹¹³ When individuals want to file a complaint concerning online direct marketing, it may be difficult for them to prove that the ad was served to them and that it constitutes a violation of the FEDMA Code.¹¹⁴

3.1.5 FEDMA Code of Conduct on E-Commerce & Interactive Marketing

BACKGROUND. In the late nineties consumers had low confidence in e-commerce. At the time, there were a number of legal obstacles to the proper functioning of the internal market, which placed a burden on the development of information society services within the Community.¹¹⁵ More specifically, divergences in legislation and legal uncertainty as to which national rules applied to such services negatively affected consumers' confidence. Accordingly, FEDMA issued a Code of Conduct on E-Commerce and Interactive Marketing (hereafter "Code on E-Commerce") in 2000 (following the entering into force of the E-Commerce Directive).¹¹⁶ With the Code on E-Commerce, FEDMA aims "to

¹¹¹ This includes invitations to provide personal data in order to be able to participate in a game of chance, tombola or lottery. *Ibid.*

¹¹² M. MACENAITE (2016). Protecting children's privacy online: a critical look to four European self-regulatory initiatives. *European Journal of Law and Technology*, vol. 7, no. 2.

¹¹³ M. MACENAITE (2016). Protecting children's privacy online: a critical look to four European self-regulatory initiatives. *European Journal of Law and Technology*, vol. 7, no. 2.

¹¹⁴ P. VERBRUGGEN (2013). Gorillas in the closet? Public and private actors in the enforcement of private regulation. *Regulation & Governance* 7(4) 512-532.

¹¹⁵ EUROPEAN ECONOMIC AND SOCIAL COMMITTEE (2007). The Database on Self- and Co-Regulation Initiatives, accessed <http://www.eesc.europa.eu/?i=portal.en.smo-database&fiche=48> on 13.10.2016.

¹¹⁶ Article 16 of the E-Commerce Directive states that "Member States and the Commission shall encourage the a) drawing up of codes of conduct at Community level, by trade, professional and consumer associations and organisations, designed to contribute to the proper implementation of articles 5 to 15". Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), accessed at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0031:en:HTML> on 11.10.2016.

contribute to the growth of an e-commerce environment conducive to online direct marketing and at the same time protective of consumer interests".¹¹⁷ In order to remove barriers to the development of cross-border services within the Community which members might offer via the internet, it was considered necessary to establish a set of professional rules on consumer and child protection or public health, and guarantee compliance at the Community level.¹¹⁸ The Code forms part of FEDMA's trustmark system (i.e. the "Ring of Confidence" for e-commerce). Companies adhering to the Code on E-Commerce can display a **Guarantee Seal** on their website. In addition, companies accept a consumer complaint resolution mechanism and link to online Alternative Dispute Resolution systems.¹¹⁹

A. Scope

SCOPE. With the Code of E-Commerce, FEDMA aims to set a **standard of ethical business conduct for online marketers** that (1) sell goods or services or (2) provide information as part of, or follow up to a sale (it is applicable to both product or service promotion through the web and/or through email).¹²⁰ It is applicable only to online commercial relations between business and consumers (including e-commerce and commercial communications). The provisions should be read in conjunction with the other FEDMA Codes and should be interpreted in accordance with the framework of applicable laws.

B. Format-specific

I. GENERAL PRINCIPLES

PRINCIPLE OF IDENTIFICATION. The Code on E-Commerce first of all contains a section of provisions that apply to all forms of online commercial communications.¹²¹ As general principles Article 3.1 states that:

- *Consumers can be confident that all online commercial communication shall be **clearly identifiable as such.***
- *The **originator** of the communication (i.e. a natural or legal person) should likewise be **clearly identifiable.***
- *All promotional **offers and games** shall be clearly identifiable as such.*

These principles reflect the general principles as contained in the e-Commerce Directive.¹²²

¹¹⁷ FEDMA (2000). FEDMA Code on E-Commerce & Interactive Marketing, accessed at <http://www.oecd.org/internet/ieconomy/2091875.pdf> on 11.10.2016.

¹¹⁸ In this regard, the EU considered that codes of conduct at Community level would be the perfect means to define principles regarding professional ethics in the context of commercial communication. See EUROPEAN ECONOMIC AND SOCIAL COMMITTEE (2007). The Database on Self- and Co-Regulation Initiatives, accessed <http://www.eesc.europa.eu/?i=portal.en.smo-database&fiche=48> on 13.10.2016.

¹¹⁹ FEDMA (2000). Explanatory Memorandum Code on E-Commerce & Interactive Marketing. Accessed <http://www.iaa.rs/assets/FEDMA-kodeks.pdf> on 16.10.2016.

¹²⁰ Introduction of the FEDMA Code on E-Commerce.

¹²¹ Section 6 of the FEDMA Code on E-Commerce.

MISLEADING COMMERCIAL COMMUNICATION. Furthermore, Articles 3.3 and 3.4 protect consumers against misleading commercial communications. More specifically Article 3.3 defines that consumers may not be misled about the nature of the product or service being promoted or offered. Moreover, consumer's freedom to exit sites should not be restricted deceptively. Search terms also have to reflect the content of the site in a fair manner. Article 3.4 on the other hand determines that price comparisons may not be misleading; must contain the start and end date of the offer and; must show any specific conditions that may apply.

EVIDENCE OF ADVERTISING CLAIMS. Finally, online marketers always need to have evidence for any claims made in their advertisements.¹²³

II. PRINCIPLES REGARDING CHILDREN'S DATA PROTECTION AND PRIVACY

Section 5 of the FEDMA Code contains general provisions on consumer privacy and data protection (in relation to information obligations and data subject rights). However, this section focuses on section 6 of the FEDMA Code, which contains provisions that are applicable to the processing of children's personal data. As a general principle, the Code guarantees that:

- *marketers will **respect the sensibilities of children** and shall **protect the privacy of children**, for example by demanding parental consent for any personal data-collection.*

Thus, direct marketers should obtain prior parental consent for the processing of children's personal data. The Code uses the terms 'minor' and 'child' interchangeably and notes that as long as there is no consensus on an age limit across the EU, marketers should respect the applicable national regulations.

EDUCATING PARENTS. Aside from the parental consent requirement, marketers have to educate parents on current software tools and technologies, for instance in relation to privacy enhancement or the supervision of online activities. Parents should be encouraged to be more involved in their children's online activities. Moreover, the Code recommends that marketers attempt to monitor the extent to which children use their websites.

RESPECTING THE SENSIBILITIES OF CHILDREN. The Code also contains certain **rules for marketers that target children or for whom children are likely to constitute a section of their audience**. Several factors that define whether or not a commercial communication aimed at children is harmful are highlighted. More specifically, the commercial communication:

- *should not exploit a child's credulity, loyalty, vulnerability or lack of experience;*

¹²² For more information on the e-Commerce Directive see V. Verdoodt, E. Lievens, L. Hellemans (2015). Mapping and analysis of the current legal framework on commercial communication aimed at minors. Accessed at www.adlit.be on 10.10.2016.

¹²³ Article 3.5 of the FEDMA Code on E-Commerce.

- *should take into account the age, knowledge and level of maturity of the intended audience;*
- *should not contain any advertising material suitable only for adults;*
- *should not encourage children to enter adult websites, copy unsafe practices nor communicate with strangers;*
- *should encourage children to obtain parental consent before purchasing goods/services;*
- *should not contain an offer of credit.*

VERIFIABLE PARENTAL CONSENT. The FEDMA Code requires marketers to verify whether the consent given in reality stems from the parent/guardian/teacher.¹²⁴ The Code requires that before any personal data of children is collected by a website, they first have to supply their age. However, the Code does not contain any further guidance on what verification mechanisms would be appropriate, or what features they recommend.

INFORMATION REQUIREMENTS. Marketers also have to comply with certain information requirements under the FEDMA Code. First of all, they should provide a clear notice of their request for data collection, with **easy-to-understand explanations** of the purposes of collection. Moreover, marketers should use **awareness notices for children** that encourage them to ask for parental consent before entering personal data.¹²⁵ Parents should also be informed and have the right to object to the disclosure of their children's personal data to third parties.¹²⁶

PROTECTION AGAINST UNSOLICITED EMAIL. Marketers have to take the necessary steps to avoid that children are targeted with unsolicited commercial email communication which does not relate to their interests.¹²⁷

LIMITATION. Finally, there are certain limitations to the collection of children's personal data. Indeed, marketers may **not collect more data from the child than is necessary for his/her participation in the website activities**.¹²⁸ Furthermore, the child's access to a website must not be depending on the collection of detailed personal data. Other incentives such as prize offers and games should also not be used to encourage children to share more of their data.

C. Complaint mechanism

IN-HOUSE COMPLAINT PROCEDURES. As a first step, marketers should have effective in-house complaint mechanisms in place, which should be confidential, free and easy for consumers to access. The

¹²⁴ This requirement was only recently introduced into the EU data protection framework, with Article 8 of the General Data Protection Regulation. Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) accessed at http://ec.europa.eu/justice/data-protection/reform/files/regulation_oj_en.pdf on 13.10.2016.

¹²⁵ "Such notices should be displayed at the point where the information is requested, be clear, prominent and easily understandable by young children." See Article 6.8.3 of the FEDMA Code on E-Commerce.

¹²⁶ Article 6.8.4 of the FEDMA Code on E-Commerce.

¹²⁷ Article 6.8.6 of the FEDMA Code on E-Commerce.

¹²⁸ Article 6.8.2 of the FEDMA Code on E-Commerce.

marketer should also make every effort to resolve complaints in a satisfactory manner within a specified time period (not exceeding 30 days).

COMPLAINT HANDLING AT THE NATIONAL LEVEL. If the complaint cannot be dealt with at the in-house level, the consumer should have redress to the National Direct Marketing Associations: see *infra* FEDMA Code of Conduct on the Use of Personal Data (section 3.1.3).

CROSS-BORDER COMPLAINT HANDLING. Finally, if a national DMA is unable to solve the problem due to cross-border aspects, FEDMA can investigate the complaint itself. For these situations, the Code foresees that the investigation is conducted by the FEDMA Monitoring Committee.¹²⁹

SANCTIONS. For serious and/or consistent breaches with the Code, the national DMA may decide to withdraw a FEDMA recognised guarantee seal of a certain marketer. The matter will then be referred to the FEDMA Monitoring Committee for approval before execution.¹³⁰

3.2 Sector-specific codes

3.2.1 Food

BACKGROUND. Over the last decades, child obesity has become a serious problem in Europe and there is increasing political pressure on the food industry's marketing activities.¹³¹ Consequently, the European food industry has responded to the potential threat of public top down regulation in various ways. Industry actions in this regard include *inter alia* taking part in the EU Platform on Diet, Physical Activity and Health (2005) and the setting up of the EU Pledge. Initially, codes of conduct of the food industry were only concerned with guiding the content of the advertisements. The pledges on the other hand were imposing actual restrictions on certain types of foods that can be advertised to children under a certain age.¹³²

A. EU Pledge

EU PLEDGE. A well-known voluntary initiative by the food and beverage industry is the EU Pledge, which is monitored by EASA.¹³³ The Pledge was launched in 2007 in response to calls made by the EU institutions to help parents make better diet and lifestyle choices for their children. The programme

¹²⁹ It seems that there is no publicly available information on how many complaints FEDMA receives and handles.

¹³⁰ Article 8.5.3 FEDMA Code on E-Commerce. See also N. SOLOVAY and C. REED (2013). *The Internet and Dispute Resolution: Untangling the Web*. Law Journal Press.

¹³¹ J.D. JENSEN and K. RONIT (2015). The EU pledge for responsible marketing of food and beverages to children: implementation in food companies. *European Journal of Clinical Nutrition*, 69, 896; J. MASON and G. PARKER (2005). EU legal threat to junk food advertising. *Financial Times*.

¹³² C. HAWKES and J.L. HARRIS (2011). An analysis of food industry pledges on marketing to children. *Public Health Nutrition*, 14(8), 1403.

¹³³ For more information see <http://www.eu-pledge.eu/>.

is supported by the World Federation of Advertising (cf. supra 2.3) and its member companies represent over 80 % of food and beverage advertising expenditure in the EU.



A1. Scope

SCOPE. The media covered by the EU Pledge include TV, print, online and company-owned websites. This year, the Pledge is broadening its scope to mobile applications. Thus, its scope is quite broad, covering nearly the entire online marketing sphere.

ADVERTISING AIMED AT CHILDREN UNDER 12. At the start of the EU Pledge, participants committed to not advertise products aimed at children under 12 years (except for products that fulfil specific nutritional criteria). Under the Pledge, advertising aimed at children under 12 was defined as advertising designed for¹³⁴ viewers, listeners or readers of media of which the target group consists of at least 50% children under 12. More recently however, the participants lowered this threshold for the target group to 35%, covering more media channels.

A2. All formats

PRINCIPLES REGARDING CHILDREN AND COMMERCIAL COMMUNICATIONS

The two main commitments of the signatories to the Pledge are the following:

1. ***No advertising for food and beverage products to children under the age of twelve on TV, print and internet, except for products which fulfil common nutritional criteria.***
2. ***No communication related to products in primary schools, except where specifically requested by, or agreed with, the school administration for educational purposes.***

These commitments are the minimum common standards that are monitored. Companies may of course apply corporate standards that would go beyond these common standards.

COMMON NUTRITIONAL CRITERIA. Initially, the companies each had their own company-specific nutrition criteria, which was criticised by academics as it lacked transparency and consistency.¹³⁵ In response

¹³⁴ See below for criticism regarding this definition.

¹³⁵ J.D. JENSEN and K. RONIT (2015). The EU pledge for responsible marketing of food and beverages to children: implementation in food companies. *European Journal of Clinical Nutrition*, 69, 896.

to the criticism, the EU Pledge developed common nutritional criteria applicable to those companies that used nutrition criteria.¹³⁶ Nevertheless, companies who can demonstrate that their company-specific criteria are more stringent than the common criteria may continue to use their own.¹³⁷ The criteria set energy caps and maximum thresholds for nutrients to limit (including salt, saturated fat and sugar). Moreover, the criteria set minimum requirements for positive nutrients, category by category.

A3. Monitoring

MONITORING. The commitments of the signatories to the EU Pledge are monitored. First of all, the commitment on food and beverage advertising on TV, print and internet is monitored by a private independent party with a mandate (e.g. auditor), Accenture Media Management.¹³⁸ Second, the monitoring of the schools was done by BDRC Continental.¹³⁹ Third, the screening of the company-owned (i.e. food companies) websites is done by EASA (since 2012). Finally, the entire EU Pledge monitoring exercise in itself is also independently reviewed by academics each year.¹⁴⁰

NON-COMPLIANT COMPANIES. If during the monitoring exercise a non-compliant ad is discovered, the company responsible for the ad is notified, so that the company can take corrective measures or adapt their media planning where needed.¹⁴¹ However, there are no other 'hard' enforcement measures.

CRITICISM. Scholars have criticised the EU Pledge for a variety of reasons. First of all, HUIZINGA and KRUSE found that the common nutritional criteria used by the Pledge for classifying certain products as 'healthy' are much less strict than those of the World Health Organisation.¹⁴² Second, NEYENS and SMITS studied Belgian and Dutch child-targeting food and beverage websites and found that few Belgian and Dutch food brands actually signed the pledge.¹⁴³ Moreover, according to their findings, numerous food industry giants are not yet participating in the Pledge and neither is the retail food industry.¹⁴⁴ Finally, in relation to defining the target audience of a specific website DONOSO - the independent reviewer of the monitoring exercise in 2015 - stressed that *"even though specific websites may not be designed to appeal "primarily" to children under 12, this does not necessarily*

¹³⁶ Certain companies do not use nutrition criteria but rather commit to not advertising any food and beverage products to children under twelve.

¹³⁷ See EU Pledge (2015). EU Pledge Nutrition Criteria White Paper. Accessed at http://www.eu-pledge.eu/sites/eu-pledge.eu/files/releases/EU_Pledge_Nutrition_White_Paper_Nov_2012.pdf on 15.10.2016.

¹³⁸ <https://www.accenture.com/us-en/service-bpo-media-management>.

¹³⁹ For more information see <http://bdrc-continental.com/>.

¹⁴⁰ EU Pledge (2015). EU Pledge Monitoring Report. Accessed at http://www.eu-pledge.eu/sites/eu-pledge.eu/files/reports/EU_Pledge_2015_Monitoring_Report.pdf on 16.10.2016.

¹⁴¹ EU Pledge (2014). EU Pledge Monitoring Report. Accessed at http://www.eu-pledge.eu/sites/eu-pledge.eu/files/reports/EU_Pledge_2014_Monitoring_Report.pdf on 16.10.2016.

¹⁴² O. HUIZINGA and M. KRUSE (2016). Food industry self-regulation scheme "EU Pledge" cannot prevent the marketing of unhealthy foods to children. *Obesity Medicine* 1, 26.

¹⁴³ E. NEYENS and T. SMITS (2016). Empty pledges: a content analysis of Belgian and Dutch child-targeting food websites. *International Journal of Health Promotion and Education*, 9.

¹⁴⁴ O. HUIZINGA and M. KRUSE (2016). Food industry self-regulation scheme "EU Pledge" cannot prevent the marketing of unhealthy foods to children. *Obesity Medicine* 1, 26.

mean that the website may not be attractive for younger children as well".¹⁴⁵ DONOSO recommended actual experiments with children, testing the appeal of specific websites in order to offer a more reliable assessment exercise.

3.2.2 Alcohol

Since certain EU Member States (e.g. Belgium, Germany, Greece) allow alcohol consumption starting at the age of 16 and alcohol advertising may also have an important impact on young children, it is important to look at the self-regulatory initiatives on alcohol consumption and minors.

A. spiritsEUROPE Guidelines for the Development of Responsible Marketing Communications

THE ORGANISATION. SpiritsEUROPE is the representative body for the spirits industry at the European level. Amongst its members are both national and leading multinational companies. In 2012, the organisation developed Guidelines for the development of responsible marketing communications.

A1. Scope

SCOPE. The spiritsEurope Guidelines are developed in order to assist the spiritsEurope members in advertising their products in line with these principles. The Guidelines are an addition to the general principles of the ICC Consolidated Code on Advertising and Marketing on responsible marketing. Important to note is that the Guidelines do not replace existing national regulatory standards, but rather provide the reference criteria for the development and future amendment of national self-regulatory codes on marketing communications for spirit drinks.¹⁴⁶

MARKETING COMMUNICATIONS. The Guidelines have adopted the definition of the ICC Consolidated Code of Advertising and Marketing. As such it has a broad scope and covers both traditional and new forms of advertising. It includes *inter alia* promotions, sponsorships and direct marketing and broadly speaking should be interpreted to mean "*any form of communication produced directly by or on behalf of marketers intended primarily to promote products*".¹⁴⁷

A2. All formats

PRINCIPLES REGARDING CHILDREN AND COMMERCIAL COMMUNICATION

¹⁴⁵ EU PLEDGE (2015). EU Pledge Monitoring Report. Accessed at http://www.eu-pledge.eu/sites/eu-pledge.eu/files/reports/EU_Pledge_2015_Monitoring_Report.pdf on 16.10.2016.

¹⁴⁶ SPIRITSEUROPE (2012). Guidelines for the Development of Responsible Marketing Communications, accessed at <http://spirits.eu/files/63/cp.as-042-2015-common-standards-on-commercial-communications.pdf> on 17.10.2016.

¹⁴⁷ SPIRITSEUROPE (2012). Guidelines for the Development of Responsible Marketing Communications, accessed at <http://spirits.eu/files/63/cp.as-042-2015-common-standards-on-commercial-communications.pdf> on 17.10.2016.

CONTENT REQUIREMENTS. The Guidelines contain certain content requirements for alcoholic beverages advertising and marketing. As a general principle, Article 3.11 states that:

- *The content of marketing communications for alcoholic drinks should not primarily appeal to individuals below 18 years-old.*

More specifically, such marketing communications should not depict a child or portray objects, images, impressions, symbols, music, characters or celebrities that primarily appeal to children. (Article 3.12). It may also not be associated to a ‘rite of passage to adulthood’ (Article 3.13). Even more strict is the requirement that models in marketing communications for alcoholic beverages should at least be 25 years of age (Article 3.14).

A3. *Complaint mechanism*

NATIONAL SRO. Complaints can be filed with the national self-regulatory organisations (e.g. in Belgium the Jury for Ethical Practices concerning Advertising).

3.2.3 Toys

TOY INDUSTRIES OF EUROPE (hereafter “TIE”). TIE is the trade association for the European toy industry. The association supports effective self-regulation of children’s advertising and has issued a booklet in 2001 to inform consumers on the rules and regulations regarding advertising to children. The booklet contains information on **how to file a complaint**:

- *If you think a commercial, advertisement or advertising campaign is unfair, dishonest, misleading, unethical, or harmful, you can complain to one of the organizations below. Mention the advertisement, product, where/when it was seen, and the reason for your objection.¹⁴⁸*

For instance in Belgium, consumers can file complaints with the Jury for Ethical Practices in Advertising (JEP).

3.3 Conclusion

At the European level, EASA plays a coordinating role in many advertising self- and co-regulation initiatives of the national Member States. A remarkable finding is that, aside from the general EASA Charter, there are a number of specific codes at the European level. However, these specific codes are mostly focused on digital advertising formats such as online behavioural advertising and direct marketing online.

¹⁴⁸ J. GOLDSTEIN (2001). Self- Regulation of Children’s Advertising - Prepared for Toy Industries of Europe, accessed at Self- Regulation of Children’s Advertising - Prepared for Toy Industries of Europe, accessed at http://www.tietoy.org/docrestreint.api/353/b6761d0d8c60640b9cb9383ef58733451b3f4b45/pdf/self_regulation_of_children_s_advertising-2.pdf on 10.10.2016.

With regard to these new advertising formats, several ARI's have been adopted that, in line with the ICC Code, require members to **not create segments for OBA purposes that are specifically designed to target anyone under 13 years**. Furthermore, the FEDMA codes go beyond the legal requirements as contained in the current EU Data Protection Directive and offer additional protection for children.¹⁴⁹ Additional protection mechanisms are: the requirement for age and parental consent verification, limitations on the collection of specific types of data (i.e. sensitive data, data of others) and the prohibition to incentivise children to share more personal data. Moreover, marketers are required to educate parents on parental control tools and how they can supervise and monitor their children's online behaviour. Important to keep in mind, however, is the **lack of complaints** at the FEDMA level. In addition, specific sectors have also been active in coordinating self-regulation at the EU level, including the food, alcohol and toy industry.

¹⁴⁹ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data Official Journal L 281 , 23/11/199.

4. SRCR Initiatives at the national level

DECISIVE FACTORS OF NATIONAL SYSTEMS. There are two principal factors which are decisive in determining the form that self- (or co-) regulation may take in any country. First of all, it is the countries' tradition (i.e. the combination of cultural, commercial and legal traditions) that influences the self-regulatory system. According to MICKLITZ and DUROVIC, consumers in different countries and regions will respond differently to the same advertising practices.¹⁵⁰ Consequently, the regulation of advertising is supposed to take into account the cultural dimension. Second, it depends on the opportunity of self-regulation to exist next to legislation. Self-regulation is (usually) complementary to legislation. Accordingly, in countries where detailed and extensive legislation on commercial communication exists, the role of self-regulation will be smaller than in those countries in which the legal framework exists only of broad principles.¹⁵¹

WIDE NATIONAL DIFFERENCES ACROSS THE EU. Considering the two decisive factors outlined above, it can be said that advertising ARI's across the EU have taken different forms and there are significant differences. Indeed, while certain countries have opted for the use and promotion of self-regulation, others only foresee a limited role for self-regulatory organisations, or the co-regulatory structure dominates the system.

4.1 Belgium

4.1.1 Introduction

THE COUNCIL FOR ADVERTISING. The **Council for Advertising** (*Raad voor de Reclame*) is the organisation representing the Belgian advertising industry, which aims at improving, valorising and defending commercial communication and the commercial freedom of expression. It consists of and is financed by different partners in the commercial communication industry, (1) advertisers, (2) communication bureaus and (3) advertising media. More in particular it consists of the following members:

- Union of Belgian Advertisers (UBA),
- Association of Communication Companies (ACC),
- Belgian News Media,
- Federation of Belgian Magazines (FEBELMAG) & Association of publishers of the Free Press (FREE PRESS),
- Union of Publishers of the Periodic Press (UPP),



¹⁵⁰ H. MICKLITZ and M. DUROVIC (2016). Internationalization of Consumer Law – A Game Changer. SpringerBriefs in Political Science, 26.

¹⁵¹ EASA (2010). Blue Book: Advertising self-regulation in Europe and beyond.

- Association of Exploitants of Billboards (AEA),
- Belgian Association of Audiovisual Media (BVAM),
- Interactive Advertising Bureau (IAB).

The members of the Council are responsible for the creation and dissemination of more than 80% of Belgian commercial communication. In 1974, the Council established the Jury for Ethical Practices in Advertising, a self-disciplinary body of the advertising sector in Belgium.

JURY FOR ETHICAL PRACTICES IN ADVERTISING. The **Jury for Ethical Practices in Advertising** (hereafter “JEP”, *Jury voor Ethische Praktijken inzake Reclame*) is a private body that is financed by the Belgian advertisers, media and marketing bureaus.¹⁵² It is the Belgian self-regulatory organisation of the advertising industry. Its main task is to watch over the correct and fair nature of commercial messages aimed at the public.

COMPETENCES. The task of the JEP is limited to researching content of advertising messages that are **spread via mass media** (such as daily or weekly magazines, radio, television, internet, movie theatres etc.) as well as via **emailing or direct mail**. The JEP does not, however, have competence for (1) buyer-seller disputes, (2) other forms of media like brochures in a shop or packaging and (3) commercial practices such as sales promotions, contests, etc.

DECISION-MAKING. The decisions of the JEP are based on (1) legislation and (2) the self-regulatory codes that complement the legislation (in particular the ICC Code, but also a number of thematic covenants, etc). The JEP examines whether the ad is in conformity with these frameworks. In case of non-conformity, the JEP reaches out to the advertiser or if needed the involved professional associations, and shares its decision on whether or not the advertiser needs to make adjustments or has to stop using the ad. The JEP can also directly contact the media or the professional associations to stop spreading the contested ad. Aside from decisions to stop or adjust advertisements, the JEP may also confine itself to communicating a reservation to the advertiser. After closing a complaint, a summary of the complaint and decision is published on the website of the JEP.

MEMBERS. The advertising sector and civil society are equally represented, both in first instance and on appeal. The Presidents of the Jury in first instance and on appeal are elected among honorary magistrates or public figures of the Bar, academia or the advertising industry. This equal representation aims to ensure the independence of the JEP vis-à-vis the government, the advertising sector, political organisations, etc.

TRANSBOUNDARY ADS. The JEP is a member of EASA (cfr. supra 3.1.1) and even a member of the Board of Directors and the Executive Committee.¹⁵³ Accordingly, the JEP can even intervene in cases where commercial communication is spread in a transboundary manner. In this regard, the following distinction needs to be kept in mind:

¹⁵² RAAD VOOR DE RECLAME (2013). Reglementering van en controle op de reclame – Repertorium op 1 januari 2013. 8th edition, 11.

¹⁵³ RAAD VOOR DE RECLAME (2016). De raad voor de Reclame wil de Europese verankering van de jep versterken. Retrieved from <http://www.raadvoordereclame.be/nl/dossiers/115-de-raad-voor-de-reclame-wil-de-europese-verankering-van-de-jep-versterken> on 13.06.2016.

- **For traditional media:** as a basic principle of the procedure, the competent institution will be the one of the country of origin of the media that disseminates advertising. This could also be the country where the advertiser is located. As such, a Belgian consumer could file a complaint about a commercial communication that is spread in Belgium by for instance a foreign newspaper. This complaint will then immediately be transferred to the self-disciplinary body of the country involved, which will handle the complaint according to its own procedures and on the basis of the applicable national rules.
- **For non-traditional media (direct mail, websites):** other rules or procedures may be applicable (such as those of the country of origin of the advertiser)

COMPLAINTS. The President of the Jury in first instance may submit an advertisement at his/her own initiative or at the request of one or more members of the Jury to the examination of the Jury, with the aim of defending consumer interests or the image of commercial communication.

PRIOR CONSULTATION. Advertisers, advertising agencies and media have the possibility to request a preliminary examination by the JEP, prior to the publication of the advertisement. However, this is not an obligation, advertisers remain responsible for the ads they use. The JEP is there to help interpret and respect the applicable legal and self-regulatory rules.

JEP LABEL. Finally, the organisations and media that financially support the JEP and commit to abide by the JEP's decisions may reproduce the JEP Label. However, this label does not imply that the JEP has monitored all commercial messages that are being spread via that medium. Nevertheless, it is useful for the public, as it allows them to easily find the contact details of the JEP and it confirms at the same time that the organisation or medium have committed to comply with the decisions of the JEP.

BELGIAN SELF-REGULATORY SYSTEM. There are a number of self-regulatory codes which have been set up by the advertising industry. Some are general, like the ICC Code, some are sectorial or even intersectorial.

4.1.2 General codes

A. All formats

First of all, the JEP bases its decisions on the principles and rules of the ICC Consolidated Code of Advertising, discussed in section 2.1.1 (supra).¹⁵⁴

B. Format-specific

B1. ICC Code

The format-specific provisions of the ICC Consolidated Code of Advertising are also applicable in Belgium and the JEP may base its decisions on these principles as well.

¹⁵⁴ A Dutch translation of the ICC Code is available at http://www.jep.be/media/icc_code_boekvorm.pdf.

B2 *Opinion on Native Advertising*

With regard to one particular format, a specific recommendation/opinion was prepared by the Council for Advertising, more specifically on native advertising and the challenges for consumers to recognise such formats. In this opinion, the use of an explicit label such as “sponsored by”, “in cooperation with”, ...¹⁵⁵ Where appropriate, such designation shall be clearly legible or audible and understandable. It is also recommended to add visible and/or audible differences to the communication and the editorial/journalistic content.

4.1.3 Sector-specific codes

A. All formats

A1. *Food*

I. CODE ON FOOD ADVERTISING

The Belgian Federation for the Food Industry (FEVIA) has drafted a Code for food advertisements.¹⁵⁶ The code was drafted in light of the ICC Framework for responsible food and beverage communications and contains specific provisions for the protection of children and/or youngsters. The Code entered into force in 2005 and the JEP is responsible for monitoring compliance. As mentioned supra, the JEP investigates complaints of consumers (except organisations with commercial interests), and secondly, offers advice when requested by advertisers, advertising agencies and the media. The JEP may, if necessary, demand to stop the publication or broadcasting of a specific advertisement.

➤ *GENERAL PRINCIPLES*

NUTRITIONAL OR HEALTH CLAIMS. Every statement or communication that can reasonably be interpreted by the consumer as a nutritional or health claim, must be scientifically proven in an appropriate manner. Moreover, such claims must be in accordance with the nature and scope of the scientific evidence and provide the consumer with verifiable information. The claims must be assessed on how the average consumer would understand these and especially when it concerns children and youngsters.

HEALTHY LIFESTYLE. Food advertisements may not encourage or condone excessive consumption and the portion sizes need to be adapted to the displayed scene. Furthermore, such advertisements should not undermine the promotion of healthy and balanced eating habits and the importance of a healthy and active life.

¹⁵⁵ JEP (2015). Opinion on Native Advertising. Accessed at http://www.jep.be/sites/default/files/inline-media/native_advertising_aanbevelingen_rvdr_nl_2016.pdf

¹⁵⁶ FEVIA (2005), Reclamecode voor voedingsmiddelen [NL], accessed at http://www.jep.be/sites/default/files/rule_recommendation/fevia_nl.pdf on 16.06.2016.

NO MISLEADING ADVERTISING. The text, sound and image of the food advertisement should present the characteristics of the product portrayed (i.e. taste, size, content, food or health advantage) correctly and should not mislead consumers concerning one of these characteristics. Tests on the taste of preference of consumer may not be used in a manner which makes it appear to be a certain statistical value, if it is non-existent. Foods that are not intended to replace meals, should also not be presented as such.

➤ *PRINCIPLES REGARDING CHILDREN AND COMMERCIAL COMMUNICATION*

ADVERTISING AIMED AT CHILDREN. As mentioned above, the Code on food advertising also contains provisions regarding the protection of children. According to Articles 5-8 of the Code, food business operators and advertisers must pay particular attention to the following elements when advertising foods aimed at children:

| Do's | Don'ts |
|--|--|
| <ul style="list-style-type: none"> ✓ any offers or promotional sales for children need to announce the terms of the offer of the premiums or competitions in a language understandable for children; ✓ ensure that children have a good understanding of the products (if applicable) that must be purchased to receive a premium and, with regard to competitions, of the conditions for participation, the type of prizes and the profit opportunities. | <ul style="list-style-type: none"> ✗ do not make use of from media known characters (real or drawn) in a way that the line between editorial content and the advertisement in order to sell products, premiums or services; ✗ do not create a sense of urgency or inappropriately minimise the price; ✗ do not undermine the role of parents or guardians regarding the choice of eating habits or lifestyle; ✗ advertising may not directly exhort children to persuade their parents or other adults to buy products for them; |

Table 9: Provisions of the Fevia Code on Food Advertising (Source: Articles 5-8)

ADVERTISING AIMED AT CHILDREN AND/OR YOUNGSTERS. Articles 9-10 of the Code specifically deal with advertising aimed at children and/or youngsters. While the Code recognises that fantasy, including animation, is appropriate in communication with children and youngsters, advertisers should be careful to:

- ✗ not abuse children' and youngsters' imagination in a way that misleads them about the nutritional or potential health benefits of the product concerned;
- ✗ not make use of allusions to status or popularity amongst peers, success in school or in sports, or intelligence.

I. THE BELGIAN PLEDGE

In 2012, the Federation of the food industry (FEVIA), the representatives of the Belgian Commerce and Services (Comeos) and the Union of Belgian Advertisers (UBA) launched a Belgian version of the EU Pledge. The Belgian Pledge is a collective self-regulatory commitment to limit certain advertising aimed at children under 12 years. It is an independently monitored self-regulatory mechanism of the Belgian advertising industry. The number of companies participating in the Belgian Pledge has been on the rise since 2012 from 32 companies to 41 in 2015. Although many food companies appear to have signed the Belgian Pledge (see the figure below), NEYENS and SMITS argue that numerous Belgian and Dutch food brands have still not signed the pledge.¹⁵⁷



COMMITMENTS. The signatories to the Belgian Pledge commit themselves to live by the EU Pledge. This entails *inter alia* that they will **only advertise products to children under 12 years if they meet specific nutritional criteria**, and this on different media (i.e. television, the online world and schools).¹⁵⁸ Additionally, the companies commit themselves to refrain from communicating in elementary schools about products, unless the school board specifically requests it or explicitly consents to it because of educational purposes.¹⁵⁹

MONITORING. The commitments of the signatories to the Belgian Pledge are monitored. First of all, the TV-spots are monitored by the media agency Mindshare Monitoring.¹⁶⁰ Second, the monitoring of the schools was done by Dr. Christine Hoefkens and Professor Wim Verbeke of Ghent University. Finally, the screening of the websites was done by the JEP. The results of the monitoring exercise of

¹⁵⁷ See E. NEYENS and T. SMITS (2016). Empty pledges: a content analysis of Belgian and Dutch child-targeting food websites. *International Journal of Health Promotion and Education*.

¹⁵⁸ The nutritional criteria can be retrieved from <http://www.eu-pledge.eu>.

¹⁵⁹ For an overview of the EU Pledge commitments see *supra* 2.2.1.

¹⁶⁰ Mindshare examined all TV commercials for food and beverages that were broadcast during the first quarter of 2015.

2015 show that there is a global conformity with the Belgian Pledge for TV commercials of 99.4%, for schools 97.5% and for websites 100% conformity. However, NEYENS and SMITS, who conducted a study of Belgian and Dutch child-targeting food and beverage websites, are critical of the Belgian Pledge.¹⁶¹ First of all, as mentioned above, the study revealed that only few Belgian and Dutch food brands have actually signed the pledge. Second, the nutrient profile of the foods and beverages that were promoted online did not differ significantly between pledge member and non-member websites, nor did the use of marketing techniques.¹⁶² Finally, the study showed that child-protection tools such as age-screening and advertising warnings are rarely or never used. The presence of such tools are taken into account in the Pledge compliance assessment by the national SROs, as an indicator of the accessibility of a certain website or mobile application for a child.

A.2 Alcohol

COVENANT CONCERNING ADVERTISING FOR AND MARKETING OF ALCOHOLIC BEVERAGES. Another self-regulatory instrument which the JEP takes into account in its decision-making is the Covenant concerning alcohol advertising and marketing. This Covenant existed since 2005 but was reviewed in 2013 and signed by the alcohol industry, the advertisement industry, consumer organisations, as well as the hotel, restaurant and café confederations. The preamble of the Covenant highlights that there is international, European, Belgian and regional legislation that supports the provisions of the Covenant (i.e. sanctions).¹⁶³ The provisions of the Covenant need to be interpreted in light of those legal provisions. In turn, the Covenant complements existing legislation. The signatories to the Covenant may consult the JEP on a voluntary basis, prior to the roll-out of an advertisement, if they have doubts concerning the conformity of the ad with the provisions of the Covenant.¹⁶⁴

I. SCOPE

ADVERTISING AND MINORS. According to Article 1 of the Covenant, **advertising** is understood as “any type of communication which directly or indirectly aims at improving the sale of alcoholic beverages¹⁶⁵, regardless of the place or means of communication”.

II. ALL FORMATS

➤ PRINCIPLES REGARDING CHILDREN AND COMMERCIAL COMMUNICATION

As a general rule,

¹⁶¹ The researchers used a different nutrition model for their research, which could potentially explain some of the differences. See E. NEYENS and T. SMITS (2016). Empty pledges: a content analysis of Belgian and Dutch child-targeting food websites. *International Journal of Health Promotion and Education*.

¹⁶² Their sample included thirty-nine branded websites, six company websites, and four action sites, of which only 15 food brands (30.6%) were members of the pledge.

¹⁶³ United Nations Convention on the Rights of the Child; AVMS Directive; Unfair Commercial Practices Directive; the Flemish Broadcasting Decree.

¹⁶⁴ Advertisers have to follow the procedure defined by Article 13 of the Regulations of the JEP.

¹⁶⁵ Alcoholic beverages are defined as beverages with an alcohol percentage of more than 0.5 percent per volume (Article 1.2).

advertising shall not be targeted at minors, nor by its content nor by the means of communication (Article 2).

This general prohibition is applicable to all media, including for instance advergames.¹⁶⁶ In addition there are a number of restrictions on the **form and content** of advertising of alcoholic beverages. More in particular, such advertising cannot:

- ✘ portray minors or persons that look underage (Article 4.2);
- ✘ present the consumption of alcoholic beverages as a symbol of maturity and the non-consumption as a symbol of immaturity (Article 4.3);
- ✘ encourage minors to buying alcoholic beverages by taking advantage of their lack of information, inexperience or incredulity (Article 4.4);
- ✘ make use of drawings or marketing techniques that refer to characters that are particularly popular or in fashion with minors, as well as drawings or marketing techniques in which images or statements appear that are mostly part of minors' culture (Article 4.5)¹⁶⁷;
- ✘ encourage minors to convince their parents or others into buying the alcoholic beverages that are advertised (Article 4.6);
- ✘ exploit the special trust minors have in their parents, teachers or counsellors (Article 4.7);
- ✘ portray alcoholic beverages as a means to cope with dangerous situations (Article 4.8).

Finally, the Covenant includes certain rules regarding the **location and timing** of the ads. Article 11.2 defines that advertising for alcoholic beverages is prohibited in the following instances:

- ✘ between a period that begins 5 minutes before and 5 minutes after a broadcast targeted at an audience that consists of minors;
- ✘ in newspapers and magazines that are primarily targeted at an audience that consists of minors;
- ✘ during the screening in the cinema of a movie that is primarily targeted at an audience that consists of minors;
- ✘ in digital media primarily targeted at an audience that consists of minors.

¹⁶⁶ JEP (2013). Covenant concerning advertising for and marketing of alcoholic beverages, 22. Accessed at http://www.jep.be/sites/default/files/rule_recommmendation/alcoholconvenant_nl_2013.pdf on 17.10.2016.

¹⁶⁷ An example of a case before the JEP concerning non-compliance with the provisions of the Covenant is the case of supermarket Delhaize of 2013.¹⁶⁷ The supermarket published a folder containing several images of characters from DreamWorks-movies such as Shrek, Puss in Boots, Kung Fu Panda and others. According to the complainant, the folder promoted an action aimed at children to collect as many cards of DreamWorks as possible and among the participating products were beer brands Hoegaarden and Jupiler. The JEP decided that the ad was not conform with Article 4.5 of the Covenant, which states that advertisements cannot make use of drawings or marketing techniques that refer to characters that are particularly popular or in fashion with minors. Accordingly, it demanded the advertiser to stop or adjust the advertisement on this point. The advertiser did not appeal the decision and confirmed to respect it. See <http://www.jep.be/nl/beslissingen-van-de-jep/delhaize-19082013>.

EDUCATIONAL SLOGAN. The Covenant also requires advertisers to add an educational slogan to all advertisements for alcoholic beverages. Depending on the beverage advertised, the advertisements should mention “*taste our know-how carefully*”¹⁶⁸ or “*beer brewed carefully, consumed with care*”¹⁶⁹. Furthermore, Annex B of the Covenant contains certain requirements for the form of the slogan (i.e. location, font, colour). In relation to digital media, there is only a general requirement that the slogan should be mentioned clearly and legibly.

WEBSITES DEVOTED TO THE PROMOTION OF ALCOHOLIC BEVERAGES. Finally, the signatories that have a website devoted to the promotion of alcoholic beverages commit to provide internet users with a message warning them that the content of the website is not appropriate for people under the age of 18, prior upon the actual accessing of the website.

III. COMPLAINT MECHANISMS

COMPLAINTS AND SANCTIONS. Any natural or legal person that does not pursue a commercial interest may file a complaint with the JEP on the basis of this Covenant (Article 13.1). All signatories commit themselves to respect the decisions of the JEP and act upon them. In case the advertiser is a recidivist or if he/she does not respect a decision of the JEP, the advertiser will be asked systematically for a prior investigation of his/her future campaigns by the JEP, and this for a period of minimum 12 months. The advice of the JEP in this context would be binding. Aside from this, the complainants can also bring an action based on Article 110 of the Law on Market Practices and Consumer Protection¹⁷⁰ before the courts.

A.3 Cosmetics

I. ALL FORMATS

➤ PRINCIPLES REGARDING CHILDREN AND COMMERCIAL COMMUNICATION

CODE ON ADVERTISING AND MARKETING COMMUNICATION FOR COSMETIC PRODUCTS. Another self-regulatory instrument that the JEP bases its decisions on is the Code for cosmetics advertising.¹⁷¹ The Code contains both general provisions on the honesty of marketing and social responsibility as well as more specific provisions on health claims, the composition and manufacturing of products, labels and disclaimers. Moreover, the provisions on social responsibility foresee in additional protection for children as a vulnerable group of society. Indeed, the cosmetics industry commits to only target

¹⁶⁸ Ons vakmanschap drink je met verstand / Notre savoir-faire se déguste avec sagesse.

¹⁶⁹ Bier met liefde gebrouwen, drink je met verstand / Une bière brassée avec savoir se déguste avec sagesse.

¹⁷⁰ For a detailed discussion of this law, see the Belgian Country Report in V. VERDOODT, E. LIEVENS and L. HELLEMANS (2015). Mapping and analysis of the current legal framework of commercial communication aimed at minors. Accessed at www.adlit.be/output on 16.10.2016.

¹⁷¹ JEP (2015). Code on advertising and marketing communication for cosmetics. Accessed at http://www.jep.be/sites/default/files/rule_reccommendation/cosmeticacode_nl_september20151_0.pdf on 21.06.2016.

children and youngsters with socially responsible advertising and marketing communication. Companies are allowed to advertise cosmetic products that are developed especially for children, if:

- ✓ the advertisement points out the benefits for hygiene and health of cosmetic products, in particular sun care, dental care and body cleansing products (including soap, shampoo, and anti-acne products for adolescents);
- ✓ the advertisement for perfumes and decorative cosmetic products does not encourage children to excessively use of such products;
- ✓ the advertisement for cosmetic products, including images, does not contribute to the early sexualisation of youngsters.

A.4 Games of chance

PRINCIPLES REGARDING CHILDREN AND COMMERCIAL COMMUNICATION

Finally, the JEP also monitors the ethical code of the National Lottery.¹⁷² In the context of children and commercial communication, Article XIV provides that:

“Advertising, communication and promotional activities for games of chance of the National Lottery may not encourage minors to play or let it appear that minors may participate, and may not be directed towards minors or use players in advertising that appear to be minors and are participating in a game of chance.”

4.1.4 Recommendations of the JEP

A. On the representation of the human being in advertisements

The JEP has issued a recommendation on the **representation of the man, woman or child** in advertisements (first version published in 1976, reviewed in 2002). The recommendations of the reviewed version build on the principles of the ICC Code.¹⁷³

¹⁷² National Lottery, Code for Ethical and Responsible Advertising of the National Lottery, retrieved from http://www.jep.be/sites/default/files/rule_recommandation/code_voor_ethische_reclame_nationale_loterij_nl.pdf on 08.12.2016.

¹⁷³ JEP (2002). Recommendation on the representation of the man, woman or child in advertisements. Accessed at http://www.jep.be/sites/default/files/rule_recommandation/a.voorstelling_van_de_persoon_jep_1976_2002.pdf on 20.06.2016.

| ICC Code | Recommendations of the JEP |
|---|--|
| Article 2 - Decency | <ul style="list-style-type: none"> ✓ Avoid that advertisements discredit human beings or in an improper way exploit them by spreading an image that damages his/her dignity and is contrary to decency, which provokes and shocks the public. Attention should be paid to both the tone of the advertisement as well as the visuals. <p>The representation of the human body (parts) may not be indecent or obscene. One should be particularly cautious when the representation does not relate to the product and its objective or subjective characteristics. If nudity is used in advertising, one should ensure in particular that this is not perceived as humiliating or degrading.</p> |
| Article 4, para 1 - Discrimination | <ul style="list-style-type: none"> ✓ Avoid that contempt, mistrust or mockery is caused, regardless of which ethnic, social, professional, national or economic category a person belongs to. ✓ Avoid that negative comparisons based on sex, age, race, nationality, social or professional status are encouraged, developed or exploited. Advertising should not misjudge the abilities, desires and the role of the different human and social groups. ✓ Avoid beliefs on the inferiority or superiority of a person vis-à-vis the social group he belongs to. <p>Avoid the encouraging of feelings or certain behavior that lead to ostracism, intolerance or racism.</p> |
| Article 4 para 3 - Violence | <ul style="list-style-type: none"> ✓ Avoid the use of gratuitous violence, either directly or suggested, and any incitement to violence, both morally and physically. The concept of violence includes at least all the illegal, unlawful and reprehensible acts as foreseen by the law. <ul style="list-style-type: none"> ○ Direct violence: an image of the act of violence itself ○ Suggested violence: the atmosphere or context caused by an act of violence <p>Under no circumstances should one trivialise violence by claims or representations in advertisements.</p> |

Table 9: Recommendations of the JEP on the representation of the human being in advertisements (Source: http://www.jep.be/sites/default/files/rule_reccommendation/a.voorstelling_van_de_persoon_jep_1976_2002.pdf)

Finally, the JEP also highlights that its recommendations should be taken into account in particular when stereotypes are used that use characteristics of certain social or ethnic groups. Moreover, one should avoid suggesting dependency and subjugation, which affects the human dignity.

B. On ads for children's celebrations ("*Sinterklaas*", Christmas and Easter)

COUNCIL FOR CONSUMPTION. The JEP also takes into account the quantitative requirements for advertising children's celebrations, as recommended by the Council for Consumption ("Raad voor het Verbruik"), an advisory body composed of members representing consumer organisations and members representing production-, distribution organisations and the middle class. The Council has formulated recommendations in its opinion of 27 June 2000 that lay down the periods in which children's celebrations (i.e. *Sinterklaas*, Christmas and Easter) may be advertised.¹⁷⁴

NO PREMATURE ADVERTISEMENTS OR PROMOTIONS. The Council urges professionals not to start their promotional or advertising campaigns before the first of November for *Sinterklaas* and Christmas and before a period of six weeks prior to Easter. The promotions that use the physical presence of Santa Claus may not begin before the first of December.

SCOPE. These requirements are applicable to the following advertisements and promotions:

- promotions that use the physical presence of *Sinterklaas*, Santa Claus or the Easter bunny;
- advertisements that are made public via posters, folders, the press, audiovisual media and emails which:
 - are clearly intended for children from kindergarten or primary school;
 - directly refer to the *Sinterklaas*, Christmas and Easter celebrations;
 - are not requested by children.

4.1.5 Decisions of the JEP

Our analysis of an inventory of decisions from the JEP¹⁷⁵ has shown that although there are several cases involving new advertising formats (e.g. internet banners¹⁷⁶, Facebook pages and events), almost all cases are related to the content of the ad, regardless of the format¹⁷⁷. More specifically, the majority of the cases concerned breaches of the rules on alcohol advertising (e.g. no age

¹⁷⁴ COUNCIL FOR CONSUMPTION (2000). Advertising for children's parties (*Sinterklaas*, Christmas, Easter). Retrieved from http://www.jep.be/sites/default/files/rule_recommendation/kinderfeesten_nl.pdf on 21.06.2016.

¹⁷⁵ The inventory was developed as follows: first of all, a search through the JEP's database using filters 'Internet' as type of media and 'child' as keyword resulted in 37 cases, of which 7 actually dealt with children and new advertising formats (i.e. the commercial communication was aimed at children). Second, a search using 'Internet' as type of media and 'minor' as keyword resulted in 26 hits, of which 5 were new and relevant for the case law inventory.

¹⁷⁶ AB INBEV - 5/08/2009, accessed at <http://www.jep.be/nl/beslissingen-van-de-jep/ab-inbev-05082009> on 21.10.2016.

¹⁷⁷ One case dealt with the use of drawings or characters popular with minors: DELHAIZE - 19/08/13, accessed at <http://www.jep.be/nl/beslissingen-van-de-jep/delhaize-19082013> on 21.10.2016.

warning¹⁷⁸, no educational slogans¹⁷⁹). Hence, from these decisions, it is difficult to deduct further guidelines on how to implement certain general principles (e.g. the identification requirement) or mechanisms (e.g. age verification) with regard to new, digital advertising formats.

4.1.6 Conclusion

The JEP is the Belgian self-regulatory body competent to deal with complaints against new advertising formats. The JEP has an extensive array of rules at its disposal on which decisions may be based, (1) legislation, on the one hand and (2) the self-regulatory codes, both general and thematic, on the other hand. Although several cases deal with new advertising formats, the content of the ad is at issue, rather than the means of delivery of the ad. Furthermore, decisions in relation to advertising targeted at minors are scarce.

¹⁷⁸ BOCKOR BROUWERIJ - 05/08/2010, accessed at <http://www.jep.be/nl/beslissingen-van-de-jep/bockor-brouwerij-05082010>; 21.10.2016.

¹⁷⁹ SALITO BEACH – HAVANA DISTRIBUTION - 7/07/16, accessed at <http://www.jep.be/nl/beslissingen-van-de-jep/salito-beach-havana-distribution-07072016> on 21.10.2016.

4.2 The Netherlands

4.2.1 General codes

A. Dutch Advertising Code

The Advertising Code Foundation (hereafter “ACF”, or in Dutch the ‘*Stichting Reclame Code*’) is an independent private organisation financed by advertisers, which enables cooperation and communication between advertisers, media-institutions, communication services and the Consumers Association in the Netherlands.¹⁸⁰

PURPOSE. The main purpose of the ACF is to facilitate responsible commercial communications, especially when they are aimed at minors. All forms of advertising thus need to comply with the rules set by the regulatory body of the Dutch Advertising Code, including its format- and sector-specific codes. In particular, it includes a code specifically regulating commercial communication aimed at minors (i.e. the Code for Advertising directed at Children and Young People), which will be discussed as an individual general code due to its size and content.

SUPRANATIONAL. The ACF participates in the frameworks of the European Advertising Standards Alliance (“EASA”), where they are currently developing global activities, as well as in the European Interactive Digital Advertising Alliance (“EDAA”).¹⁸¹

COMPLAINTS. The ACF is also the organisation behind the Advertising Code Commission (hereafter “ACC”), which encourages advertisers to create responsible commercials to improve and maintain consumer trust. The Commission is an independent body that handles all complaints against advertisements that do not comply with the Dutch Advertising Code (see infra D).

DUTCH ADVERTISING CODE. All forms of commercial communication, regardless of medium, have to comply with the rules of the Dutch Advertising Code (hereafter “DAC”). In essence, advertisements cannot mislead nor violate statutory provisions, the truth, 'good taste' and decency. These rules are inspired on the ICC Code and have been drafted after thorough consultation of the various actors in the advertising sector: advertisers, communications consultants and media.

A1. Scope

SCOPE. Article 1 of the Dutch Advertising Code defines the commercial communications it applies to as:

¹⁸⁰ For more information about the ACF and its structure visit their website at: <https://www.reclamecode.nl/adverteerder/default.asp?paginaID=1&hID=1> (accessed on: 31st of August, 2016). and read infra, section D on their internal structure as well as their cooperation agreements with other media-organisations.

¹⁸¹ For more information on their activities on a supranational and international level, visit their website at: <https://www.reclamecode.nl/consument/default.asp?paginaID=167&hID=102> (accessed on: 31st of August, 2016).

“Every public and/or systematic, direct or indirect, promotion of goods, services and/or views, in the sole or partial benefit of the advertiser, with or without assistance of third parties.”

The DAC thus applies to **all forms and sectors of commercial communication and to all consumers, including adults and minors**. The ACF also created a list of specific forms of commercial communication that fall under the code, such as **teleshopping, telemarketing, sponsorship, product placement, packaging, etiquettes, direct marketing and 'buzz marketing'**¹⁸². It also stresses the exclusion of personalized individual ('one-on-one') sales by explicitly using the words public and/or systematic promotion. Mere announcements and communications without any promotional value or intention are also excluded. The qualification of this promotional value is based on a global assessment that not only includes text, but also factors such as size, lay-out, colours and so on. The ACF states that even merely presenting the name of the advertiser can constitute an advertisement, as is often the case with sponsorships. In the end, the ACF adds that it makes no difference for the public whether or not the advertisement took place on the basis of a fee.

CHILDREN AND YOUNG PEOPLE. All provisions of the DAC automatically apply to minors, but the ACF has developed a code for Advertisements directed at Children and Young People with additional rules for advertisements that are at least partially directed at minors. This specific code will be discussed as a separate general code given its particular relevance for this report (see chapter 4.1.2).

A.2 All formats

I. GENERAL PRINCIPLES

BASIC PRINCIPLES. Article 2 of the DAC stipulates that

“in essence, advertisements should not mislead nor violate statutory provisions, the truth, 'good taste' and decency.”

The meaning of the basic principles stipulated in this article needs to be interpreted in view of the provisions of the Audiovisual Media Services Directive (although they are also applicable to other advertising formats than audiovisual commercial communication), meaning that advertisements cannot affect 'human dignity', nor contain or promote any form of discrimination based on sex, race or ethnical origin, nationality, religion or belief, disability, age or sexual orientation.¹⁸³ Other general principles in the Code include prohibitions of 'violating public interest, public order and morality' (article 3), 'unnecessary offensiveness' (article 4), 'harmfulness to trust in advertising' (article 5), 'appealing to fear or superstition' (article 6), 'unfair, misleading or aggressive advertising' (articles 7,

¹⁸² Buzz marketing is a marketing strategy in which people/legal entities are paid to create a “buzz” around a product or service in their social relations, even when those products or services are not yet for sale or available. For more information read the following article (in Dutch): http://www.marketingfacts.nl/berichten/buzz_verslaat_gewone_reclame (accessed on: 22/11/2016)

¹⁸³ V. Verdoodt, E. Lievens, L. Hellemans (2015). Mapping and analysis of the current legal framework on commercial communication aimed at minors. Accessed at www.adlit.be on 10.10.2016.

8 and 14 respectively) and identification (article 11). The application of these general principles to commercial communication aimed at children will be illustrated below.

A3. Format-specific

CUMULATIVE REQUIREMENTS. Any format-specific rules are provided for by separate codes, which need to be read in conjunction with the general principles of the DAC and/or of the Code for Advertising directed at Children and Young People, often explicitly referred to in these specific codes. When the advertising is directed at minors, these provisions need to be fulfilled cumulatively. For this reason, the following chapters on the Code for Children will also expand on these format-specific provisions (section 4.1.2).

A4. Complaint mechanisms

ADVERTISING CODE COMMISSION. According to [Article 19](#), complaints may be filed with the independent body of the Advertising Code Commission by anyone who feels that specific advertisements are non-compliant.¹⁸⁴ Both the Commission and its Appeals College consist of 5 representatives, one of each of the following stakeholders: advertisers, communications consultants, participating media organisations, consumers and finally a chairman with legal qualifications. The complaint mechanism is the same for violations of any provisions of either the general DAC as for any of the provisions of the format- or sector-specific codes, or any combination thereof, including the provisions of the code related to minors as will be discussed below. A complaint filed by a consumer is essentially free, whereas the complaint by a professional party could still be subject to certain costs.¹⁸⁵

COMMISSION RECOMMENDATIONS. When the Commission finds the advertisement to be unsuitable in a recommendation, the advertiser has the option to either adapt it or to stop its distribution. Filing an appeal is possible with the College of Appeal, which consists of the same stakeholders as the Commission. The ACF has found that some 96% of advertisers comply with these recommendations. Those who refuse to comply, are put on an **online non-compliance list**¹⁸⁶, open for consultation by supervisory authorities (see *infra*). If the Commission deems it necessary due to the sensitive nature of the advertisement to increase awareness of the ad's unsuitability, the Commission can also send out an "ALERT". This means that the ACF will make sure that the recommendation will be brought to the public's attention by way of an official press release.¹⁸⁷

¹⁸⁴ On how to file a complaint: <https://www.reclamecode.nl/consument/default.asp?paginaID=72&hID=2> (accessed on: 25th of August 2016).

¹⁸⁵ See for more information on the costs relating to filing a complaint: <https://www.reclamecode.nl/nrc/pagina.asp?paginaID=248%20&deel=1#kostenconsumenten> (accessed on: 29th of August, 2016).

¹⁸⁶ See the non-compliance list on: <https://www.reclamecode.nl/adverteerder/default.asp?paginaID=92&hID=3> (accessed on: 25th of August 2016).

¹⁸⁷ See for an example of an alert published on the 20th of June, 2016: <https://www.reclamecode.nl/consument/default.asp?nieuwsID=537&terugURL=%2Farchiefnieuwsberichten%2Easp%3FhID%3D7> (accessed on: 29th of August, 2016).

THE INTERMEDIARY ROLE OF THE ACF AND ITS COMMISSION. In accordance with the Dutch Media law, all organisations that provide radio or audiovisual commercial communications¹⁸⁸ have to be registered at and subscribed with the ACF.¹⁸⁹ This means that the Commission has the competence to make reservations or impose conditions on them, to request them to stop specific broadcasts or distributions, or it can call upon the competences of a supervising authority. For supervision of the general codes, the ACF has **cooperation agreements** with both the Consumer Authority and the Media Commissariat, and for sector-specific supervision the ACF has a cooperation agreement relating to food, financial services and games of chance.¹⁹⁰

COOPERATION WITH THE CONSUMER AUTHORITY. Where the Commission does not have any competence to impose fines or damages, but only to draft recommendations on the commercial communications at stake, it does have a cooperation agreement with the Consumer Authority when collective damage to consumers occurs. This cooperation constitutes a mutually beneficial relationship where the Consumer Authority can rely on the expertise and swift procedures of the Commission and the Commission can rely on the Authority to use their legal competences when enforcement is required.¹⁹¹

COOPERATION WITH THE MEDIA COMMISSARIAT. Aside from the consumer authority, the ACF also has close relationships with the Media Commissariat. The Commissariat is an independent body installed by the government to function as a supervising authority of media-players. To effectively fulfil this position, the Commissariat has been given a range of enforcement competences, including private hearings, revoking licenses and even imposing fines. The Commissariat can take the measures they deem appropriate when called upon by the Commission to take action against a traditional media player, should the specific nature of a case demand it.¹⁹²

B. Code for Advertising directed at Children and Young People

SPECIAL CODE FOR THE PROTECTION OF MINORS. Aside from a general code for advertising, the ACF considered it beneficial for minors to create a code that was specifically designed for advertising aimed at this specific target group. The Code for Advertising directed at Children and Young People

¹⁸⁸ The ACF clarifies that the Media Act limits the scope of this obligation to “Providers of radio-broadcasting and audiovisual mediaservices” Defining an audiovisual mediaservice as “either linear or non-linear: traditional linear services and television-on-demand”. For more information visit: <https://www.reclamecode.nl/adverteerder/default.asp?paginaID=128&hID=1> (accessed on: 27/11/2016).

¹⁸⁹ But see for the whole list of relevant media organisations involved: <https://www.reclamecode.nl/adverteerder/default.asp?paginaID=21&hID=1> (accessed on 31st of August, 2016)

¹⁹⁰ <https://www.reclamecode.nl/adverteerder/default.asp?paginaID=25&hID=1> (accessed on 31st of August, 2016).

¹⁹¹ For more information about this cooperation see their agreement (in Dutch) on: https://www.reclamecode.nl/bijlagen/11-7-2011_13_46_12.PDF (accessed on: 31st of August, 2016)

¹⁹² For more information on the tasks and competences of the Media Commissariat, see: <http://www.cvdm.nl/over-het-commissariaat-voor-de-media/bevoegdheden/#> (accessed on: 31st of August, 2016)

came into effect on the 1st of November 2013 and lays down a clear set of rules for advertisers (hereafter “the Code”).

B1. Scope

MINORS. The preamble to the Code makes a distinction between children on the one hand and young people on the other hand. In the Code, ‘**Children**’ are defined as people under the age of 13, whereas ‘**Young people**’ are considered minors, meaning under the age of 18. Advertising that is considered suitable for young people, may not always be suitable for children. However, **Article 2** states that where the AVMS-Directive¹⁹³ overlap with the basic principles of the Code, “children” must be interpreted as “minors”.

ADVERTISING AIMED AT MINORS. Advertising that is **at least partially aimed at minors** will be considered to fall under the scope of these specific rules. The scope is further defined per format and sector to better correspond with reality.

B2. All formats

I. GENERAL PRINCIPLES

MISLEADING ADVERTISING. **Article 1** of the Code clearly stipulates that any advertisement aimed at children, cannot contain any words, sounds or images that may potentially mislead children about the possibilities and characteristics of the promoted product. The assessment of misleading must take into account the comprehension and expectations of children, especially with regards to the fun, size and performance of the product.

MORAL OR PHYSICAL DAMAGE. **Article 2** then continues to specify four particular cases in which advertising is considered harmful for children (see *supra*: interpret children as minors in cases where the provisions of the code overlap with the provisions of the AVMS-Directive, specifically article 9 (g)):

- ✘ they must not encourage the purchase of a particular product by exploiting their inexperience or credulity;
- ✘ they must not directly encourage children to persuade their parents or others to purchase promoted products;
- ✘ they shall not exploit the special trust children have in parents, teachers or others;
- ✘ it may not depict children in dangerous situations.

PEERS. **Article 3** adds the principle that advertisers should not suggest that their promoted products will give children a physical or social benefit over their peers, nor suggest the opposite effect. For example they cannot imply that buying their shoes will make children look ‘cool’ among peers.

¹⁹³ For a more detailed discussion of this instrument, see V. VERDOODT, E. LIEVENS and L. HELLEMANS (2015). Mapping and analysis of the current legal framework of commercial communication aimed at minors. Accessed at www.adlit.be/output on 16.10.2016.

II. PRINCIPLES REGARDING DATA PROTECTION AND PRIVACY

PERSONAL DATA. **Article 12** of the Code clearly stipulates that the advertiser should use all means available to inform the minor and/or the guardian about the purposes of the collected data. When data is consciously used for commercial purposes aimed at minors, the information relating to it should be clear, easily accessible and comprehensible for a child. The article then continues to clarify that if specific data protection legislation requires children under the age of 16 to explicitly consent, that the consent should come from their guardian.

B3. Format-specific

I. PRINT

(YOUTH-)MAGAZINES AND OTHER PRINTED MEDIA. **Article 4** implements the identification principle by stipulating that when printed media reaches an audience that consists of children for 25% or more, every advertisement therein needs to have the word “advertisement” above it in 12pt font-size. The audience measurement needs to be done according to a generally accepted methodology in the sector.

HARMFULNESS TO CHILDREN. **Article 8** of the Code adds that it is unlawful to send advertising, unaddressed or specifically addressed to children, which can reasonably be assumed to be harmful to their mental health.

II. RADIO AND TELEVISION

IDENTIFICATION PRINCIPLE. There are several provisions that relate to advertising through audiovisual media, such as radio and television. Starting with a general **article 4b**, which refers to the principle of identification in article 11 of the DAC. Advertising on radio or television needs to be clearly distinct from the rest of the programme by using optic, virtual and/or acoustic means, fitting the comprehensive abilities of children. It was previously shown that the subjective perception of the audience is important in the concrete assessment by the Commission (see supra chapter 4.1.1 section B).

DISTANCE CONTRACTS. The Code makes a distinction between teleshopping and other ways of entering into contracts through communication media, also referred to as ‘distance contracts’. Teleshopping is defined in the preamble as marketing and sales through a TV channel, whereas distance contracts can also occur through radio, telephony, or the internet. Both have their own separate article in the Code as to what they can and cannot do in regards to children.

When providing advertising by way of **teleshopping**, **Article 10** explicitly mentions that advertisers cannot encourage children to enter into sales or rental contracts. **Article 9** on the broader category of **distance contracts** is more flexible. It tells the advertiser to urge children to get permission from their parents or guardian(s) before entering into any contracts. Consequently, the advertiser needs to take all precautions necessary to be able to reasonably assume that such a permission was in fact given.

INFLUENTIAL INDIVIDUALS. A very important provision of the Code is the [Article 11](#) prohibition on hiring certain individuals to promote products, when they can be assumed to have some form of influence over or to instil some kind of trust with children, by virtue of their participation in other audiovisual programmes.

III. INTERNET

RANGE OF FORMATS. The internet is a large category that consists of several different formats that require specific provisions due to their specific characteristics. The formats discussed mainly by [Article 5](#) of the Code are **banners and pop-ups, hyperlinks, social media platforms, virtual worlds and finally (in-) game advertising**. Due to its specific nature, the format of e-mail will be discussed as a separate format, rather than in the context of the internet.

BANNERS/POP-UPS. When a website uses banners or pop-ups for commercial advertising directed at children, the identification principle requires the ad to provide the word “commercial” or “advertising”, clear and visible at a single glance. The article does make an exception for advertisements that are smaller than 150x50 pixels. For such ads, the word can be abbreviated as “adv.” For the purpose of clarity, the article adds that the same rules apply for ads in a social media context (more on this infra).

HYPERLINKS. When the abovementioned type of advertisement also contains a hyperlink, connecting the ad to another webpage when clicked on, that connected page should evidently also comply to all provisions of this Code.

VIRTUAL WORLD. Examples of virtual worlds are Second Life, Habbo and World of Warcraft. When these environments are also used by children, any form of advertising therein should again comply to all previous rules, with special attention to its identification in relation to children’s subjective perception.

(IN-)GAME ADVERTISING. The difference with the previous paragraph is that (part of) the game itself is the advertisement and as such, the game should make it very clear that the game is a form of advertisement. The article stresses that when the game is intended to be played by children, the game should unambiguously and in a way fitting for a child’s subjective perception, inform the child of the advertiser’s identity and of the nature of the game (or the advertising part thereof).

SOCIAL MEDIA AND THE SOCIAL MEDIA CODE. The same article 5 adds that advertisements in a social media context, other than through banners and pop-up ads, should be identifiable as such, e.g. by optic, virtual or acoustic means. The identification as an ad should also take into account children’s subjective perception when the social media platform is also used by them. Additionally, social media has its own set of rules due to its specific nature and characteristics. It can provide and use advertisements in a different way, which is not necessarily included or implied in other provisions. For that reason, the ACF has drafted a separate code for advertising in a social media context, the Social Media Code (SMC). The SMC states that it is not allowed to encourage children under the age of 13, to promote products or services on a social media network (Article 5). This promotion needs to be understood broadly so as to include for example children “liking” a Facebook page in return for

certain benefits (such as obtaining free products, discounts or entering into competitions to obtain prizes).

IV. E-MAIL

EMAIL CODE. In 2012, the ACF drafted a specific code for advertising through e-mail communication. It is very clear in its demand that the advertiser should have certainty that the recipient either gave his permission to receive such a communication, or if the recipient is a client of the advertiser through a previous similar transaction ([Article 1.3](#)). The advertisement should again be identifiable as such. The article elaborates that the identification needs to be derived from a combination of the identification of the sender (e-mail address of the sender) and the subject of the mail ([Article 2.1 and 2.3](#)).

EMAIL ADVERTISING DIRECTED AT CHILDREN. Additionally, when the e-mail is directed at a child every advertisement should again clearly be provided with the word “commercial” or “advertisement”, or abbreviated as “adv.” when the ad is no bigger than 150x50 pixels. When the entire e-mail constitutes the advertisement, then the word should be presented prior to the body of the mail ([Article 6](#) of the Code).

V. TEXT-MESSAGING

Similar to the previous paragraphs, any advertisement sent to a child by way of a text-message should contain the abbreviated word “adv.” prior to the body of the text-message in a clear and noticeable manner ([Article 7](#)).

VI. TELEPHONE SERVICES

EROTIC PHONE SERVICES. [Article 13](#) of the Code is specifically dedicated to phone services that involve erotic or pornographic services or that refers to such services, either explicitly or implied. Minors cannot be directly or indirectly encouraged to use these services, nor should these services make any reference to minors.

TELEMARKETING. [Article 14](#) finally refers to the scenario of telemarketing, which is defined by the code as making planned and systematic unrequested calls to consumers to promote goods, services or certain views. This includes the request of services. Again, the ACF thought it necessary to create a separate code for this form of commercial communication, called the Telemarketing Code. [Article 9](#) of the Telemarketing Code mentions that the telemarketer is not allowed to present an offer to a consumer of which he could reasonably know that they were still under-age.

4.2.2 Sector-specific codes

A. Food

SELF-REGULATION AND THE EU PLEDGE. In light of the EU Pledge, the Dutch food sector drafted specific rules for food advertising aimed at children, codified as the Code for Food Advertising (hereafter “CFA”).

12 AND UNDER. The CFA specifies that no advertising may be aimed directly at children under 13, nor can these children constitute at least 25% of the audience reached by their advertisements. Packaging and in-store advertising are exempted from such a prohibition however. This age requirement was moved up from 7 years old to 12 years old in 2015.¹⁹⁴

DIETARY CONDITIONS. If advertisers want to reach an audience of children between the ages of 7 and 12 with their food advertisements, they can only do so after providing evidence of compliance with very strict dietary conditions based on the amounts of calories, saturated fats, salt and sugar present in these products. Exceptions can, for example, be made for certain light-products, fruits or vegetables. These conditions correspond to the criteria agreed upon in the framework of the EU Pledge.¹⁹⁵

OFFICIAL CAMPAIGNS. Another exception to the age rule is when the advertisements were created through cooperation with the government or other recognised authorities in the framework of food, health or exercise campaigns.

PROGRAMME-RELATED AND BRANDED FOODS. The code also contains a very specific rule on advertising products that are directly associated with audiovisual programmes aimed specifically at children. Such products cannot be promoted in advertising blocks that directly follow or interrupt the broadcast of such audiovisual programmes.

IDOLS. For the same reason as the previous paragraph, ads are also not allowed to use individuals that could be considered idols in the perception of children to actively promote certain foods.

PEERS. Finally, the CAF stresses that no ad for a food product can give the impression that consuming the product will give these children an increase in status or popularity among peers in comparison to the consumption of other food products.

B. Medical Goods

THE CODES ON ADVERTISING PHARMACEUTICAL PRODUCTS AND MEDICAL SELF-CARE PRODUCTS. Together with the provisions of the Code, the ACF designed specific codes regarding medical goods. It makes a distinction between pharmaceuticals on the one hand, and all kinds of medical aid/tools on the other hand, but the content of the provision is in fact identical. **Articles 22** of both the code of Advertising Pharmaceutical products (the CPG of 2015) and the code of Advertising for Medical self-care products (the CMH) indicate that advertising should never be exclusively or mainly directed at children. The ACF clarifies that by 'children' is meant every minor under the age of 13. Advertising

¹⁹⁴ For more information on why scholars consider that the regulatory changes in 2015 helped protect minors against advertising of unhealthy foods (and alcohol), please read: Hoogenraad, E. and Duivenvoorde, B., "The Netherlands: Stricter Rules on Food Advertising Directed at Children in the Netherlands" in *European Food and Feed Law Review* (EFFL), 2015, Vol.10(1), p.54-56

¹⁹⁵ For more details on these conditions see the White paper of the EU Pledge: http://www.eu-pledge.eu/sites/eu-pledge.eu/files/releases/EU_Pledge_Nutrition_White_Paper_Nov_2012.pdf (accessed on: 31st of August, 2016)

directed at teenagers (13 and up) is therefore not a problem as such, as long as the ad complies with the other provisions of the Code of Advertising Directed at Children and Young People (see supra). The ACF requires those ads to directly target parents/guardians, rather than indirectly by using children to persuade their parents/guardians.

C. Games of Chance

THE CODE ON GAMES OF CHANCE. The provisions of the Code on Games of Chance as regards children are fairly elaborate and the amount of recommendations ruled by the Commission show the sensitivity of the subject. The Code on Games of Chance starts with the requirement of the advertisers to be in possession of a Dutch license to provide games of chance within the Netherlands. The second basic requirement is to clearly indicate the legal minimum age of 18 to participate in games of chance. This means that advertising, regardless by which format, is not allowed to be directed at minors. Due to the amount of cases, the Commission has been able to give more accurate recommendations in regards to these communications.

AIMED AT MINORS. This way it has added that when a game of chance is advertised through a website, the advertiser should give the necessary information about the prohibition of participation by minors.

DEPICTION OF MINORS IN ADVERTISING. To decide whether or not advertisements are directed at children, it has also been added that the advertisement should not needlessly depict people that could be perceived as a minor. Aside from the prohibition to directly aim their advertising at minors, the Code equally prohibits licensed providers of certain services of games of chance (such as e.g. a casino) to target an audience between the ages of 18 and 24 (Article 6 (10) with references to the licensed services therein). Depiction of minors in an ad for games of chance is only allowed when the games of chance are in fact provided and/or performed by minors (such as a raffle organised by groups of scouting or other youth organisations), as long as the advertising does not encourage minors to participate.

ADVERTISING COMBINED WITH PROGRAMMES OR PRODUCTS FOR MINORS. Advertising will also be considered to be aimed at minors when they are shown in relation to programmes or products that are meant for youth. These concepts need to be understood broadly.¹⁹⁶ Programmes can refer to any audiovisual programmes, such as TV, cinema and radio programmes, but also programmes such as events or activities specifically intended for children will fall into this category. Products that are meant for youth will include for example collectibles (such as related to popular sports or youth programmes) or toys and the sale of which cannot be combined with e.g. ads relating to betting services or the sale of tickets for a raffle. These products should not contain such additional advertising in any form. The code does allow advertising in the vicinity of places where by occasion events for minors take place.

¹⁹⁶ See for example the Commission case revolving around the “Zuiderzee”-museum. The museum had organized an activity specifically for children, the advertisement of which clearly indicated the sponsorship of the National Lottery. Sponsorship also falls under the scope of advertising however and was thus not allowed in this specific context. (document nr.2014/00833, 3rd of February, 2015)

D. Alcohol

THE ADVERTISING CODE FOR ALCOHOLIC BEVERAGES. The rules revolving around alcoholic products are similar to the rules relating to games of chance in that no depiction of people that could be perceived as a minor is allowed and that the ad should inform the audience of the prohibition of under-age alcohol consumption.¹⁹⁷ Another similarity lies in the circumstances of the advertisement. The advertisements relating to alcoholic beverages cannot take place in the context of programmes specifically intended for youth or which are reasonably assumed to constitute at least 25% of the targeted audience. For movies, a distinction is made between those movies shown in a movie theatre and those broadcasted in the living room. The former will not allow such ads depending on the nature of the movie, the latter will have to prove the 25% bar is not reached.¹⁹⁸

E. Tobacco

THE ADVERTISING CODE FOR TOBACCO PRODUCTS. Self-regulation is especially strict in regards to marketing tobacco products, which can by no means target young people (**Article 8**). The Advertising Code for Tobacco Products (the RVT) defines “youth” as under-aged people, but its article 8.3 goes even further by prohibiting any depiction of people under the age of 30. The article specifies that any advertising of tobacco products cannot explicitly link its consumption to a certain level of maturity.

F. Cosmetics

THE ADVERTISING CODE ON COSMETIC PRODUCTS. The provision of the Advertising Code on Cosmetic Products relating to children and minors is phrased short and simple. **Article 7** stipulates that on top of the general rules relating to minors, ads for cosmetic products that are specifically developed with minors in mind can only target them when the ads do not contribute to an untimely sexualisation of minors.

4.2.3 Conclusion

The Dutch Advertising Commission addressed commercial communications towards minors by way of a separate code for minors. This separate code allowed them to deviate from and add to the

¹⁹⁷ See for example a case of the 8th of July, 2015 which shows that these rules are also strictly applied in a social media context. A bar had posted a picture on their Facebook page which jokingly expressed: “If anyone tells you it’s too early to drink wine...unfriend them. You don’t need that kind of negativity in your life!”. The Commission regarded this as an advertisement on a social media platform of which the audience consists of a large amount of minors, a fact that the defendant did not rebut by performing an audience measurement. In accordance with previously mentioned rules, the post required the informative slogans of “Not 18, no alcohol” or “Enjoy, but drink responsibly Recommendation by the Advertising Code Commission on the 8th of July 2015, Document nr.2015/00547 (<https://www.reclamecode.nl/webuitspraak.asp?ID=133589&acCode>, accessed on: 29th of August, 2016)

¹⁹⁸ See for example a case involving the family movie “McKenna shoots for the Stars” that was broadcasted one evening during the summertime, but which the Commission declined on the grounds that only 6% of the audience would have been a minor according to a regulated audience measurement research (Document nr.2015/00811, on the 8th of September, 2015)

general principles of the general code and thus give special attention to the needs and characteristics of advertising aimed at minors. The code makes a **distinction between children and young people**, defined as anyone under the age of 13 and 18 respectively, to better adapt its provisions to the level of maturity of the minor. The self-regulatory instrument also has a **clear focus on various types of formats, both old and new**, with specific provisions tailored to the technical and practical realities of each format. The same level of clarity can be seen in their **complaint mechanism (cf. A.4)**, which appeared to be accessible, fast and thorough.

4.3 The United Kingdom

4.3.1 General codes

A. Co-Regulation UK Acts and Self-regulatory Codes

REGULATORY LANDSCAPE. The regulatory landscape for commercial communication in the UK is very complex as it consists of both UK governmental acts and self-regulated codes of practice drafted by (largely) independent bodies. Some of these independent bodies have statutory powers over the media, whereas others are entirely self-regulated by the media, journalists or advertisers themselves. For the purpose of this country report it is important to keep this patchwork landscape of co- and self-regulation in mind.¹⁹⁹

ALTERNATIVE REGULATORY FRAMEWORK. In the UK, the advertising and other requirements related to children are integrated in a complex co-regulatory framework. The framework is a mix of (1) self-regulation for Non-Broadcast Advertising and (2) Co-Regulation for Broadcast Advertising. There are two main industry committees drafting the self-regulatory codes: the **Committee of Advertising Practice (CAP)** drafts the UK Code of Non-broadcast Advertising, Sales Promotion and Direct Marketing (hereafter: the CAP code) and the **Broadcast Committee of Advertising Practice (BCAP)** develops the UK Code of Broadcast Advertising (hereafter: the BCAP code).

THE ADVERTISING STANDARDS AUTHORITY (hereafter “ASA”). Aside from the two industry committees, the **ASA** is an **independent regulator for advertising across all media**. The ASA has statutory powers to act on complaints and to proactively check the media, including pre-clearance for some TV and radio broadcasts, to take action against misleading, harmful or offensive advertisements, sales promotions and direct marketing where necessary.²⁰⁰ Although the ASA has certain statutory powers, it is a non-statutory body and it cannot impose fines or bring advertisers before the courts. However, the ASA can issue opinions on advertising practices, send broadcasted materials through pre-clearance and when non-broadcasted materials incessantly breach ASA rules and decisions, the ASA can refer them to the **Office of Fair Trading (hereafter “OFT”)** for misleading or unfair advertising.²⁰¹ Broadcasting advertisers that breach the Broadcasting Code can be referred to the **Office of Communications** (hereafter “Ofcom”), which has statutory powers to impose fines or withdraw broadcasting licenses.²⁰² For sector-specific scenario’s, the ASA works in close cooperation with

¹⁹⁹ For more information on the regulatory landscape in the UK, see: SENDEN ET AL. (2015). Mapping Self- and Co-Regulation Approaches in the EU Context. Explorative Study for the European Commission, DG Connect, 21-24.

²⁰⁰ As will be elaborated below, the ASA has statutory powers insofar that Ofcom has delegated a part of their powers to the Broadcast Advertising Committee, which is a Committee founded within the Advertising Standard Authority. Thus, the ASA only has statutory powers in relation to broadcasted advertising materials. For more information see ASA (2015). FAQs, on <https://www.asa.org.uk/News-resources/FAQs.aspx> (accessed on: 21/20/2016).

²⁰¹ For more information on what the Office of Fair Trading can do against unwilling advertisers, read their informative brochure on https://www.asa.org.uk/Industry-advertisers/Sanctions/~media/Files/CAP/Misc/Compliance%20leaflet_FINAL.ashx (accessed on: 21/10/2016).

²⁰² Aside from a regulatory framework, the ASA also provides parents with a specific page with not only information regarding Children and Advertising, including case law and how to file a complaint, but also including links to other social organisations helping parents and children alike in a variety of ways, eg. Lobbying

statutory sector regulators, such as the Financial Conduct Authority, the Food Standards Agency, the Gambling Commission and the Medicines and Healthcare products Regulatory Agency (see infra, the chapter on sector-specific self-regulation).

THE OFCOM BROADCASTING CODE. In the UK Communications Act of 2003, a mandate was given to **Ofcom** to draft a general **Code for all broadcasted materials**, which would cover the standards in programmes regarding sponsorship, product placement, fairness and privacy.²⁰³ This resulted in the Ofcom Broadcasting Code, which offers guidance for broadcasters to comply with the general principles and rules. For the rules specially regarding Advertising Standards, Ofcom delegated this part of their mandate to the Broadcast Advertising Committee, founded in the context of the Advertising Standards Authority (the Broadcasting Committee on Advertising Practices, or: “BCAP”). The table below presents an overview of how the different powers are currently distributed in the UK’s co-regulatory system. However, in this report we will focus on those aspects of the co-regulatory system which have been delegated to BCAP and not the broadcasting code itself.

connections, practical help, children’s society and so on. Visit the parents’ page at: <https://www.asa.org.uk/Consumers/Parents-Page.aspx> (accessed on: 18/10/2016).

²⁰³ For more information on the Informations Act and Ofcom’s mandate, read the full document on: http://www.legislation.gov.uk/ukpga/2003/21/pdfs/ukpga_20030021_en.pdf (accessed on: 21/10/2016).

| | | | |
|-------------------------------------|---|--|---|
| | <i>SELF-REGULATION</i> | | <i>STATUTORY LEGISLATION</i> |
| <i>Overarching Competences</i> | <p style="text-align: center;">Advertising Standards Authority (ASA) <i>UK's independent regulator for advertising across all media.</i></p> <ul style="list-style-type: none"> ➤ Proactively check the media ➤ Code policy development ➤ Complaints handling & rulings | | <p>OFCOM <i>Statutory Communications Regulator</i></p> |
| <i>Code of Practice</i> | NON-BROADCAST ADVERTISING CODE | BROADCAST ADVERTISING CODE | Transfer of Responsibility to BCAP |
| <i>Responsible committee</i> | Committee of Advertising Practice (CAP) | Broadcast Committee of Advertising Practice (BCAP) | |
| <i>Functions & Duties</i> | Guidance, pre-publication advice and training, pre-vetting of persistent offenders | Pre-clearance ²⁰⁴ : - TV: ClearCast - Radio: Radiocentre | |
| <i>Compliance & Enforcement</i> | Withdrawal of trading privileges, request removal of online paid-for-space ads, bad publicity, ... Fines: OFFICE OF FAIR TRADING | Ad alerts, bad publicity, Disqualification of industry awards, ... Fines: | OFCOM Impose fines or revoke licenses |

Table 10: Summary of the UK's advertising co-regulatory system.

²⁰⁴ For broadcasted materials, the ASA has rules that require advertisements to be cleared by an independent organisation prior to broadcasting. These organisations will evaluate each ad in light of the BCAP Code. For more information on TV clearance visit: <http://www.clearcast.co.uk/> and for Radio clearance: <http://www.radiocentre.org/> (both accessed on: 23/10/2016).

B. Code of Broadcast Advertising (BCAP)

B1. Scope

SCOPE. The Code of Broadcast Advertising (or BCAP)²⁰⁵ is applicable to all Ofcom-licensed television and radio services provided by broadcasters within UK jurisdiction. It makes no difference whether or not the targeted main audience is located in the UK or not. The BCAP defines a commercial reference as:

“[...] publicity by advertisers, including spot advertisements and broadcaster promotions with advertisers (outside programme time), that is broadcast in return for payment or other valuable consideration to a broadcaster or that seeks to sell products to viewers or listeners.”²⁰⁶

EXAMPLES. The BCAP adds some non-exhaustive examples of promotions, such as teleshopping, television text and interactive television advertisements, but also programme sponsorship credits on radio and television services.²⁰⁷

EXCLUDED PROMOTION. The abovementioned definition excludes the promotion of broadcasters' own-branded activities, goods and events insofar that they are not designed for profit or for the promotion of a commercial partner. This exclusion from scope is repeated throughout the Code as an exception to specific rules. Additionally, BCAP also does not address commercial references within a programme (i.e. product placement), as they are regulated by the previously discussed Ofcom Broadcasting Code.²⁰⁸

PRE-CLEARANCE. The BCAP gives specific attention to radio advertisements that require substantiation of claims.²⁰⁹ Such advertisements require pre-clearance, either locally or by Radiocentre²¹⁰ when the

²⁰⁵ The BCAP Code can be found at: <https://www.cap.org.uk/Advertising-Codes/Broadcast.aspx> (accessed on: 23/10/2016).

²⁰⁶ Introductory Chapter, b.II “Advertisement”.

²⁰⁷ For more on the regulatory framework, scope and goals of the BCAP, see the full preliminary works at: <https://www.cpsa.co.uk/userfiles/file/BCAPConsultationdocumentandAnnex1.pdf> (accessed on: 21/10/2016), read more about the scope specifically on pages.

²⁰⁸ See supra, Ofcom Broadcasting Code, chapter C1.

²⁰⁹ For a full list of “special category” advertisements see p. 8 of the BCAP on:

<https://www.cap.org.uk/Advertising-codes/~media/Files/CAP/Codes%20BCAP%20pdf/The%20BCAP%20Code.ashx> (accessed on: 10/10/2016).

²¹⁰ For broadcasted materials, the ASA has rules that require advertisements to be cleared by an independent organisation prior to broadcasting. These organisations will evaluate each ad in light of the BCAP Code. For more information on TV clearance visit: <http://www.clearcast.co.uk/> and for Radio clearance: <http://www.radiocentre.org/> (both accessed on: 23/10/2016).

claims belong to the “special category” (eg. medical or nutritional claims).²¹¹ A similar system is put in place for Television advertising through the association of Clearcast.²¹²

B2. *Format-specific*

B2.1 TELEVISION AND RADIO

I. GENERAL PRINCIPLES

IDENTIFICATION PRINCIPLE. The main recurring identification principle in a context of radio or television broadcasts is stipulated as follows in rule 2.1 BCAP:

“Advertisements must be obviously distinguishable from editorial content, especially if they use a situation, performance or style reminiscent of editorial content, to prevent the audience being confused between the two. The audience should quickly recognise the message as an advertisement.”

SPECIAL CARE. Expressions or sound effects associated with news bulletins or public service announcements, but also the use of titles, logos, sets or certain music associated with a programme broadcasted through the same medium, should all be treated with special care as the recognisability as an advertisement is weaker in those cases. The audience should quickly recognise the message as an advertisement.²¹³

TELEVISION ONLY. Next, the BCAP has rules that are specifically designed for both the context of radio and television as their characteristics call for tailored principles on recognition and presentation. For television this means that their advertisements may not have viewers believe they are watching a programme, may not feature a person currently presenting factual news or affairs, nor include extracts from real parliamentary proceedings.²¹⁴

RADIO ONLY. For a radio context this principle means that any person who currently presents the news, either on a radio or television broadcast, may only voice radio advertisements insofar that they do not advertise products or services that appear to compromise the “impartiality of their news-reading role”.²¹⁵

MISLEADING ADVERTISING. The second general principle of the BCAP is that advertisements should **not mislead or even be likely to do so**. The focus in these articles lies on the omission of material information, or otherwise presenting them in an “unclear, unintelligible, ambiguous or untimely manner”. The likeliness of misleading a consumer depends on a variety of factors, such as the

²¹¹ For more practical information on this clearance, look at: <http://www.radiocentre.org/clearance/> (accessed on: 10/10/2016).

²¹² For more information on Clearcast, visit: <http://www.clearcast.co.uk/> (accessed on 14/10/2016).

²¹³ Art. 2.2 and 2.3 BCAP.

²¹⁴ Art. 2.4 BCAP.

²¹⁵ Art. 2.5 BCAP.

context, medium, time or space of the ad, and of any other measures the advertiser actively takes to make the information concerned available to consumers.²¹⁶

HARMFUL OR OFFENSIVE ADVERTISING. The third general principle of the BCAP relates to the generally accepted standards of harm or offence. Generally, the standards aim to minimise causing any harm or serious or widespread offence, but more concretely they refer to unsuitable scheduling and the **protection of those under the age of 18**.²¹⁷ The Advertising Standard Authority released a statement on the 7th of October 2016 on the question what does and does not constitute as offensive due to the subjective nature of the qualification. The statement clarifies that it takes into account the audience, context, prevailing standards and finally the protection of children.²¹⁸

II. PRINCIPLES REGARDING COMMERCIAL COMMUNICATION AND CHILDREN

SECTION 5 BCAP. The protection of children is discussed in separate sections in both the BCAP as the CAP for non-broadcast advertising and the importance attached to the topic continuously reappears in their statements and preambles.

GENERAL PRINCIPLES. Children are defined as **viewers under the age of 16**.²¹⁹ This age group needs to be taken into account not only for advertisements that are directly targeted at them or likely to interest them, but just as much when the ad features children or could harmfully influence them. The core principle remains that they must be protected from any advertisements that could “*cause physical, mental or moral harm*”. The most important provisions aimed to protect them concern the scheduling of certain broadcasts.²²⁰ What follows in the next few paragraphs are the general provisions of the BCAP aimed at protecting minors, of which the recurring principle is that “*children’s inexperience, credulity or sense of loyalty must not be exploited*”.

| GENERAL PRINCIPLES ON CHILDREN OF THE BROADCAST ADVERTISING CODE | | |
|--|-----|---|
| HARMFUL BEHAVIOUR | 5.2 | Advertisers should not present their ads in a manner that condones, encourages or unreasonably features behaviour that could be dangerous for children , especially in regards to their interactions with strangers, without prohibiting informative ads on the dangers thereof. |
| CHILDREN’S | 5.3 | Advertisements must not condone or encourage practices that are detrimental |

²¹⁶ Art. 3.1 and 3.2 BCAP.

²¹⁷ Art. 4.1 BCAP.

²¹⁸ For the full statement, visit: <https://www.asa.org.uk/News-resources/Media-Centre/2016/Bad-taste-or-offensive.aspx> (accessed on: 13/10/2016).

²¹⁹ Whereas viewers aged 16-18 are considered ‘young persons’, the specific principles contained in this section do not apply to them.

²²⁰ Art. 5.1 BCAP, with reference to a separate Section 32 on Scheduling.

| | | |
|--|------|--|
| HEALTH | | to children's health. |
| BULLYING | 5.4 | Advertisements must not condone or encourage bullying. |
| SEXUALITY | 5.5 | Advertisements must not portray or represent children in a sexual way. |
| NEGATIVE IMPACT | 5.6 | Advertisements must not imply that children are likely to be ridiculed, inferior to others, less popular, disloyal or have let someone down if they or their family do not use a product or service. |
| INEXPERIENCE, CREDULITY OR SENSE OF LOYALTY | 5.7 | Advertisements must not take advantage of children's inexperience, credulity or sense of loyalty. Advertisements for products or services of interest to children must not be likely to mislead; for example, by exaggerating the features of a product or service in a way that could lead to children having unrealistic expectations of that product or service. |
| CHILD ACTORS | 5.8 | Child actors may feature in advertisements but care must be taken to ensure that those advertisements neither mislead nor exploit children's inexperience, credulity or sense of loyalty. |
| EXHORTATION | 5.9 | Advertisements must not include a direct exhortation to children to buy or hire a product or service or to persuade their parents, guardians or other persons to buy or hire a product or service for them. |
| DIRECT RESPONSE MECHANISMS | 5.10 | Advertisements that promote a product or service and invite consumers to buy that product or service via a direct response mechanism must not be targeted directly at children. [...] |
| PRICE | 5.11 | If it includes a price, an advertisement for a children's product or service must not use qualifiers such as "only" or "just" to make the price seem less expensive. |
| CHILDREN'S PRODUCTS | 5.12 | Television only - Advertisements for a toy, game or comparable children's product must include a statement of its price or, if it is not possible to include a precise price, an approximate price, if that product costs 30 pounds or more. |
| PROMOTIONS TARGETED AT | 5.13 | Advertisements for promotions targeted directly at children must include all significant qualifying conditions and must make clear if adult permission is required for children to enter. Advertisements for competitions targeted directly |

CHILDREN

at children are acceptable only if the skill required is relevant to the age of likely participants and if the values of the prizes and the chances of winning are not exaggerated.

Table 11: General Principles on children of the Broadcast Advertising Code (Source: <https://www.cap.org.uk/Advertising-Codes/Broadcast.aspx>)

C. Code of Non-Broadcast Advertising and Direct & Promotional Marketing (hereafter "CAP")

C1. Scope

RESIDUAL SCOPE. The first article clarifies the CAP's scope of application by stating what it does not apply to due to overlap with the scope of other codes and consequently with the competences of other regulatory bodies, be it self- or co-regulatory or legislative. The scope is thus described in a complex manner that could give rise to uncertainty for both advertisers and consumers.²²¹ An example of the residual nature of CAP's scope is the additional code of practice created by the mobile industry on commercial content presented through these new formats. The ASA will have to take this code of practice into account when assessing compliance of practices in this sector. This code of practice will be discussed further below.

In accordance with the definition in rule III.f, a marketing communication includes all forms of communications listed as follows:

²²¹ For more information on the self-regulation and regulation of these new advertising formats (eg. Internet, games and mobile), see: Shiyong Li, Megan Pickering, Moondore Ali, Mark Blades & Caroline Oates, "Young Children's Ability to Identify Advertisements on Television, Web Pages and Search Engine Web Pages", in *Advertising to Children*, by Mark Blades, Caroline Oates, Fran Blumberg and Barrie Gunter (eds), Springer, August 2014, Section 11, p.231 and on (254p.).

Positive scope of the Non-broadcast advertising code

| | |
|-----------|---|
| A. | Advertisements in newspapers, magazines, brochures, leaflets, circulars, mailings, e-mails, text transmissions (including sms and mms), fax transmissions, catalogues, follow-up literature and other electronic or printed material |
| B. | Posters and other promotional media in public places, including moving images |
| C. | Cinema ²²² , video, dvd and blu-ray advertisements |
| D. | Advertisements in non-broadcast electronic media, including but not limited to: online advertisements in paid-for space (including banner or pop-up advertisements and online video advertisements); paid-for search listings; preferential listings on price comparison sites; viral advertisements (see iii l); in-game advertisements ²²³ ; commercial classified advertisements; advergimes that feature in display advertisements; advertisements transmitted by bluetooth; advertisements distributed through web widgets and online sales promotions and prize promotions |
| E. | Marketing databases containing consumers' personal information |
| F. | Sales promotions in non-broadcast media |
| G. | Advertorials (defined as: "an advertisement feature, announcement or promotion, the content of which is controlled by the marketer, not the publisher, that is disseminated in exchange for a payment or other reciprocal arrangement") |

²²² For more information on the (self-)regulation of cinema advertising, specifically related to children, please read a UK government Impact Assessment on the matter on: <https://www.gov.uk/government/consultations/consultation-on-exemptions-to-the-video-recordings-act-and-on-advertising-in-cinemas> (accessed on: 24/10/2016) as published by the Office of Fair Trading and with consultations by the Advertising Standards Authority and the Advertising Association.

²²³ See infra, C2 on Advergimes and In-game advertising.

| | |
|-----------|--|
| H. | Advertisements and other marketing communications by or from companies, organisations or sole traders on their own websites, or in other non-paid-for space online under their control, that are directly connected with the supply or transfer of goods, services, opportunities and gifts, or which consist of direct solicitations of donations as part of their own fund-raising activities. |
|-----------|--|

Table 11: Scope of the Non-broadcast advertising code (Source:

C2. *Format-specific*

C2.1 ADVERTISEMENTS IN NON-BROADCAST ELECTRONIC MEDIA

Considering the aim of this report, this section will focus on the provisions that are applicable to new advertising formats aimed at children.

➤ GENERAL PRINCIPLES

IDENTIFICATION PRINCIPLE. Rule 2.1 of the CAP stipulates that:

“Marketing communications must be obviously identifiable as such.”

In the subsequent articles 2.2 to 2.4, special attention is given to certain specific situations however, such as the identification of unsolicited e-mails, of the commercial intent or a communication and of the advertising nature of an advertorial by way of a visible header.

The following general principles are largely the same as those of the BCAP, albeit less tailored to the specific situation of radio and television broadcasts and thus more abstract and vague.

MISLEADING ADVERTISING. The principle of misleading advertising for example limits itself to simply stipulating in art. 3.2 that *“Marketing communications must not mislead consumers by omitting restrictions on the availability of products, for example geographical restrictions or age limits.”*

HARMFUL OR OFFENSIVE ADVERTISING. The principles on harm and offence are addressed in art. 3.3: *“[...] account must be taken of prevailing standards and the context in which the communication is likely to appear [...]”*. However, the CAP does express the necessity of taking particular care to avoid causing harm or offence *“on the grounds of race, religion, gender, sexual orientation, disability or age.”* This is an assessment that is not clearly stipulated within the BCAP itself, but which will likely be taken into account when assessing on a case by case basis with the familiar factors of context, medium, audience, product and prevailing standards.

PROTECTION OF CHILDREN. When it comes to children, the CAP puts forward the core principle that:

“[...] when marketing communications are addressed to or depict a child, that they must take care not to condone or encourage any unsafe practices” (article 4.5)

This core principle is subsequently elaborated on in its section 5, as presented in the following chapter.

➤ *PRINCIPLES REGARDING CHILDREN AND COMMERCIAL COMMUNICATION*

SECTION 5 CAP. Similar to the BCAP, the CAP also emphasises the importance of the protection of minors and elaborates on the topic in its Section 5 of the Code.

GENERAL PRINCIPLES. The general principles are largely similar to those of the BCAP in which children are defined as ‘viewers’ **under the age of 16** and are to be taken into account not only for advertisements that are directly targeted at them or likely to interest them, but just as much when the ad features children or could harmfully influence them. The core principle remains that they must be protected from any advertisements that could *“cause physical, mental or moral harm”*. What follows in the next few paragraphs are the general provisions of the CAP aimed at protecting minors, of which the recurring principle is that *“children’s inexperience, credulity or sense of loyalty must not be exploited”*.

YOUNG PERSONS. The CAP code only mentions protection of “young persons”, defined as minors between the ages of 16 and 18, within the context of gambling. These protections will be discussed infra (4.2.3 Games of Chance)

HIGHER LEVEL OF PROTECTION. Different from the BCAP however, is the **higher level of detail in the provisions**. The table below for example shows how the CAP identifies approximately 5 different ways in which a child may find itself in a harmful situation, whereas the BCAP limits itself to providing only the general rule to harmful behaviour (see supra: article 5.2 BCAP). This higher level of detail may be due to the residual nature of the scope, meaning it will apply not only to currently known practices and formats, but also to upcoming and future formats.

GENERAL PRINCIPLES ON CHILDREN OF THE NON-BROADCAST ADVERTISING CODE

| | | |
|----------------------------|------------|---|
| HARMFUL TO CHILDREN | 5.1 | Marketing communications addressed to, targeted directly at or featuring children must contain nothing that is likely to result in their physical, mental or moral harm: |
|----------------------------|------------|---|

| | | |
|--------------------|-------|--|
| ➤ <i>STRANGERS</i> | 5.1.1 | Children must not be encouraged to enter strange places or talk to strangers |
|--------------------|-------|--|

| | | |
|---|------------|---|
| ➤ <i>DANGEROUS BEHAVIOUR</i> | 5.1.2 | Children must not be shown in hazardous situations or behaving dangerously except to promote safety. Children must not be shown unattended in street scenes unless they are old enough to take responsibility for their own safety. Pedestrians and cyclists must be seen to observe the Highway Code |
| ➤ <i>DANGEROUS SUBSTANCES OR EQUIPMENT</i> | 5.1.3 | Children must not be shown using or in close proximity to dangerous substances or equipment without direct adult supervision |
| ➤ <i>IMITATION</i> | 5.1.4 | Children must not be encouraged to copy practices that might be unsafe for a child |
| ➤ <i>DISTANCE SELLING</i> | 5.1.5 | Distance selling marketers must take care when using youth media not to promote products that are unsuitable for children. Credulity and unfair pressure. |
| <i>INEXPERIENCE, CREDULITY OR SENSE OF LOYALTY</i> | 5.2 | Marketing communications addressed to, targeted directly at or featuring children must not exploit their credulity, loyalty, vulnerability or lack of experience |
| ➤ <i>NEGATIVE IMPACT</i> | 5.2.1 | Children must not be made to feel inferior or unpopular for not buying the advertised product |
| | 5.2.2 | Children must not be made to feel that they are lacking in courage, duty or loyalty if they do not buy or do not encourage others to buy a product |
| ➤ <i>DISTINGUISH</i> | 5.2.3 | It must be made easy for children to judge the size, characteristics and performance of advertised products and to distinguish between real-life situations and fantasy |
| ➤ <i>COMPLEX OR COSTLY PRODUCTS</i> | 5.2.4 | Adult permission must be obtained before children are committed to buying complex or costly products. |
| ➤ <i>CHARITY</i> | 5.3 | Marketing communications addressed to or targeted directly at children: 5.3.1 must not exaggerate what is attainable by an ordinary child using |

| | | |
|-------------------------------------|-----|--|
| | | the product being marketed |
| | | 5.3.2 must not exploit children's susceptibility to charitable appeals and must explain the extent to which their participation will help in any charity-linked promotions. |
| ➤ PARENTAL AUTHORITY | 5.4 | Marketing communications addressed to or targeted directly at children: 5.4.1 must not actively encourage children to make a nuisance of themselves to parents or others and must not undermine parental authority 5.4.2 must not include a direct exhortation to children to buy an advertised product or persuade their parents or other adults to buy an advertised product for them. |
| ➤ DIRECT-RESPONSE MECHANISMS | 5.5 | Marketing communications that contain a direct exhortation to buy a product via a direct-response mechanism must not be directly targeted at children. Direct response mechanisms are those that allow consumers to place orders without face-to-face contact with the marketer. |
| ➤ PROMOTIONS | 5.6 | Promotions addressed to or targeted directly at children: 5.6.1 must make clear that adult permission is required if a prize or an incentive might cause conflict between a child's desire and a parent's, or other adult's, authority 5.6.2 must contain a prominent closing date if applicable (see rule 8.17.4) 5.6.3 must not exaggerate the value of a prize or the chances of winning it. |
| ➤ DIRECT EXHORTATION | 5.7 | Promotions that require a purchase to participate and include a direct exhortation to make a purchase must not be addressed to or targeted at children. See Section 8: Sales Promotions. |

Table 12: General Principles on children of the non-Broadcast Advertising Code (Source: <https://www.cap.org.uk/Advertising-Codes/~media/Files/CAP/Codes%20CAP%20pdf/The%20CAP%20Code.ashx>)

Because the scope of the CAP extends to the online environment, the code has codified privacy and data protection legislation²²⁴:

Article 10.15 “Marketers must not knowingly collect from children under 12 personal information about those children for marketing purposes without first obtaining the consent of the child’s parent or guardian.

Article 10.16 “Marketers must not knowingly collect personal information about other people from children under 16 unless that information is the minimums required to make a recommendation for a product, is not use for a significantly different purpose from that originally consented to, and the marketer can demonstrate that the collection of that information was suitable for the age group targeted.

Data about third parties collected from children must not be kept for longer than necessary.”

D2.2 ADVERGAMES AND IN-GAME ADVERTISING

ADVERTISING STANDARD AUTHORITY. The ASA makes a very clear statement in their annual report of 2015 on how they view these new advertising formats, including references to two cases that they had encountered in the meantime:

“[...] As advertisers make use of new technologies to promote their products and services, it’s important that they stay on the right side of the rules, especially when they’re engaging with children. We will be decisive when they cross that line. In 2015, we considered complaints from the Competition and Markets Authority (CMA) about online games. We took swift action and found two advertisers (Mind Candy t/a Moshi Monsters and 55 Pixels Ltd t/a Bin Weevils) in breach of the rules because their games wrongly and unfairly pressurised children into making in-game purchases. Our action is a timely reminder to advertisers who engage children that strict rules designed to protect them extend equally to online as well as offline media.”²²⁵

The ASA pointed out in 2015 that there was an increase of 121% in complaints relating to in-game advertising compared to 2014, but with a total decrease of complaints relating to the Internet of

²²⁴ Article 10.15 and 10.16 of the CAP Code (<https://www.cap.org.uk/Advertising-Codes/Non-Broadcast/CodelItem.aspx?cscid={88bdf54f-faaf-41cf-9951-a2073b06c698}#.WA0wyNWLSpo> ; accessed on: 23/10/2016).

²²⁵ Annual Report (2015), ASA, p. 15, available at: <https://www.asa.org.uk/About-ASA/~media/Files/ASA/Annual%20reports/ASA%20Annual%20Report%202015.ashx> (accessed on: 24/10/2016).

29%, which the ASA explains is due to direct complaint mechanisms with the advertiser through social media.²²⁶

OFFICE OF FAIR TRADING. Additionally, the Office of Fair Trading has made similar statements on this format in their consultation in 2013:

“[...] We also scrutinised 38 children’s online games during our investigation. Most of those games contained, in their descriptions or in gameplay itself, commercial practices that we considered were likely to breach consumer protection law. We encountered some practices that we considered aggressive in that they placed, in our view, undue influence on children to make purchases or contained direct exhortations to them to do so. We were also concerned that there were industry-wide commercial practices that had the potential to mislead consumers as to the true cost of a game. A particularly common example was the use of ‘free’ to describe a game that encouraged, or even required, consumers to make purchases to play the game in the way that they would reasonably have expected from its initial description in an app store.”²²⁷

It appears from these statements that the self-regulatory and statutory bodies are thus aware of these new advertising formats and are making it their aim to review them with due scrutiny.

E. Complaint Mechanisms

ASA COMPLAINT MECHANISM. Both the BCAP and the CAP originate from the Advertising Standards Authority, which is responsible for handling complaints concerning both Codes. As such, the mechanism is largely the same for both broadcasted as non-broadcasted material. The main difference between the two systems lies in the absence of powers of Ofcom in the non-broadcasted materials, so that the complaint mechanism with regard to the CAP is solely regulated by the ASA. However, much like in the BCAP case, the ASA only has limited enforcement power. For the non-broadcasted materials the ASA has solved this by referring certain breaches to either formally acknowledged consumer protection organisations or the Office of Fair Trading (OFT), who do possess certain statutory powers and may for example impose heavy fines upon the breaching advertiser.²²⁸

²²⁶ For more numbers read their Annual Report, available at: <https://www.asa.org.uk/About-ASA/~media/Files/ASA/Annual%20reports/ASA%20Annual%20Report%202015.ashx> (accessed on: 24/10/2016).

²²⁷ Children’s Online Games, *Response to the consultation*, OFT, 2013, p.5 (<http://webarchive.nationalarchives.gov.uk/20141210121632/https://assets.digital.cabinet-office.gov.uk/media/53330c0440f0b62e99000003/oft1517.pdf>, accessed on: 24/10/2016)

²²⁸ For more information on the specific complaint mechanism in regards to the CAP, read the ASA information document at: <https://www.asa.org.uk/Consumers/~media/Files/ASA/Misc/Non-Broadcast%20Complaint%20Handling%20Procedures.ashx> (accessed on: 14/10/2016) or for more general information on the ASA complaint handling procedures at: <https://www.asa.org.uk/Consumers/How-to-complain.aspx> (accessed on 14/10/2016)

The ASA receives some 27.000 complaints in total the past year, of which it processed only an approximate of 5500.²²⁹

STATUTORY POWERS. As shown in the table in section 4.1.1, the ASA still functions in close cooperation with Ofcom with regard to broadcasted advertising. Ofcom has delegated some powers to the ASA, including limited statutory powers of pre-clearance and enforcement. However, Ofcom has retained the most imposing enforcing powers, such as fines and retentions of license.

COMPLAINT MECHANISM. Consumers can file complaints with the ASA in most scenario's. The ASA will direct the complainant to either the CAP or BCAP investigative cells, depending on the format of the advertisement (i.e. broadcasted or non-broadcasted). The designated investigative cell will then assess the complaint in light of their respective codes, whilst taking into account other relevant self-regulatory provisions. These cells will then call upon the ASA to enact the final decision and consecutively enforce it. If a party does not agree with the decision of the ASA, he or she can address the Independent Reviewer of the Rulings of the ASA Council.

INTERACTION BCAP – CAP. As can be derived from the analysis provided above, both the Broadcasting Advertising Code and the non-Broadcast Advertising Code are very similar in its content aside from those few provisions specifically related to the technical characteristics of the regulated medium. For these reasons the different investigative cells have explicit permission to regard the decisions made in relation to other media (for example the assessment of an ad on an online video stream, taking into account a previous, related assessment for an ad on TV), before passing their results to the ASA Council to make the final decision.²³⁰ These decisions will thus create a reciprocity insofar as the specific nature of the respective medium is thoroughly taken into account in the concrete cases, e.g. the format, the context, the medium and the extent in which both provisions correspond.

ENFORCING COMPLIANCE. When dealing with complaints, the ASA can take certain actions against or with the broadcaster. For example, the ASA can require the broadcaster to **withdraw, amend or suspend an advertisement** even before the result of a formal investigation is published. These decisions by the ASA Council are based on their own interpretation of the BCAP and are published on a weekly basis on the ASA website.²³¹ When either complainant, advertiser or broadcaster is dissatisfied with the results of the decision, review is possible with the Independent Reviewer of the Rulings of the ASA Council.²³²

²²⁹ For more numbers read their Annual Report, available at: <https://www.asa.org.uk/About-ASA/~media/Files/ASA/Annual%20reports/ASA%20Annual%20Report%202015.ashx> (accessed on: 24/10/2016).

²³⁰ For more background information on the complaint mechanism of the ASA Council, please read: https://www.asa.org.uk/Consumers/~media/Files/ASA/Misc/ASA_consumer_complaints_single_Final.ashx (accessed on: 21/10/2016).

²³¹ For more published decisions and other rulings, visit: <https://www.asa.org.uk/Rulings/Adjudications.aspx> (accessed 13/10/2016).

²³² For more information on how to file a complaint, visit: <https://www.asa.org.uk/Consumers/How-to-complain.aspx> (accessed 13/10/2016) and for more background information on the complaint mechanism of the ASA Council, please read:

SERIOUS OR REPEATED BREACHES. When the breach is serious or happens repeatedly by the same advertiser, the ASA Council can refer the case back to Ofcom. Ofcom can (1) present the advertiser with a formal warning, (2) suspend, shorten or revoke licenses to a broadcast and (3) impose fines when and to the extent deemed necessary.

4.3.2 Sector-specific codes

A. Food

TELEVISION SCHEDULING. The BCAP restricts the scheduling of any form of advertising for foods and drinks that are considered to be unhealthy. More specifically such advertisements must not be shown in or around programmes specifically made for children (i.e. everyone that is still under the age of 18), nor programmes that are of particular appeal to those under the age of 16. These restrictions have been criticised by BOYLAND et al. as they showed how approximately 71% of children's viewing time was spent outside programmes that were labelled as 'appealing to them'. According to experts in the field, too little attention is given to the actual viewing of television in practice and that as such, these rules offer too limited protection for under 16s. They make the same arguments for any other sector specific regulation that limits itself to this category of programmes.²³³

CONTENT. As for the content of food and drinks advertising, Ofcom has added that regardless of scheduling, there is a full **prohibition on the use of licensed characters, celebrities, promotional offers and health claims** when the advertisements are aimed at minors under the age of 13.

REFORMS. The CAP recently announced that it would bring print and web in line with TV rules concerning junk food advertising. More specifically, from the 1st of July 2017, advertisements for products with high fat or sugar content will no longer be allowed on video-sharing platforms and sponsored games, if they are likely to appeal to children under the age of 16. Moreover, promotions, licensed characters and celebrities popular with children will only be allowed for healthy foods and beverages.²³⁴

B. Medical Goods

EU DIRECTIVE OF 2001 ON THE ADVERTISING OF MEDICINAL PRODUCTS. With the coming into force of the EU directive 2001/83/EC (as amended) concerning "The Advertising of Medicinal Products for Human

https://www.asa.org.uk/Consumers/~media/Files/ASA/Misc/ASA_consumer_complaints_single_Final.ashx (accessed on: 21/10/2016).

²³³ E.J. BOYLAND, J. A. HARROLD, T. C. KIRKHAM and J.C.G. HALFORD (2014). Commercial Food Promotion to Children, in *Advertising to Children - New Directions, New Media*, by M. BLADES, C. OATES, F. BLUMBERG and B. GUNTER (eds), Springer, August 2014, Section 11, 62.

²³⁴ S. BOSELEY (2016). Junk food ads targeting children banned in non-broadcast media. The Guardian, retrieved from https://www.theguardian.com/society/2016/dec/08/junk-food-ads-targeting-children-banned-in-non-broadcast-media?CMP=Share_iOSApp_Other on 9.12.2016.

use”, the UK has implemented the provisions in both legislation and self-regulation. The result is that the provisions for both broadcasted as non-broadcasted advertising (CAP and BCAP) are copies of those legislative acts.

SELF-REGULATION IN THE UK.²³⁵ The preamble to the BCAP text on medical advertising (repeated in a similar way in the CAP) starts by stipulating that “*advertisements that include health claims and advertisements for medicines, medical devices and treatments receive the necessary high level of scrutiny.*” It adds that the provisions may also extend to therapeutic or prophylactic effects of products, including toiletries and cosmetics. Finally, it stresses that such advertising should also comply with rules and professional codes of conduct as laid down by their respective professional bodies.²³⁶

PRE-CLEARANCE.²³⁷ As was mentioned before in the chapter on the scope of BCAP, there are some categories of radio and television advertisements that require pre-clearance by Radiocentre or Clearcast respectively. Advertisements relating to medicinal goods or services is one included in the list of “special categories” and as such requires said pre-clearance. This pre-clearance is performed by way of a panel of consultants that advise the respective association on health and medical aspects of the advertising. When a member of those panels deems it necessary, they may also call upon a professional medical opinion for specific challenges.

PROTECTION OF CHILDREN. The self-regulatory provisions in the CAP and BCAP do however very explicitly state that **advertising of medicinal products is never allowed to be directly targeted at children**²³⁸ (Section 12 article 16, CAP and BCAP).

COMPLAINTS. Consumers may also file complaints concerning advertising of medicinal products to the ASA. The ASA will have to take several regulatory instruments into account when assessing these complaints, as a lot of different actors are active in this field, ranging from EU regulations, national legislation and all kinds of (non-)binding self-regulation. This complex system makes no difference for the access of the complainant to the same complaint mechanisms as for other advertisements, but it does make the process of handling the complaint fairly complicated for the designated investigative cell in the ASA.

C. Games of Chance

²³⁵ For more information on how this sector of advertising is regulated in the UK read the Blue Guide drafted by the Medicines & Healthcare Products Regulatory Agency, available on: <http://webarchive.nationalarchives.gov.uk/20141205150130/http://www.mhra.gov.uk/Howweregulate/Medicines/Advertisingofmedicines/BlueGuide/index.htm> (accessed on: 14/10/2016).

²³⁶ The Medicines and Healthcare products Regulatory Agency is a very active agency, which performs (almost) monthly investigations into advertising practices, of which an overview can be found here: <https://www.gov.uk/government/collections/advertising-investigations-by-mhra> (accessed on: 24/10/2016).

²³⁷ For more information on pre-clearance schemes and requirements read the Blue Guide drafted by the Medicines & Healthcare Products Regulatory Agency, available on: <http://webarchive.nationalarchives.gov.uk/20141205150130/http://www.mhra.gov.uk/Howweregulate/Medicines/Advertisingofmedicines/BlueGuide/index.htm> (accessed on: 14/10/2016).

²³⁸ Defined as a person under the age of fifteen by Articles 5.1 both CAP and BCAP.

SOCIAL RESPONSIBILITY. The CAP dedicates a specific section to gambling in which it lays down rules that are tailored to the reality of games of chance.²³⁹ The preamble to the sections starts by stressing the need for marketing communications for gambling products to be socially responsible, and in particular regarding minors and other vulnerable persons (article 16.1). For this reason, the definition of a minor is slightly different in this section. **A child is considered a person under the age of 16, whereas a “young person” is defined as a person age 16 or 17.**

VULNERABILITIES. Article 16.3 continues by prohibiting marketing communications to exploit susceptibilities, aspirations, credulity, inexperience or lack of these vulnerable categories of people. More specifically in the context of minors, the article prohibits marketing communications to associate gambling with youth culture.

YOUTH CULTURE. To avoid such an association between gambling and youth culture, the CAP puts a lot of emphasis on the featuring of young people and lays down very concrete rules on their appearance and behaviour in such marketing communications. For example, no featured person may appear to be younger than 25, or otherwise act in a youthful way. When the featured person is between 18 and 25, they may appear under certain strict conditions: i.e. they may only appear in a place where a bet is placed directly through a transactional facility (e.g. a gambling site) and only where that person is the subject of a specific betting selection offered by the facility. For this reason the person may only be shown in the context of the bet, and not in a gambling context, or in other words: the young person is not performing a bet, but can be the subject of one (one can think for example of soccer players).

FAMILY EVENTS. The only exception the CAP will make in this respect is when the context of the offered games of chance is one that may involve the family as a whole, such as cruise ships, entertainment centres, travelling fairs and (likely due to their British cultural heritage) horse racecourses and dog race tracks.²⁴⁰ Even in those contexts, the communications need to remain socially responsible and put emphasis on the family situation as a whole and keep within the legislative framework of the Gambling Act.

D. Tobacco

TOBACCO PRODUCTS DIRECTIVE. The BCAP puts an important focus not only on traditional tobacco products, but equally so on electronic cigarettes, which it treats in the same way. These rules were implemented into the BCAP after the enactment of the Tobacco Products Directive of 2014, to be in effect as of the 20th of May 2016. The same has not been done by the ASA for the non-broadcast media however, these will be governed by the amended Communications Act of 2003, contrary to Ofcom, who was given the legal obligation to use its statutory powers to implement the Directive for all broadcasted media (meaning both the Broadcasting Code as the BCAP under ASA authority).

²³⁹ The specific section in the CAP Code on gambling can be found at: <https://www.cap.org.uk/Advertising-Codes/Non-Broadcast/CodelItem.aspx?cscid={33f1cb65-f23b-4206-8bd4-04a5f7ccd2f7}#.WA00Y9WLSpo> (accessed on: 23/10/2016).

²⁴⁰ Article 16.4 CAP Code.

SMOKING AND TOBACCO PRODUCTS. BCAP dedicated their Section to the regulation of Tobacco products. **Article 10.3** therein **prohibits the advertising of smoking and other tobacco products entirely**. The following article even goes so far as to restrict the promotion of brands that could be associated with a tobacco brand to a clear adult audience and to the extent they refrain from making any reference to such products or even enable a certain association with them in the audience's mind. The same rules go for the advertising of interest to young people, without excluding the possibility of anti-smoking or anti-drugs campaigns.

ELECTRONIC CIGARETTES. The Tobacco Products Directive added similar restrictions to the promotion of electronic cigarettes to this list for broadcasted media (including on-demand services which fall under their scope), as well as prohibiting programme sponsorship intended as marketing communication.

E. Weight Control Products

CAP. Aside from regular provisions on food products, the CAP also pays specific attention to weight control and slimming products, which serve to complement the already extensive food and medical products regulations. These products are also further regulated by several CAP guidelines for Press Advertisements, which will not further be discussed here due to their non-binding nature²⁴¹.

HEALTH GUIDELINES. In relation to minors, the specific rule of **article 13.7** is very clear and straightforward: marketing communications on very low calorie diets or other diets below 800 kcals a day may only do so for short term uses and must encourage users to seek prior medical advice. Additionally, any advertiser in the business is obliged to have read and agreed to a guidance by the National Institute for Health and Care Excellence on "Obesity: the prevention, identification, assessment and management of overweight and obesity in adults and children" of 2006.²⁴²

4.3.3 Conclusion

The UK has an extensive and elaborate co- and self-regulatory framework, with close co-operations between the different relevant bodies. The framework is a mix of (1) co-regulation for broadcast advertising and (2) self-regulation for non-broadcast advertising. First of all, Ofcom functions as an independent regulator of television, radio, telecommunications and wireless communications services. Ofcom has statutory competences of enforcement and may publish its decisions following consumer complaints regarding TV or Radio programmes or may impose sanctions when necessary. Second, the ASA is an **independent regulator for advertising across all media** (both traditional advertising formats such as television and radio, and new formats such as online advertising). With regard to online advertising aimed at minors, complaints may be filed with the ASA on the content of such advertising. The ASA can refer non-compliant practices to the **Office of Fair Trading (hereafter**

²⁴¹ For more information, see the "Slimming Guidelines" at: <https://www.cap.org.uk/~media/Files/CAP/Advertising%20Guidance/Slimming%20guidelines%20for%20the%20press%20Advertising%20Guidance%20non-broadcast.ashx> (accessed on: 23/10/2016)

²⁴² These guidelines can be found at: <https://www.ncbi.nlm.nih.gov/pubmed/22497033> (accessed on: 15/10/2016)

“OFT”) for misleading or unfair advertising. Important to note is that in its 2015 annual report, the ASA indicated that there is still a lack of spontaneous awareness by citizens of existing complaint procedures.²⁴³

²⁴³ ASA (2015). Advertising regulation: The balance is shifting, retrieved from <https://www.asa.org.uk/News-resources/~media/Files/ASA/Annual%20reports/ASA%20Annual%20Report%202015.ashx> on 07.12.2016.

CONCLUSION

The mapping of international, European and national legislative (Legal research report 1) and self-regulatory (Legal research report 2) provisions has confirmed that a myriad of obligations is imposed on advertisers. Obligations relate, for instance, to the identification of commercial communications, to the content of the commercial message and to the collection and processing of personal data, and are often remarkably similar across different regulatory instruments. The number of existing legislative provisions and self-regulatory rules, however, is **not necessarily indicative** of a sufficient or high **level of protection and empowerment** of children with regard to commercial communication, in general, and new advertising formats in particular.

First, both the legislative and self-regulatory principles are often formulated in a **general or abstract manner** (“commercial communications must be recognisable as such” or “marketing communications should not be intended to primarily appeal to minors”), and guidelines for the implementation in practice thereof are often lacking. Our study showed that self-regulatory codes, especially in the Netherlands and the United Kingdom try to formulate more specific rules or guidelines, often for certain specific products (food, alcohol), sometimes for specific formats (e.g. in the Dutch Code for Advertising directed at Children and Young People). It remains unclear, however, whether this provides enough guidance for advertisers that use new advertising formats aimed at minors, and, hence, whether this influences the level of compliance.

Second, the application and enforcement of the existing legislative and self-regulatory provisions will always be assessed on a case-by-case basis: first, it will be determined whether a specific provision is applicable to a certain message, and second, it will be determined whether the commercial message – the content, the identification or other elements – infringes the provision in question. However, certain definitions in legislative or self-regulatory instruments are formulated in a manner that leads to **uncertainty as to their scope of application** for new, digital advertising formats. Moreover, **no uniform definition** on what constitutes a ‘child’ exists. Indeed, children are regarded *inter alia* as ‘anyone under 18’, ‘anyone under the legal purchase age as regards alcohol advertisements’ or ‘12 years or under in relation to online behavioural advertising’. Whereas of course different commercial messages may be inappropriate for children of different ages, the variety of ages that are relevant for the application of different provisions may lead to confusion, not only for advertisers, but also for parents and children.

Third, although different regulators (both government regulatory bodies, such as, in Flanders/Belgium, the Flemish Media Regulator and the Privacy Commission, and self-regulatory bodies, such as the Jury for Ethical Practices in Advertising) are competent to enforce the existing provisions, in practice **few decisions with regard to commercial communications, minors and new advertising formats** have been issued in recent years. This provides both advertisers (and researchers) with little guidance on how the (often general) provisions should be implemented in practice. It is unclear which causes underlie this finding. Possible reasons could be a lack of awareness of citizens that complaints with regard to digital advertising formats may be submitted, for instance to the JEP; uncertainty for regulators whether specific rules are applicable to new

advertising formats; lack of resources of regulators to instigate investigations on their own initiative; or compliance by advertisers with regard to this topic.

Fourth, with regard to advertising formats that collect and process children's personal data, different legislative and self-regulatory obligations and principles, which run in parallel, apply. First, there needs to be a legitimate ground for such processing, this means that there must be consent given, depending on the age of the child, by the parents or by the parents and the child. Several self-regulatory documents include the general requirement that consent should be verified, but there is no actual guidance with respect to appropriate verification mechanisms. Second, a number of important data protection principles must be adhered to: for instance, the personal data of children need to be processed fairly and lawfully, the data can only be collected for specified, explicit and legitimate purposes and must not further processed in a way incompatible with the initially specified purpose(s), and only adequate, relevant and non-excessive data can be collected and/or further processed. Important to note is that according to the ICC and IAB Europe, **behavioural advertising should not be aimed at children 12 years or under**. However, at the same time, in an environment in which personalised advertising is increasingly pervasive, this also means that **additional guarantees might be necessary for the use of such methods aimed 13 to 18 year olds** as well.

From the first two legal research reports of the AdLit Project, the following initial recommendations may be derived:

RAISE AWARENESS. First of all, **more awareness** is needed among citizens regarding the available **complaint mechanisms**. Policy makers and regulatory bodies should provide citizens with clear and accessible information on how to file complaints against unlawful digital advertising formats.

NEED FOR MORE COORDINATION. **A better coordination between existing regulatory bodies**, i.e. in Belgium the Jury for Ethical Practices in Advertising, the Flemish Media Regulator and the Privacy Commission (for instance in relation to behavioural advertising) is needed. Through improved dialogue and joint consultations, more concrete guidelines and common recommendations on the implementation of the often general or abstract principles of the regulatory framework and their application to new advertising formats could be developed.

PROMOTE CHILDRENS RIGHTS IMPACT ASSESSMENTS. Advertisers should be encouraged to carry out **children's rights impact assessments** when developing commercial messages or campaigns. The Child Rights Self-Impact Assessment Tools developed by Unicef provides useful guidance in this respect.

NEED FOR MORE EMPIRICAL RESEARCH. Considering the important role of the identification principle in the current regulatory framework (i.e. both the legal and self-regulatory framework require commercial communication to be clearly identifiable as such), **more empirical research on current implementation of the principle is needed**. This includes research on the effectiveness of **advertising cues or labels**.

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