FEATURE

Who Should Regulate the Marketing of Unhealthy Food to Children?

Petronell Kruger and Safura Abdool Karim

Introduction

'A looming health-care crisis': this is how Statistics South Africa described the astronomical rise in non-communicable diseases in recorded death statistics for 2023. 'Non-communicable disease' (NCD) is a term used to refer to diseases such as high blood pressure, heart disease, cancer, and diabetes that are not spread from one person to another. Risk factors like diet, pollution, reduced physical activity, and alcohol and tobacco use may contribute to these diseases. Being overweight or obese is often contributing risk factor. NCDs used to be called 'lifestyle' diseases, but this term has fallen away given that such diseases are now understood as driven largely by environmental and structural factors outside of individual control.

Given the range of factors that drive NCDs, a suite of policy interventions is necessary to address the epidemic. Preventative policies are shown to be the more cost-effective and effective in managing NCD prevalence than curative approaches alone. A key prevention strategy which has been recommended is restricting the marketing of goods that contribute to NCDs. Major successes have already been achieved in restricting alcohol and tobacco marketing; however, unhealthy food is still a relatively unregulated space.

For decades, NCD experts and international bodies such as the World Health Organization have indicated that intervening at the childhood level has the largest policy gains and comes with relatively small implementation costs. It has also been recognised that restricting child-directed marketing promotes the best interests of the child and is aligned with both the right to health and the right to food, as it promotes healthy diets and prevents disease.

In South Africa, several studies have indicated that the majority of food advertising promotes unhealthy food (often described as food high in salt, sugar, and fat) and that children are often either exposed to or even targeted by such promotion. This is unsurprising in the South African context, where children under 5 are twice as likely to be overweight or obese.

In recognition of this, the Department of Health has published a Draft Regulation (R3337) that developed a mechanism to address unhealthy food through restrictions on how such food can be labelled and marketed. However, the scope of the regulation and the ability of the department to engage in marketing content oversight, as well as the uncertainty of the draft regulation's being adopted into law, raises a key question: Who should regulate child-directed marketing of unhealthy food in South Africa?

This article considers the mandate and authority of different possible implementation entities, the infrastructure of such entities, and possible implementation methods for this form of regulation of the three different entities: the Department of Communications and Digital Technologies (DCDT), the Advertising Regulatory Board, and the Department of Health.

The Department of Digital Technologies and Communications

The DCDT has the mandate to regulate the digital and traditional communications sectors. It is the custodian of the Electronic Communications Act (ECA) and the Independent Communications Authority of South Africa Act (ICASA). The ECA is the primary enabling legislation for regulating the communications sector in South Africa. It contains limited oversight into the content of advertising, through, amongst others, restrictions on political advertisements. It also places the obligation on all broadcasting system licensees to adhere to the Code of Advertising Practice – a voluntary code administered by the Advertising Regulatory Board (ARB).

As will be discussed below, this voluntary code has several shortcomings. However, there is limited face value in the Code as a negative finding based on the Code, can lead to a broadcasting license being withdrawn or withheld. The implementing body – ICASA – can also make additional regulations on marketing or adjudicate on adherence to the ECA where the ARB does not have oversight. ICASA is mainly concerned with oversight of the scheduling of advertisements, not of content.

In 2020, the DCDT published the White Paper on Audio- and Audio-visual Content Services Policy framework ('White Paper'). The White Paper came in response to a need to overhaul how communications in South Africa are regulated, given, amongst others, the rise of digital media. This is important as the ECA and ICASA are geared primarily towards television, radio, and postal service regulation.

For our purposes, the White Paper contains two essential principles. First, it makes the protection of children a guiding principle for legal and policy reform. Secondly, it expressly highlights the need to take policy action to regulate the scheduling of adverts for alcohol as well as harmful food – defined as 'foods that are high in salt, sugars, saturated fats or trans-fatty acids or that otherwise do not fit national or international nutritional guidelines'.

At first blush, the White Paper seems to be a prime vehicle to introduce comprehensive restrictions on marketing unhealthy foods and beverages to children. It is the policy document with the largest and most relevant cross-institutional impact and will overhaul bodies that are already engaging in related marketing oversight activities. However, there are some drawbacks.

The White Paper does not seem to envisage that video-sharing platform services (like YouTube) require licensing, which means that regulatory mechanisms attached to licensing – the likely tool to implement restrictions – will not impact one of the largest growing forms of media that children consume. Instead, these services are envisaged as engaging in self-regulation.

It also lacks detail on how the marketing restrictions will be implemented. Would enforcement still occur through the voluntary body, the ARB, with the understanding that the administered Code will be amended? If so, how will the amendment process be monitored to ensure adequate restrictions? If not, what type of mechanism will be used?

Finally, the DCDT has expressed concern over its ability to identify the harmful foodstuffs that should fall within the scope of restrictions. It also questioned its mandate on this issue during public submissions on the White Paper – Instead indicating its view that the Department of Health might be the more appropriate government department.

> **Accordingly, a growing body of literature addresses the operationalisation of the right to food in food and nutrition policy-making (Riol 2016; Harris et al. 2022; Wilder et al. 2020).**

The Advertising Regulatory Board

The ARB plays a possible role in the White Paper policy overhaul (particularly in enforcement) and enjoys a standing position as the only broad marketing-content oversight body in South Africa. In short, it was set up by the marketing and communications industry as a self-regulatory mechanism. It administers the Code of Advertising Practice, a code developed based on an international model and contextualised for South African use. The Code proclaims that it is based on certain core principles, including responsibility, decency, truthfulness, and competitive fairness, and seeks to ensure that confidence in the industry is maintained. It is supplemented by subject-matter-specific codes, including the Food and Beverage Code.

Importantly, the ARB is an entirely voluntary body, with its initial members primarily being publishers. This means that the ARB has no jurisdiction over industry players (specifically the producers and sellers of unhealthy foods) who do not submit to its jurisdiction, either ad hoc or through membership. Though there are now food producers in its members, this limits its sanction powers considerably.

When an organisation is not a member of the ARB, the ARB can determine the compliance of the advertisement with the Code and publish its views to its members on whether the advertisement should be withdrawn or retained. In practice, this means a product producer can be a non-member, but when it publishes an advertisement through a media house that is a member, the ARB can technically have the advertisement withdrawn.

The weakness of this sanction becomes apparent if one considers scenarios where the advertisement is published by non-members (such as social media entities), or where the marketing is on an item's packaging. Even this small sanction power over non-members was a hard-fought battle all the way to the Constitutional Court, where the jurisdiction of the ARB had to be clarified in *Bliss Brands (Pty) Ltd v Advertising Regulatory Board NPC and Others* [2023] ZACC 19.

The ARB is also funded solely on a voluntary basis by industry (i.e., there are no membership fees). This conflict of interest and financial incentive to keep members happy creates a situation ripe for industry capture. It is also unclear what external checks and balances exist (beyond costly court review) to ensure its independence.

Moreover, as the Code stands, it does not do much at present to address concerns about marketing to children. The Food and Beverage Code does give a nod to some of the issues that underlie the need to restrict marketing to children. For example, in section 4, it provides that

> "[f]ood and beverage advertising should not be so framed as to abuse the trust of consumers at whom it is directed or who are likely to be exposed to it or exploit their lack of experience or knowledge or their credulity."

It also provides for limited restrictions on the use of cartoons or direct appeals to children under 12 years old (and not 18, as is the definition of 'children' in other legal instruments). In section 7, under the heading 'social values', the Code provides as follows:

1) As it is recognised that children of twelve years old and under are impressionable, food and beverage advertising should not mislead children about product benefits from use of the product. […]
2) Food and beverage product advertising should not undermine the role of parents or others responsible for a child's welfare in guiding diet and lifestyle choices.
3) Food and beverage product advertising should not directly appeal to children of twelve years old and under to persuade their parents or others to buy advertised products for them; or suggest any negative consequences of not purchasing the product.

The Food and Beverage Code, in section 8, also places a restriction on the use of cartoons and celebrities when advertising food and beverage products that "do not represent healthy dietary choices and a healthy lifestyle, consistent with established scientific standards acceptable". However, this is arbitrarily limited to television, excludes company-owned

characters, and expressly permits the use of such characters on packaging.

In Fair Cape Diaries, a decision by the ARB, the scope of sections 7 and 8 was tested. A complaint was lodged against a milkshake product that used a large image of the Barbie cartoon on the front of its packaging. The ARB provided a very limited interpretation of section 7.3. and found as follows:

> "[One] cannot dissect the provisions of Clause 7.3. It clearly states that 'Food and beverage product advertising should not directly appeal to children of twelve years old and under to persuade their parents or others to buy advertised products for them; or suggest any negative consequences of not purchasing the product'. In other words, the advertising may not tell children to persuade their parents to buy the product, or tell children that there will be negative consequences if they do not buy the product."

This interpretation minimises the application of section 7.3. to instances where a child is expressly prompted to persuade their parents to purchase a product.

This interpretation does not allow for the sanction of 'pester power', a well-studied and effective marketing tool where the child is excited with the purpose of influencing the purchaser, usually a caregiver. The ARB also found that the direct prohibition of cartoons in advertisements targeted at children under 12 on television presupposed the permissibility of such cartoons in advertisements on other media.

It is noteworthy that the ARB declined to decide on the classification of the product as unhealthy. The product was a sugar-sweetened milk product that contained 36.6g of sugar per serving, or about 70 per cent of the recommended sugar allowance for adults. This foreshadows possible problems with products that are less overtly unhealthy being deemed as falling within the scope of the relevant restrictions. This decision is currently on appeal.

The Department of Health

In 2023, the Department of Health published Draft Regulation R3337. The key feature of the regulation is the introduction of warning labels on the front of packaged food to assist consumers in identifying whether food contains artificial sweeteners or high levels of salt, fat, or sugar. Regulation 51 provides that no marketing to children is permitted where foodstuffs carry a warning label. The scope of what is considered marketing to children is not set out.

However, Regulation 52 contains a specific list of marketing activities or techniques which are prohibited under the ban. The list resembles some of the marketing techniques identified by the World Health Organization as child-directed, such as depicting celebrities, cartoons, puppets, or other characters; providing gifts, tokens, and competitions using children in the promotion; abusing family values; condoning or encouraging excessive consumption; being misleading about possible benefits; or creating a sense of urgency. The list is fairly comprehensive, and the Draft Regulation is clear that children are persons under 18 (not under 12).

Since marketing is contested ground, it is unsurprising that industry actors have raised challenges to the Draft Regulation. One such challenge concerns the Department of Health's authority to regulate marketing at all, given a perceived competing mandate assigned to the DCDT.

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Authority to regulate marketing

It certainly cannot be that regulating marketing is *ipso facto* exclusively within the mandate of the DCDT. Successful restrictions in other statutes, such as limiting the advertisement of tobacco, liquor, and gambling, are accepted as falling within the relevant mandate of other ministries (See Table 1).

Table 1: Selected restrictions on marketing to children in other statutes

Legislation/regulation	Summary of provision	Audience targeted	Strategies targeted
Section 9(1) of the Liquor Act 59 of 2003	A person must not advertise liquor or methylated spirits in a manner intended to target or attract minors.	Children	Advertisements intended to target or attract minors.
Section 3 of the Tobacco Products Control Act 83 of 1993	No person shall advertise or promote a tobacco product through any direct or indirect means, including through sponsorship and advertising.	General public	Limits direct and indirect advertisement and promotion of tobacco products. Also limits commercial communications.
Section 15(1)(b) of the Gambling Act 7 of 2004	A person must not advertise or promote a gambling activity, other than an amusement game, in a manner intended to target or attract minors.	Children	Advertisements intended to target or attract minors

However, given that the Draft Regulation is delegated legislation and hence subject to scrutiny as an administrative act, there is merit in considering whether the regulation of marketing is lawful. The Draft Regulation is proposed under the Foodstuffs, Cosmetics and Disinfectants Act. Section 15(1) of this Act gives the Minister of Health the power to make regulations on various aspects of the Act, including:

- prescribing how consumers are informed of processes or methods, or the fact of adding or removing substances to food (section 15(1)(c));
- regulating various components of the sale of food, including the prohibition of certain "foods, naming, and appliances and containers" used in its production (section 15(1)(g)-(j));
- prescribing any matter in terms of the Act "which may be prescribed" (section 15(1)(o)); and
- prescribing any matter which the Minister may consider necessary or expedient to further the objects of the Act (section (15)(1)(o))).

We argue that the Foodstuffs, Cosmetics and Disinfectants Act allows for intervention in marketing given that section 15(1)(c) goes beyond the mere labelling of food to include any mechanism whereby consumers interact with the product or how it is sold. Section 1 of the Act provides that 'sell' or 'sale' includes advertising. This directly empowers the Minister to intervene in how food is advertised. The regulation of 'advertisement' read with the Minister's broad powers regarding the means of sale and product labelling can reasonably be interpreted to cover most forms of marketing. 'Advertising' is defined broadly as

> "[a]ny written, pictorial, visual, or other descriptive matter or verbal statement, communication, representation, or reference –
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> (a) appearing in a newspaper or other publication; or
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> (b) distributed to members of the public; or
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> (c) brought to the notice of members of the public in any manner, and which is intended to promote the sale or encourage the use of such· foodstuff, cosmetic or disinfectant; and 'advertise' has a corresponding meaning."

The Act allows for other aspects that require further regulation to be dealt with by the Minister in subsequent regulation. Section 5(1) prohibits misleading advertisements in relation to a host of issues, such as the 'composition, quality [or] nutritive value' of the product. This explicitly empowers the Minister, and obliges the Department, to regulate and monitor health claims. The marketing restrictions as proposed in the Draft Regulation are tied directly to the nutrient composition of the food. The Minister is given broad powers to provide regulations that promote the objects of the Act (section 15(1)(o)). The Act broadly provides that its goal is to promote the sale, manufacture, and importation of food, and 'incidental' matters.

It is therefore not surprising that the Department of Health has already exercised this power to regulate marketing in terms of regulations enabled by the Foodstuffs, Cosmetics and Disinfectants Act, including regulating health endorsements and information claims on advertisements (GNR146), regulating claims in salt advertisements (GNR184) and providing for extensive marketing restrictions on infant and young child feeding products (GNR991).

Conclusion

What emerges from the discussion is that while the marketing of unhealthy food is regulated to varying degrees, this regulation vests authority in a fragmented collection of entities with different powers, status, and mandates. Unlike many other countries, South Africa has not created an independent, well-resourced authority to regulate marketing, but instead has relied primarily on the industry-funded ARB and provided an unfunded mandate to the Department of Health. This creates an environment where enforcement is both difficult and littered with conflicts of interest.

The White Paper and a mandate within the DCDT offer a potential new pathway for the regulation of marketing if its implementation could learn from the shortcomings of existing systems and create cohesion in a currently fragmented regulatory environment. The pressing issue of unhealthy food and its impact on the country's health requires action to comprehensively address marketing and ensure that any policies adopted are enforced.

Dr Petronell Kruger is the Programme Manager at Healthy Living Alliance (HEALA), Johannesburg.

Dr Safura Abdool Karim is a legal consultant at Healthy Living Alliance (HEALA), Johannesburg, and a research associate at the Centre for the Aids Programme of Research in Durban, South Africa.

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> **South Africa has not created an independent, well-resourced authority to regulate marketing**