

# **A WHO/UNICEF Global Code of Practice on the Marketing of Unhealthy Food and Beverages to Children**

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*The High-level Meeting of the United Nations General Assembly on the Prevention and Control of Non-Communicable Diseases (“NCDs”) has drawn much-needed attention for the development and implementation of a cogent global strategy to reduce risk factors related to alcohol abuse and unhealthy diets starting in childhood. Absent in the Political Declaration of the High Level Meeting (“the NCD Political Declaration”), however, is any proposal for adoption of an international legal framework to advance cooperation in addressing these global challenges. The lack of a global legal framework to guide national action and international cooperation to reduce risk factors related to alcohol abuse and unhealthy diet significantly hinders the capacity of nations worldwide to unilaterally and collectively curb the expanding NCD epidemics. Recognizing the growing burden of NCDs, a number of commentators have suggested the adoption of comprehensive treaties or framework conventions on obesity, or alcohol or both.<sup>1</sup> Given the legal, political, budgetary, and time-related limitations to the development and adoption of all-encompassing treaty regimes to address obesity and alcohol abuse, the authors recommend an alternative legal strategy to counter these rising NCD epidemics. In particular, the authors call for the prompt adoption of a WHO/UNICEF Global Code of Practice on the Marketing of Unhealthy Foods and Beverages to Children. Such a non-binding international legal instrument has significant advantages over an treaty approach at the present time. It would provide a much-needed step towards advancing meaningful engagement with and holding to account all relevant actors, including national governments, private industry, and UN agencies, in protecting children everywhere from harm. The WHO Framework Convention on Tobacco Control (“FCTC”) addresses one of the major risk factors contributing to NCDs by establishing a global legal framework to counter the tobacco pandemic; the global community should now act collectively to establish a legal architecture to regulate a central component of these two other major risk factors.*

## **SCOPE, ISSUES AND THE GLOBAL IMPACT OF MARKETING**

Unhealthy diet and alcohol use during childhood are associated with acute and chronic, physical, and psychological illnesses during this important period and lead to chronic conditions later in life. Excess weight and obesity during childhood has rapidly emerged as a global epidemic. More than one child in ten in the world is overweight, totaling over 155 million.<sup>2</sup> In the United States, for example, childhood obesity has tripled over the last three decades.<sup>3</sup> However, contrary to popular opinion, the childhood obesity epidemic is not limited to industrialized nations. Of the 42 million children under the age of five currently estimated by the WHO to be overweight, approximately 35 million reside in developing countries.<sup>4</sup>

The harmful use of alcohol, particularly amongst the young, is another grave and growing global public health tragedy. The unhealthy use of alcohol is associated with the loss of 2.5 million lives annually. It is the world's third leading risk factor for disease and disability, and the leading risk factor in middle-income countries. The 2011 Global Status Report on Alcohol and Health highlights the high prevalence of under-age drinking in many countries, with numerous countries in the Caribbean and South America identifying alcohol use rates of over 50 percent amongst 13-15 year olds surveyed; increasing trends of under-age drinking across countries; as well as rising rates of hazardous and harmful drinking patterns amongst youth.<sup>5</sup>

The marketing of unhealthy foods and beverages to children worldwide is a significant contributing factor to these global health challenges. Since the adoption of the WHO Global Strategy on Diet, Physical Activity, and Health in 2004, scientific evidence for critical action on marketing unhealthy food and non-alcoholic beverages, especially towards children, has strengthened. A recent WHO report demonstrates that unhealthy food and non-alcoholic beverage marketing has significant effects on children's food preferences, purchases, purchase requests, and consumption in countries worldwide,<sup>6</sup> and cautions against harmful marketing practices increasingly targeting children. There is also mounting evidence of the growing magnitude and impact of the marketing of alcoholic beverages to children in developing countries. Studies increasingly suggest that youths are exposed to similar, possibly higher, levels of alcohol beverage advertisements as adults.<sup>7</sup> There is established evidence of an association between children's exposure to advertisement and their intention to drink, onset of drinking, and consumption patterns.<sup>8</sup>

## **INADEQUACIES OF CURRENT POLICIES AND STRATEGIES**

In the last decade there has been a significant change in the policy environment, with more countries, particularly high-income states, contemplating strategies to address the marketing of unhealthy food and beverages to children. Despite a diversity of potential policy interventions to address unethical marketing to children, in most countries with strategies to restrict marketing, voluntary self-regulation remains the dominant response. Such voluntary standards are largely industry developed, implemented, and monitored. An increasing number of food and beverage corporations have launched voluntary 'pledges'<sup>9</sup> to reduce the extent and impact of commercial promotion of energy-dense food and beverages to children in response to the growing epidemics.<sup>10</sup>

However, industry-driven voluntary 'pledges' have proven insufficient to stem this growing problem, even in high-income countries. For example, whilst voluntary pledges to restrict advertising are in place in the European Union, the United States, Canada, and Australia, such pledges are often restricted to young children under the age of 12 or 14. The pledges are mainly limited to traditional mediums, such as advertising in print, on the internet, and on TV; and generally use industry-defined nutritional criteria regarding what can and cannot be advertised.<sup>11</sup>

Low- and middle-income countries face daunting challenges in controlling the marketing of unhealthy food and beverages to children. While some low- and middle-income countries such as Brazil, Malaysia, Chile, South Africa, and South Korea have developed official policies, including regulations, on food marketing to children, effective implementation and enforcement remain substantial barriers. Although there

are challenges to compliance with limited industry-driven standards in high-income countries, evidence suggests such pledges are frequently not applied to countries in other regions such as Africa and South-east Asia.

To support Member States in their efforts to counter the growing burden of NCDs, the WHO recently adopted recommendations on the marketing of unhealthy food and beverages. In May 2010 the World Health Assembly (WHA) adopted a Set of Recommendations on the Marketing of Food and Non-alcoholic Beverages to Children (“Set of Recommendations”). The purpose of the Set of Recommendations is to guide efforts by Member States in designing new and/or strengthening existing policies on food marketing to children in order to reduce the impact of marketing of foods and drinks high in saturated fats, *trans*-fatty acids, free sugars, and salt.<sup>12</sup> The Set of Recommendations provides important guidance but does not effectively address the extent or underlying nature of the global challenge. It envisions national action and fails to articulate global standards, engage industry in the development and compliance of relevant standards, or fully engage the WHO in the monitoring of potentially abusive marketing practices. Similarly, the recent adoption of the 2010 WHO Global Strategy to Reduce Harmful Use of Alcohol (“WHO Global Alcohol Strategy”), containing explicit recommendations related to alcohol marketing, is to be commended. However, it too does not adequately address the marketing challenge. As with the Set of Recommendations for unhealthy food marketing, the WHO Global Alcohol Strategy focuses primarily on national action and fails to engage private industry in developing global standards or to leverage UN institutions in monitoring compliance.

A high-level meeting of the General Assembly has since been convened to consider strategies for the prevention and control of non-communicable diseases worldwide. Rather than calling for a much needed global legal strategy to address the worst abuses related to the marketing of unhealthy foods and beverages to children, the September 2011 NCD Political Declaration, adopted by the General Assembly at this high profile meeting, primarily emphasizes the use of the highly limited WHO Set of Recommendations and the Global Alcohol Strategy as the key strategies to prevent and control obesity and alcohol-related NCDs. The NCD Political Declaration can even be reasonably interpreted as weakening the existing WHO Set of Recommendations by calling on the private sector to implement WHO recommendations ‘where appropriate.’ The Declaration uses relatively strong language directed at the tobacco industry and its support for strengthened implementation of the FCTC. In contrast, its language towards the engagement of the private sector in the food and alcohol industry, particularly with regards to marketing to children, is soft. Most significantly, the NCD Political Declaration does not elaborate a framework for advancing global cooperative action to address the NCD crisis of unhealthy food and alcohol abuse.

Food and beverage marketing to children is now a globalized phenomenon that cannot be addressed by unilateral national action alone. Rather, the diversity of contributing factors and the globalization of NCDs necessitates the elaboration and implementation of comprehensive and cogent global standards that address these challenges. Marketing to children “now tends to be pluralistic and integrated, using multiple messages in various channels.”<sup>13</sup> A multifaceted mix of marketing communications designed to build brands and relationships with children increasingly complements television. Advertising that spills over national borders through television, internet, newspapers, magazines, film, brand mascots and characters popular with

children, as well as advertising embedded in videos, games, and sponsored international sport and music events, cannot be addressed by one country acting alone. The challenge of implementing voluntary self-regulation and national regulations, particularly in resource poor countries, highlights the need for a global framework incorporating meaningful international standards as well as effective legal and institutional mechanisms, including information sharing, reporting and monitoring. The marketing of unhealthy foods and beverages to children is a global problem requiring a global solution.

### **A WHO/UNICEF GLOBAL CODE: THE CASE FOR OR A GLOBAL SOLUTION**

In response to rising public concern about global obesity trends, civil society organizations have long proposed the development of a WHO international code of practice on the marketing of unhealthy food and non-alcoholic beverages to children,<sup>14</sup> an idea that has been considered in other fora.<sup>15</sup> This neglected idea deserves renewed attention, re-conceptualization, and legal refinement. In particular, the authors recommend the adoption of an innovative legal strategy centering upon the development and implementation of a WHO/UNICEF Global Code of Practice on the Marketing of Unhealthy Food and Beverages to Children.

A WHO/UNICEF Global Code could establish a set of minimum global standards, containing specific provisions to facilitate further data collection and information exchange, while incorporating strong institutional and monitoring mechanisms. The latter, as present in the WHO Global Code of Practice on the International Recruitment of Health Personnel, is particularly important to promote implementation.<sup>16</sup> The WHO and UNICEF should jointly develop the Code because UNICEF's strong and unparalleled country presence and mandate to protect children would be invaluable in the implementation phase.

Despite the significant differences in marketing practices between the food and non-alcoholic beverage industry and that of the alcohol industry, the two should be addressed through a single international legal instrument. There are sufficient parallels between their modern marketing practices to justify a single instrument. Moreover, the development of health related international legal instruments is a rarity. Only two code instruments have been adopted by the WHA, separated by almost thirty years. Furthermore, the challenges of achieving consensus in multilateral institutions make it highly unlikely that separate codes of practice, let alone treaties, will be achievable in the near future.

Expanding an international legal instrument on the marketing of harmful food and beverages to children is also consistent with the WHO's constitutional mandate to set norms and standards in global health as well as its emerging mandate in global health law. Although the development of global legal standards was traditionally a neglected function at the WHO,<sup>17</sup> international law is receiving more prominence as WHO Member States increasingly recognize the need to cooperate to complement domestic action with cross-border action to protect the health of their populations.<sup>18</sup> Notably, in the debates surrounding WHO reform at the 2011 WHA, Member States widely endorsed the idea that the WHO's normative function—its role in serving as the

institutional platform for the development of global health law—should become a priority function of the Organization in the years to come.

### **THE MERITS OF A NON-BINDING LEGAL INSTRUMENT**

A WHO/UNICEF Global Code of Practice on the Marketing of Unhealthy Food and Beverages to Children can serve as an important mechanism to enhance international cooperation, and as a springboard for more effective domestic action to limit abusive marketing activities by the food and beverage industries. A non-binding international legal instrument can mobilize public, media, and civil society attention and thereby enable the public to hold governments, international organizations, and the private sector more readily accountable.

Although non-binding legal instruments are frequently dismissed as weak, inferior, and ineffective relative to treaties, there is growing recognition that the challenges of global governance require faster and more flexible approaches to international cooperation than can be achieved by traditional treaty strategies. While treaties have certain advantages as tools of international cooperation, they can be remarkably slow and expensive to negotiate, conclude, and bring into force. Consequently, in realms of international concern ranging from arms control to the environment, the global community is increasingly turning to the creation and implementation of non-binding norms.

A non-binding code has a variety of features that could make it an effective international legal framework for addressing the marketing of unhealthy food and beverages to children. Although technically non-binding as a matter of international law, non-binding international instruments can be codified into national law and practice. Consequently, non-binding global standards, unlike the ineffective non-binding national standards that have been widely adopted in this realm, could provide countries with more effective and enforceable national legal frameworks.<sup>19</sup> The experience of other global codes indicate that the code format, by establishing international minimum standards, could bolster the political capacity of lower-income nations in addressing the challenges presented by powerful industries when codifying and implementing national legislation. A WHO/UNICEF Code could provide low- and middle-income countries with much-needed leverage to resist industry pressure to withdraw national legislation aimed at protecting their populations during bilateral negotiations with wealthy nations and agreements with the food and beverage industries. In addition, the establishment of a WHO/UNICEF Code could directly pressure industry to meet global marketing standards in all markets, high- and low-income countries alike.

Another key advantage of a code is that it can incorporate all relevant actors in the negotiation and implementation process and can speak directly to industry and civil society. A critical limitation of a treaty approach is that, pursuant to international law, treaties are primarily between states. As a general rule, non-state actors cannot become parties or directly participate in the negotiations. Civil society participation in negotiation and implementation of the code could empower citizens to seek greater accountability from industry and governments, and potentially discourage coercion by wealthy nations and powerful corporate interests.

The WHO's recent experience in the negotiation and adoption of the WHO Global Code of Practice on the International Recruitment of Health Personnel demonstrates the significant contribution that non-binding instruments can make to addressing global health challenges and the advantages that such instruments can have over hard-law treaty strategies.<sup>20</sup> For example, since non-binding standards do not involve formal legal commitments, compromise and agreement may be easier to achieve than heavily legalized treaty strategies. The FCTC was negotiated over five years in six separate rounds of two-week negotiation sessions open to all WHO Member States, while the WHO Global Code of Practice on the International Recruitment of Health Personnel was negotiated in a fraction of that time. In addition, by removing concerns about legal non-compliance, non-binding instruments may also promote deeper commitments with stricter compliance mechanisms than binding treaties. While both the FCTC and the WHO Global Code set forth a shallow substantive framework, the WHO Global Code incorporates more potent procedural mechanisms to advance implementation. Finally, the elaboration of a code can be part of a dynamic process that leads to a deepening of commitment and action to protect children from marketing abuses over time by building experience with global standards and trust among all actors involved in the process.

## CONCLUSION

The imperative to act is clear. Recent WHO experience illustrates the ability of the global community to address contentious and seemingly intractable health issues through the development of international legal instruments, as with the FCTC and the WHO Global Code of Practice on the International Recruitment of Health Personnel. Bold action, particularly in light of the limited outcome of the UN High Level Meetings on NCDs, is needed to protect all children globally. This can be achieved through a comprehensive and inclusive international legal framework that does not neglect children living in least developed and emerging market economies from the worst abuses related to the marketing of unhealthy foods and beverages, alcoholic and non-alcoholic. The time is ripe for the development, adoption and implementation of a WHO/UNICEF Global Code of Practice on the Marketing of Unhealthy Food and Beverages to Children.

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<sup>1</sup> “Urgently needed: a framework convention for obesity control,” *Lancet*, 378, 741 (2011); “A Framework Convention on Alcohol Control,” *Lancet*, 370 (2007): 1102.

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<sup>5</sup> World Health Organization, *Global Status Report on Alcohol and Health*, 2011, [http://www.who.int/substance\\_abuse/publications/global\\_alcohol\\_report/msbgsruprofiles.pdf](http://www.who.int/substance_abuse/publications/global_alcohol_report/msbgsruprofiles.pdf).

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<sup>14</sup> Consumers International and International Obesity Taskforce, “Recommendations for an International Code on Marketing of Foods and Non-Alcoholic Beverages to Children,” March 2008, <http://www.consumersinternational.org/media/314595/recommendations%20for%20an%20international%20code%20on%20marketing%20of%20foods%20and%20non-alcoholic%20beverages%20to%20children.pdf>.

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