

From Denial to Corporate Social Responsibility: The Rhetoric of the Food Industry on Obesity Prevention

Amandine Garde

School of Law and Social Justice

amandine.garde@liverpool.ac.uk

Map of excess weight

Adults aged 16 or over. England, January 2012 to January 2013

Top three (fattest), by % excess weight

Copeland (Cumbria)

75.9%

Doncaster (south Yorkshire)

74.4

East Lindsey (Lincolnshire)

73.8

Bottom three (thinnest)

Kensington & Chelsea

45.9

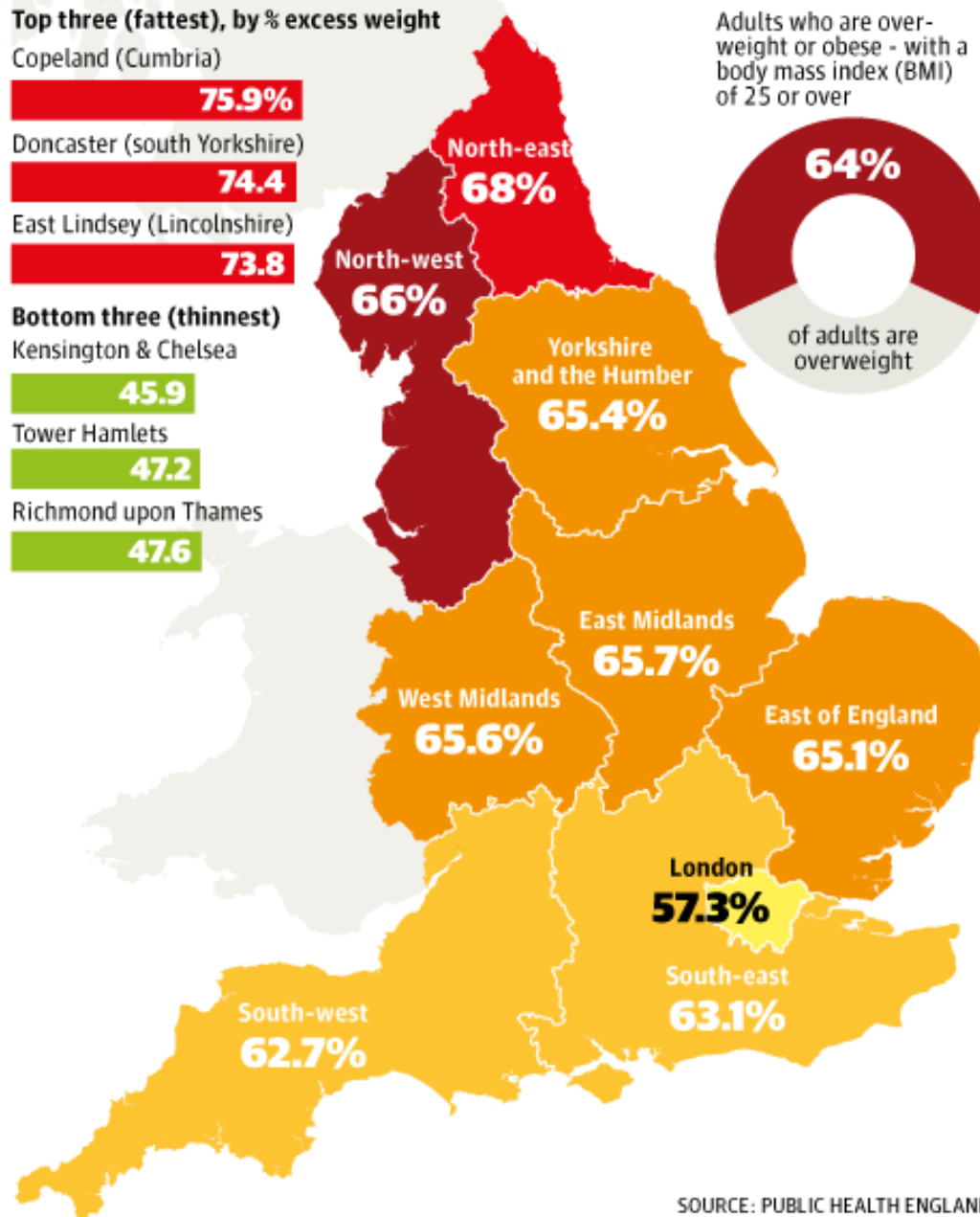
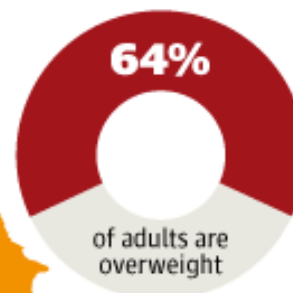
Tower Hamlets

47.2

Richmond upon Thames

47.6

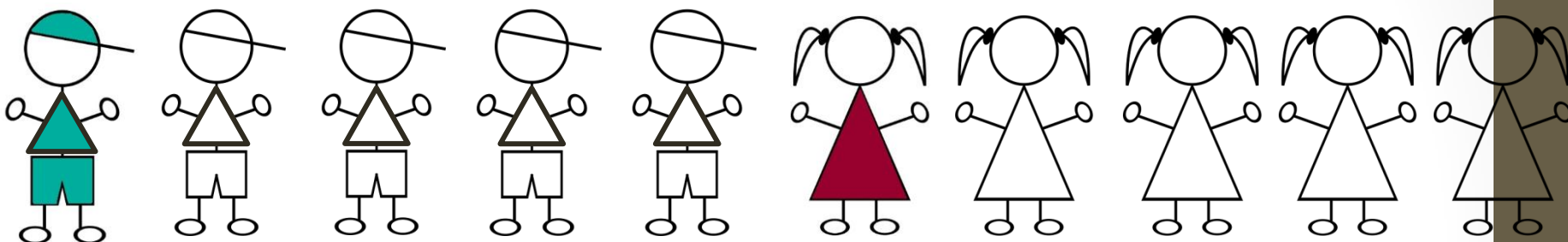
Adults who are over-weight or obese - with a body mass index (BMI) of 25 or over



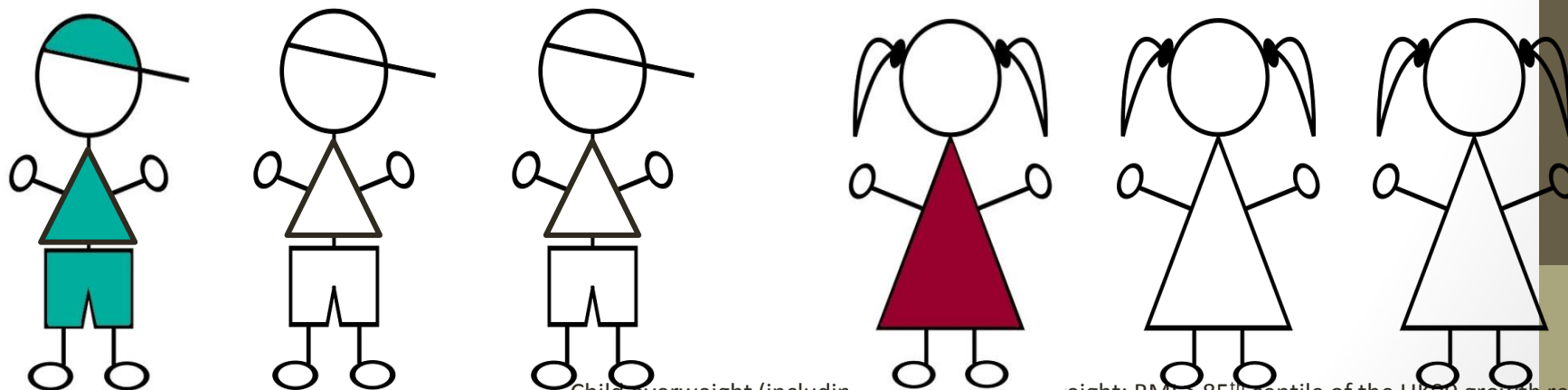
Prevalence of excess weight among children

National Child Measurement Programme 2012/13

One in five children in Reception (4-5) is overweight or obese (boys 23.2%, girls 21.2%)



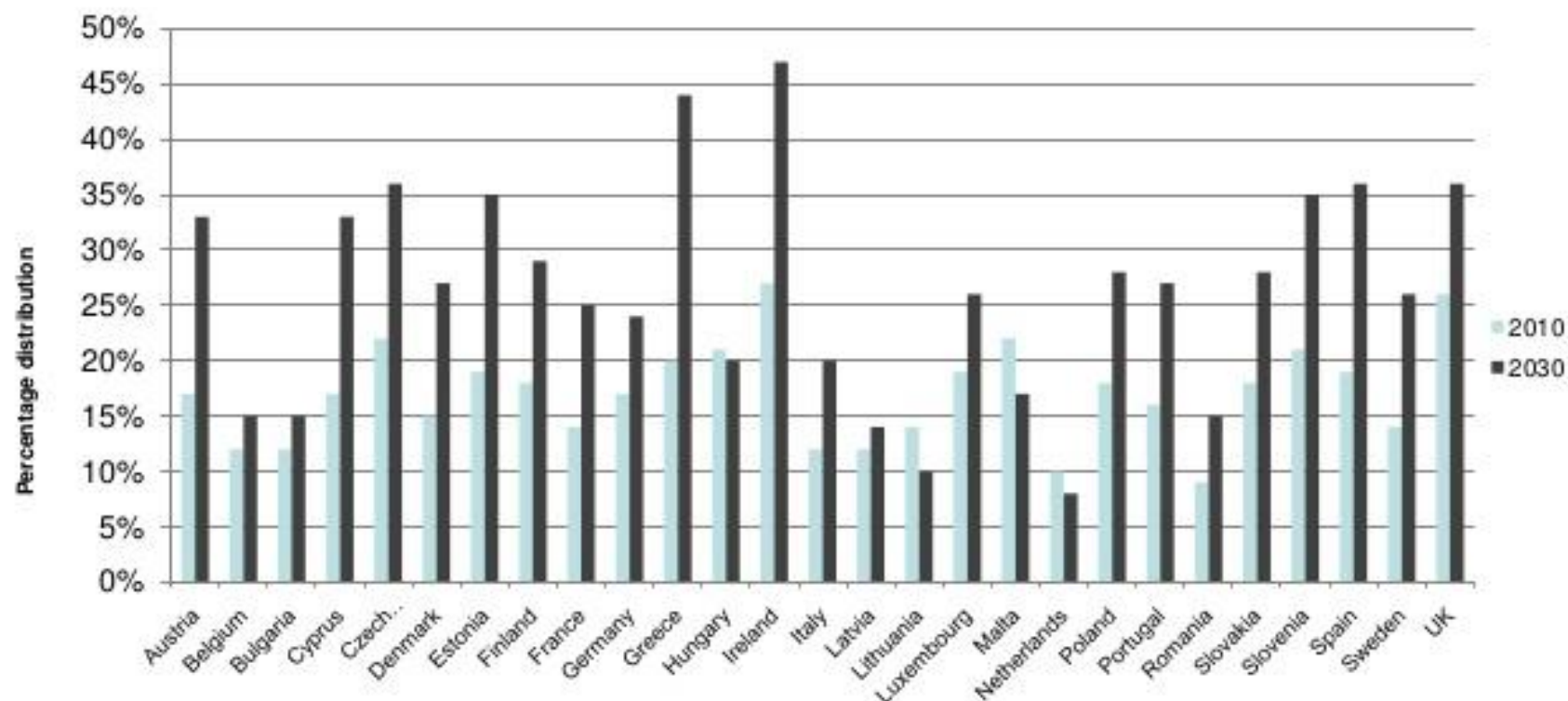
One in three children in Year 6 (10-11) is overweight or obese (boys 34.8%, girls 31.8%)



Child overweight (including obesity)/ excess weight: BMI \geq 85th centile of the UK90 growth reference

Projected obesity for 2030

WHO Modelling obesity Project 2013 together with UK Health Forum – NOPA II



World Health
Organization
REGIONAL OFFICE FOR Europe



WHO European Ministerial Conference on Nutrition and
Noncommunicable Diseases in the Context of Health 2020

4-5 July 2018, Vienna, Austria

Advertising as a form of expression

- Article 10(1) ECHR:

- ‘Everyone has the right to freedom of expression.

This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.’

- ECtHR case law:

- all forms of expression are protected under this provision, **including commercial expression**
 - See also **CJEU** in C-71/02 *Karner* (2004) and C-380/03 *Tobacco Advertising II* (2006)

VA Pharmacy Board v VA Consumer Council, US Supreme Court (1976)

‘Advertising, however tasteless and excessive it sometimes may seem, is nonetheless **dissemination of information** as to who is producing and selling what product, for what reasons and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. **It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed.** To this end, the free flow of commercial information is indispensable.’

In the EU, advertising is also seen as facilitating market integration

‘In a developed market economy based on free competition **the role of advertising is fundamental**. Advertising is the means by which manufacturers and distributors of goods, and providers of services, seek to persuade consumers that their goods or services are worth buying [...]

A ban on advertising tends to crystallize existing patterns of consumption, to ossify markets and to preserve the status quo [...] Such measures prevent the **interpenetration of markets** and are inimical to the very concept of a single market.’

(AG Jacobs’ Opinion in Case C-412/93 *Leclerc-Siplec* [1995])

Advertising as a source of information?



The right to free expression is not absolute

- **Article 10(2) ECHR:**

- ‘The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are **necessary** in a democratic society [...] **for the protection of health** [...].’
- Advertising restrictions subject to a **proportionality assessment** = balancing exercise between potentially competing interests

Proportionality as a key principle

A MEASURE MUST BE LEGITIMATE

**IT MUST NOT EXCEED WHAT IS
REQUIRED TO ACHIEVE ITS
OBJECTIVE(S)**



- **Role of evidence**
- **Standard of review** can only be determined on the basis of a thorough engagement with case law
- **!!!** It will vary from one legal system to another
 - Courts in Europe tend to leave a broader margin of discretion to regulatory authorities than US courts

Children's exposure to food advertising on television in the UK

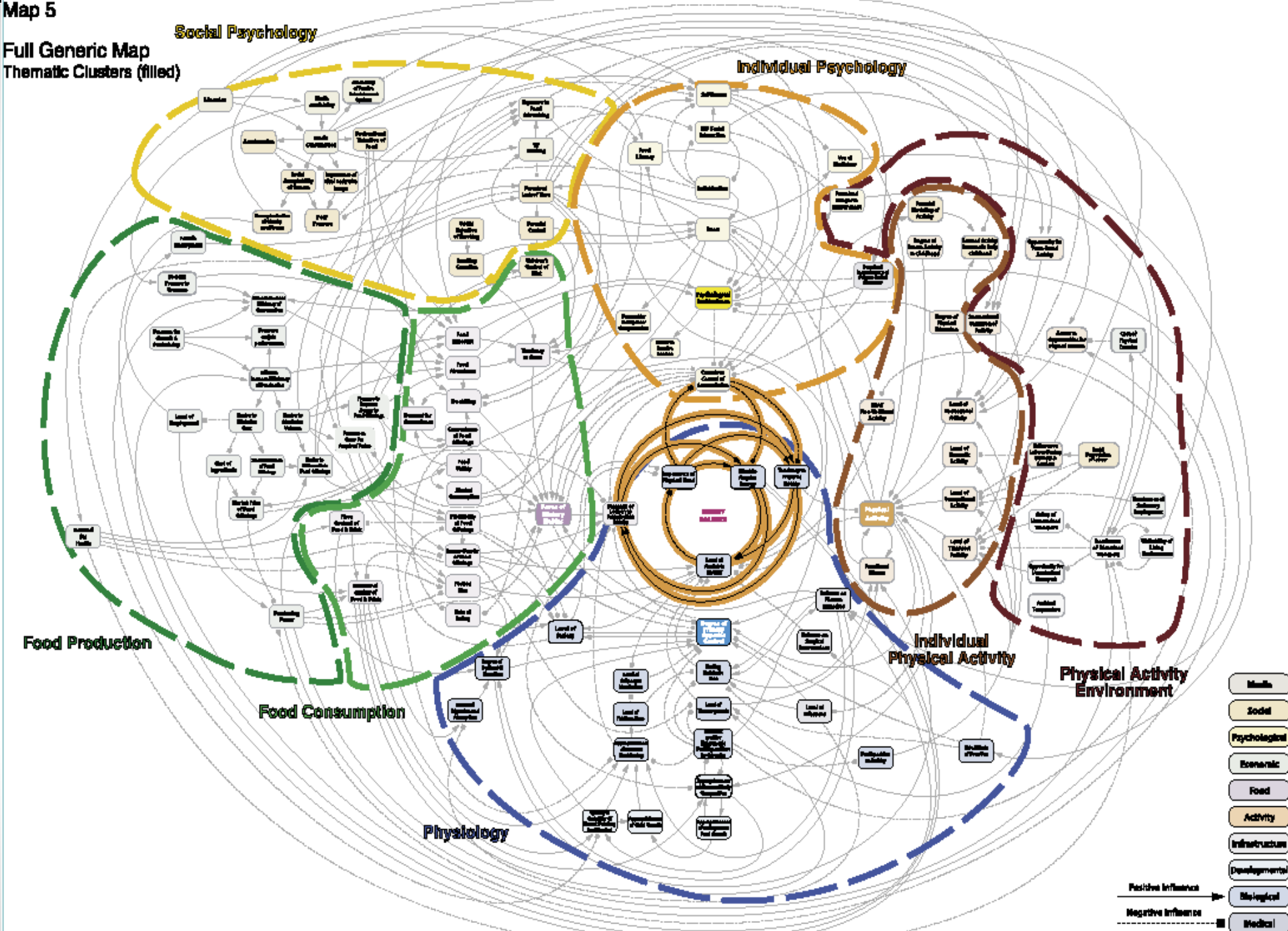
- In 2001, children saw on average 13h35 minutes of commercial television per week (which means a total of 217 adverts)
- Food advertising = largest category of products advertised to children (up to 70%), of which 95% to 99% were high in either fat, sugar or salt (in particular fizzy drinks, chocolate bars, biscuits and pre- sweetened breakfast cereals)
- £594 million was spent on advertising food, of which around 20% was spent by the four confectionery manufacturers: Nestlé, Mars, Cadbury and Wrigley

(Source: Sustain, *TV Dinners: What's being served up by advertisers?*, 2001)

DENIAL

- “Food advertising does not make children fat”
 - Lack of physical activity
 - Snacking whilst watching television
- Coupled with the argument that obesity is complex
 - “there is no magic bullet and restricting food advertising will not solve the obesity epidemic afflicting the nation”
- And with the argument that parents are responsible for their children’s health
- → More focused research to determine the legitimacy of imposing restrictions on food marketing

Full Generic Map
Thematic Clusters (filled)



Obesity cannot be reduced to a question of personal responsibility



Evidence associating food marketing and child obesity

- Independent evidence has confirmed that food marketing negatively affects food preferences, purchase requests and consumption patterns:
 - Literature review
 - Experimental evidence
 - Assessment of existing restrictions on food marketing to children

**THE EXTENT, NATURE AND EFFECTS
OF FOOD PROMOTION TO CHILDREN:
A REVIEW OF THE EVIDENCE TO
DECEMBER 2000**

PREPARED FOR THE WORLD HEALTH ORGANIZATION

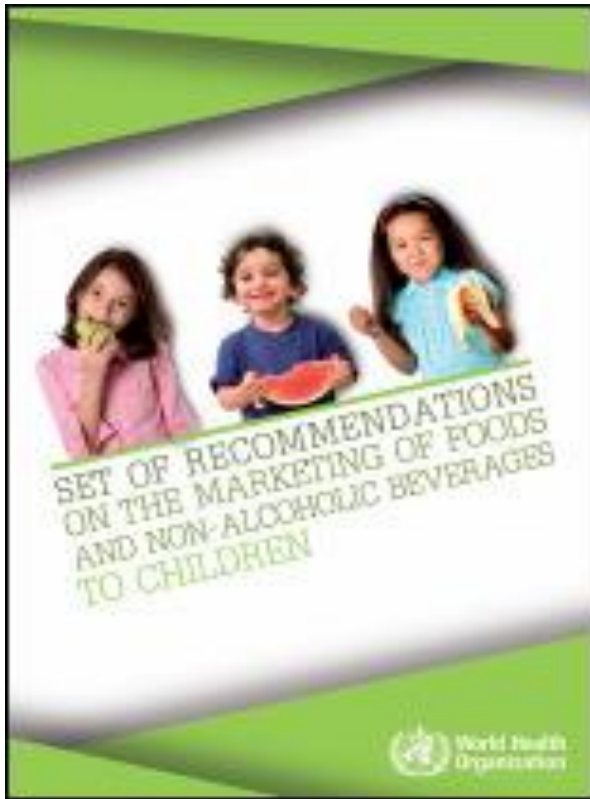
By Georgina Cairns, Kathryn Rogers & Gerard Hastings

Institute for Marketing Research, University of Reading &
The Open University, United Kingdom



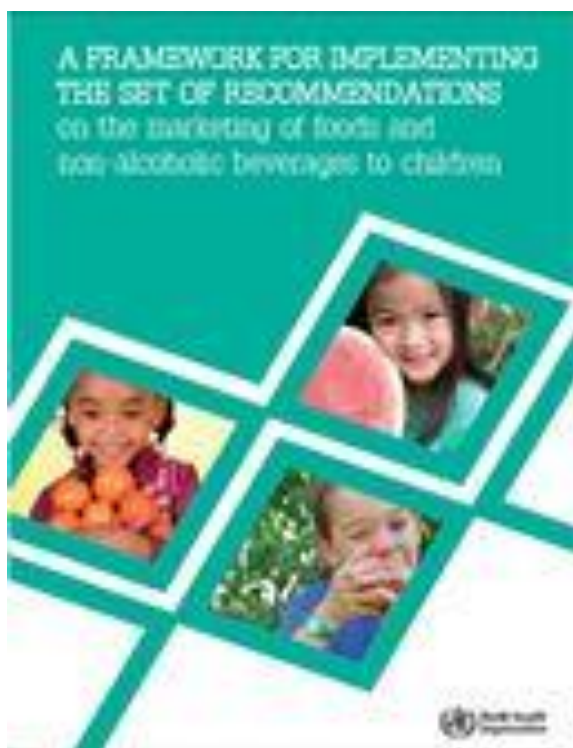
December 2001

WHO Recommendations (2010)



- Unanimously endorsed by Resolution WHA 63.14
- **Overall objective:** to reduce the impact of marketing on children and therefore contribute to effective obesity prevention strategies

Framework Implementation Report (2012)



- Puts some flesh on the bones of the Recommendations and identifies key considerations for States to take into account

Three key principles

- Importance of adopting **a comprehensive approach** where possible: more likely to achieve the objective as they prevent the industry from **shifting investment** from one regulated media to non-regulated media
- Effectiveness requires that two components are tackled:
 - **Exposure** = the reach, frequency and media impact of the marketing message
 - **Power** = the creative content, design and execution of the marketing message
- Importance of regulating **cross-border marketing**
- Responsibility of governments to act in the public interest, whilst **avoiding all conflicts of interest and undue influence from commercial operators**

The use of licensed and equity brand characters



The use of celebrities



“No Conflicts of interest or undue influence from commercial operators”

WHO Global Strategy on Diet and Physical Activity (2004)

- Main objective: to challenge the food industry to do far more to improve nutrition and help tackle obesity prevention
- But **ambiguity** concerning the involvement it foresees for food businesses:
 - It encourages governments to establish mechanisms to promote their participation in activities related to diet, physical activity and health
 - → Premise: the food industry can play a positive role in preventing obesity worldwide, even though undefined

IFBA – “Our Commitments”

- IFBA was formed in May 2008 “when CEOs of the world’s leading food and non-alcoholic beverage manufacturers signed a letter to WHO Director-General Dr Margaret Chan, committing their companies **to support the WHO’s 2004 *Global Strategy on Diet, Physical Activity and Health***”
- “Many experts agree that significant increases in NCDs are linked to an increasing prevalence of obesity, resulting from a number of factors including poor diets, less physical activity and changes in lifestyle. WHO, governments, civil society and the private sector all share a common interest in tackling the problem of NCDs and we all agree that the solution requires a whole of society approach and collaboration of multisectoral actions. **We are committed to do our part and in 2008, our CEOs acknowledged the private sector’s role by pledging to expand efforts already underway at individual companies** to realize ‘Five Commitments in Five Years’ ”
- IFBA report annually and publicly on their progress

IFBA Members

- The Coca-Cola Company; Ferrero; General Mills; Grupo Bimbo; Kellogg Company; Mars; McDonald's; Mondelēz International; Nestle; Pepsi-Co; Unilever
- “IFBA member companies represent the global leaders of the food and non-alcoholic beverage industry. We employ more than 3.5 million people worldwide and had combined annual revenues in 2012 of approximately USD 422 billion”

“Five Commitments in Five Years”

1. Reformulate products and develop new products that support the goals of improving diets;
2. Provide clear and fact-based nutrition information to all consumers;
3. Extend **responsible advertising initiatives** and marketing to children **globally**;
4. Raise awareness on balanced diets and increased levels of physical activity; and
5. **Actively support public-private partnerships that support the WHO's 2004 *Global Strategy on Diet, Physical Activity and Health***

Self-regulation as a solution to obesity prevention?

- SR = “the possibility for economic operators to adopt amongst themselves and for themselves common guidelines” , i.e. voluntary
- SR often praised for its responsiveness, its flexibility and its cheapness
- Government intervention always possible if SR fails

Article 9(2) AVMS Directive

“Member States and the Commission **shall encourage** media service providers to develop **codes of conduct** regarding **inappropriate** audiovisual commercial communication, accompanying or included in children’s programmes, of [unhealthy] foods and beverages”

The 'EU Pledge'



“We will change our food advertising to children” (EU Pledge signatories)

- “The EU Pledge is a voluntary initiative by leading food and beverage companies to change the way they advertise to children. This is a response from industry leaders to calls made by the EU institutions for the food industry to use commercial communications to support parents in making the right diet and lifestyle choices for their children.”
- “The EU Pledge programme is endorsed and supported by the World Federation of Advertisers.”

Enhanced commitments 2012

- No advertising of products to children under 12 years, except for products which fulfil specific nutrition criteria based on accepted scientific evidence and/or applicable national and international dietary guidelines
- In the online sphere, the above commitment will apply to marketing communications for food and beverage products on company-owned websites, in addition to third-party internet advertising
- No communication related to products in primary schools, except where specifically requested by, or agreed with, the school administration for educational purposes

Assessing the EU Pledge

- **LIMITED COVERAGE**

- commitment of some (not all) major food operators not to advertise to children unless products fulfil specific nutrition criteria
- children under 12s
- media: TV, print, radio, internet, primary schools
- audience: minimum of 35% of children under 12

- **ENFORCEMENT AND EVALUATION**

- 94% compliance rate on websites of signatories
- Impact of the commitments on public health?

- **INHERENT CONFLICT OF INTEREST**

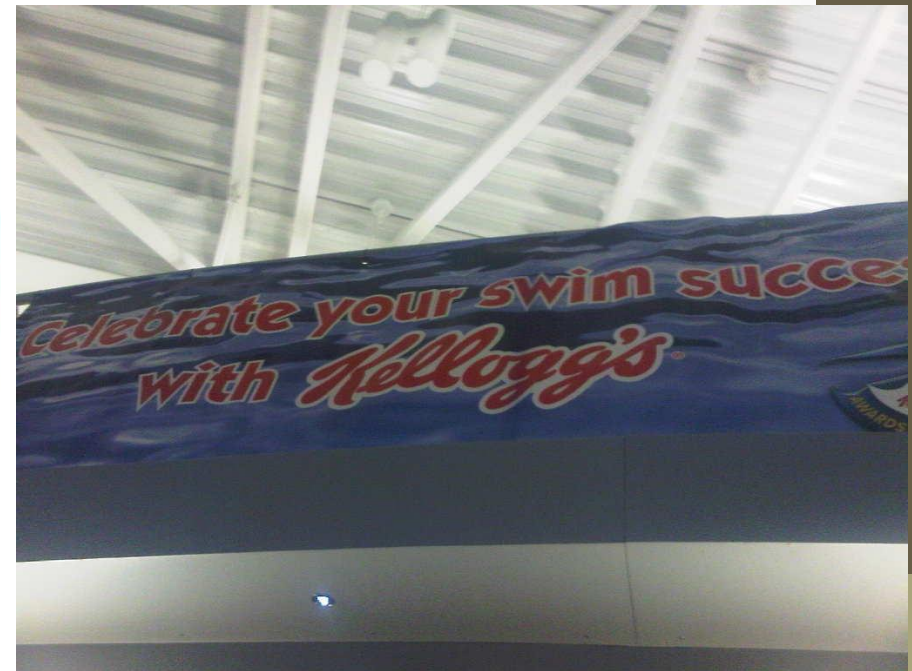
- wrong motivating factors for the food industry?
- Coherence of the regulatory environment?

Celebrating 40 Years Together

http://www.40together.com/?skip=true&utm_source=desktop&utm_medium=ownedassets-hpto&utm_campaign=40thanniversary082014#206304



Sponsorship of physical activity by food industry operators



Minimum harmonisation as an opportunity for Member States?

- **Minimum harmonisation:** MS are “free to require media service providers under their jurisdiction to comply with more detailed or stricter rules” (Art. 4 AVMS Directive)
 - Hence the stricter rules on food marketing in the UK, for example
- **BUT** the freedom of Member States is limited by the “**Transmitting State**” principle
 - See CJEU judgment in C-34/95 *De Agostini* [1997]

The Transmitting State Principle

Article 3(1): “**MS shall ensure freedom of reception and shall not restrict retransmissions on their territory of AVMS from other MS** for reasons which fall within the fields coordinated by this Directive.”

- Attempt to strike a balance between the free movement imperative of the internal market and other imperatives of public interest such as consumer and public health protection
- **BUT** the common standard on food marketing is far too low in the first place → problem both for the internal market and for public health protection
- **Failure of the EU to take sufficient account the WHO Recommendations**

Shifting the paradigm: using fundamental rights as a sword

- Exposure to food marketing must be further restricted
- The WHO should provide the yardstick against which measures must be assessed
- Standard setting is a clear responsibility of governments and must not be delegated to private parties to avoid conflicts of interest
- Role of fundamental rights in promoting healthier diets?

Olivier De Schutter, UN Special Rapporteur on the Right to Food, September 2011

‘It is unacceptable that when lives are at stake, we go no further than soft, promotional measures that ultimately rely on consumer choice, without addressing the supply side of the food chain. [...] Food advertising is *proven* to have a strong impact on children, and must be strictly regulated in order to avoid the development of bad eating habits early in life.’

- **Right to food interpreted as meaning the right to adequate, nutritious food** (beyond food security): see also FAO Guidelines

2013: a growing momentum – obesity and the right to health

- **Committee on the Rights of the Child:** ‘The marketing of “fast foods” that are high in fat, sugar or salt, energy-dense and micronutrient-poor– especially when such marketing is focused on children – should be regulated and their availability in schools and other places controlled.’
- **UN High Commissioner for Human Rights:** ‘obesity [...] and substance use [...] are among the areas requiring sustained and immediate attention [...] States should therefore prioritize issues that have received little attention to date [...] They should ensure adequate attention to the underlying determinants of child health, including, *inter alia*, access to minimum safe and nutritionally adequate food [...] and a healthy and safe environment.’

WHO Global NCD Action Plan 2013-2020

- Adopted unanimously on 27 May 2013 by 194 States through Resolution WHA 66.10
- Lays down 9 voluntary targets to be reached by 2025 – including a halt in the rise of obesity
- Overarching principles, including:
 - the adoption of a ‘Human Rights Approach’ to the prevention and control of NCDs; and
 - ‘the management of real, perceived or potential conflicts of interest’

Fundamental rights and obesity prevention

- No policy is child-neutral → consumer and health policies must respect the rights of the child and make sure they take his/her best interest as “a primary consideration”
- Lack of systematic approach to children’s rights
- Need for impact assessments (ex ante) and monitoring (ex post)
- Expertise required for evidence-based policies
- **BUT NOTHINH WILL EVER REPLACE STRONG POLITICAL WILL**

THANK YOU FOR YOUR ATTENTION

