

## **General Comment submission**

### **Children's rights in relation to the digital environment**

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Dear Members of the Committee on the Rights of the Child,

We write in response to the Committee's consultation on children's rights in relation to the digital environment, which we very much welcome. We are a group of colleagues who often work together to raise awareness and promote regulation of harmful marketing to which children are exposed, including for tobacco, alcohol, unhealthy food, energy drinks, gambling services, slimming products and treatments. We have written extensively on such marketing, arguing that it infringes many rights enshrined in the UN Convention on the Rights of the Child (CRC) and other international instruments.

Currently, via digital media marketing, children are subjected to intense commercial practices of implicit influence, neuromarketing, attitudinal structuring and behavioural modification. These are carried out without independent evaluation to ensure they do no harm. Children are thus commercial digital test subjects for marketing practices affecting their development, health and privacy. On the basis of our collective expertise, spanning law, child development, childhood studies, psychology, food and nutrition, media studies, and child, consumer and digital rights, we call on the Committee to recognize the far-reaching harms caused by digital marketing and the personal data extraction on which it is predicated, and the need to protect children from these, so children can fully enjoy the opportunities digital environments offer for their development and fulfilment of their rights.

#### **1. Background**

##### ***Children's exposure to digital marketing***

During children's daily lives online, they are exposed to extensive digital marketing. They engage with it from an early age, often without adult awareness. This is due to rapid increases in use of mobile devices such as tablets and smartphones, and the increasingly individualized marketing strategies in digital environments. To deliver these, children's personal data are extracted, processed and used to identify and influence their attention, attitudes and preferences.

***Immersive marketing.*** Digital media marketing (e.g., on social media and media sharing sites) for unhealthy commodities, services and brands is immersive, interactive, integrated, and highly engaging. Brands employ tactics that strongly appeal to children including adolescents: striking graphics, visual design and cartoons, with an emphasis on humour, fun, competitions and entertainment. Brands encourage photo and video sharing, and offer games; feature local events popular with young people; and offer prizes, e.g., samples or branded music- and sport-focused items. They also include promotion by celebrities, sports stars and video bloggers ('vloggers') whose popularity is extensive – the most popular have millions of subscribers. Many of these strategies may be difficult to identify as marketing. In LMICs, creative marketing, including in social media, by ultra-processed food and fast food industries aims to build them as 'daily brands'.

**Personalized marketing.** The data available to digital service providers and weak privacy provisions further amplify the power of harmful marketing. Marketing in digital media is personalized to unprecedented degrees, employing new data analytics to track, profile and target individual consumers. Methods used includes data-driven targeting by ethnicity and race with 'culture-coded' content; geotargeting and 'place-based' marketing, including in-store surveillance and point-of-purchase prompting; and new measurement tools to 'micro-moment' messaging.<sup>1</sup> The effectiveness of these strategies is constantly measured by marketers, enabling real-time optimization for impact as documented in industry research. Yet the impact on children's development, health and well-being is not considered, and nor is valid consent obtained for this wholesale experimentation with children's attention, responses and data by major media actors.

**Magnified risks online.** The impact of marketing can be magnified in digital media for psychological, technical and structural reasons. Marketing on mobile devices (described by marketers as the 'brand in the hand'), mimics the effect of receiving a personal message, offering brands the opportunity to establish personal, 'intimate' relationships with consumers. Peer-to-peer transmission through social media networks increases the appeal of messages, and also exponentially distributes entertaining, engaging marketing. Furthermore, digital marketing is integrated with other channels, to deepen impact. In combination, digital marketing *magnifies* existing effects of marketing in other channels (such as broadcast, cinema, and retail).

As digital media use rates grow globally, and as companies marketing unhealthy items focus increasing efforts on LMICs, behaviourally targeted advertising therefore is an ever-growing concern.

### ***Digital marketing as a major children's rights concern***

Digital marketing for unhealthy commodities, services or brands is increasingly perceived as a children's rights issue. Although the CRC itself does not specifically refer to advertising and other forms of commercial communications as a source of harm to children's rights, there are increasing references made by human rights bodies, including the Committee on the Rights of the Child, to the imperative of addressing children's exposure to harmful marketing. By imposing legal obligations on States, a children's rights-based approach guarantees a degree of State accountability, making effective remedies more likely where rights are violated. A children's rights approach supports the monitoring of State commitments and has the potential to translate the commitments and obligations enshrined in the CRC into operable, durable and realizable entitlements. Furthermore, as children's rights are inalienable and universal, the language of human rights can help ensure that a given issue is afforded special consideration in public policy.<sup>2</sup>

In particular, we have argued (see Annex for publications) that marketing for unhealthy food negatively affects a broad range of children's rights, not least their right to the enjoyment of the highest attainable standard of health and their right to privacy.

### ***The right to the enjoyment of the highest attainable standard of health***

The right to enjoy the highest attainable standard of health is specifically protected by Article 24 CRC, which requires that "States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health" (Article 24(1)) and specifically "combat disease and malnutrition [...] through, inter alia, the provision of adequate nutritious foods" (Article 24(2)(c)). As the Committee clearly stated in its General Comment on Article 24,<sup>3</sup> the child's right to health is "an inclusive right, extending not only to timely and appropriate prevention, health promotion, curative, rehabilitative and palliative services, but also to a

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<sup>1</sup> Montgomery et al., 2017; WHO 2016 as cited in Annex

<sup>2</sup> The advantages of a rights based-approach to harmful marketing are discussed extensively in the Unicef report mentioned in the Annex (2018). See also Ó Cathaoir, K. (2017) *A Children's Rights Approach to Obesogenic Marketing*. PhD thesis (mimeo), University of Copenhagen.

<sup>3</sup> Committee on the Rights of the Child, General Comment 15.

right to grow and develop to their full potential and live in conditions that enable them to attain the highest standard of health through the implementation of programmes that address the underlying determinant of health".<sup>4</sup>

There is independent, consistent, and unequivocal evidence that children's health is negatively influenced by food marketing:

- Food marketing to children is almost exclusively for unhealthy food.
- Food marketing undermines food knowledge and establishes unhealthy eating as the norm.
- Food marketing stimulates a preference for unhealthy food, increasing the consumption not only of the product of a given brand, but of all products in a given food category.
- Food marketing encourages the purchase of, and pestering for, unhealthy food.
- Food marketing, including in digital media, makes children more likely to consume unhealthy food, which is directly linked to childhood obesity and weight gain, and related harms to health.

The Committee on the Rights of the Child has noted that the food industry spends billions of dollars on persistent and pervasive marketing strategies that promote unhealthy food to children, and has called for children's exposure to fast foods to be limited and for the marketing of them, 'especially when [it] is focused on children', to be regulated.<sup>5</sup> Furthermore, in several recent State Reports, the Committee has also called on countries with high obesity rates to regulate unhealthy food marketing to ensure that they comply with their obligations under the CRC. As Anand Grover, UN Special Rapporteur on the right to health, unequivocally stated in 2014:

Owing to the inherent problems associated with self-regulation and public-private partnerships, there is a need for States to adopt laws that prevent companies from using insidious marketing strategies. The responsibility to protect the enjoyment of the right to health warrants State intervention in situations when third parties, such as food companies, use their position to influence dietary habits by directly or indirectly encouraging unhealthy diets, which negatively affect people's health. Therefore, States have a positive duty to regulate unhealthy food advertising and the promotion strategies of food companies. Under the right to health, States are especially required to protect vulnerable groups such as children from violations of their right to health.<sup>6</sup>

Particular challenges arise in defining marketing to children online, as the Internet locations most visited by children are often not those "directed at" or "targeting" them but those providing access to a wide range of content (e.g. Google, Facebook, Instagram, YouTube). Therefore, in determining the scope of their laws and regulations, States must ensure that they protect children *effectively* from harmful marketing. This includes addressing marketing for mixed audiences, in order to capture all the marketing that children are exposed to, including that on sites, platforms, apps and other digital locations likely to be of interest to children, even if children are not the primary target audience.

#### *The right to data protection and privacy*

The digital advertising ecosystem exploits children's attention and extracts their personal data in order to target marketing more effectively. As the United Nations High Commissioner for Human Rights has remarked, such practices have the power to provide "comprehensive insight into an individual's behaviour, social relationships, private preferences and identity".<sup>7</sup>

The global data economy, entirely reliant on data extraction and profit-driven by the 'adtech' (advertising technology) industry, has been characterized as 'advertising as surveillance', from which multiple privacy-related risks flow. Whatever purposes are stated originally in notice-and-consent agreements, these data are frequently sold, and used to profile children, and draw inferences about them,

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<sup>4</sup> Ibid, paragraph 1

<sup>5</sup> Ibid, paragraph 47

<sup>6</sup> Grover, A., 'Unhealthy Foods, Non-Communicable Diseases and the Right to Health', A/HRC/26/31, Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, United Nations, 1 April 2014, paragraph 25.

<sup>7</sup> See State of the World's Children, 2019

with the consequence not just of immediate and shorter-term harms (e.g., more precise targeting of products/brands for harmful items) but also long-term forms of control. The commercial commodification of personal data has led Joseph Cannataci, UN Special Rapporteur on the right to privacy, to note:

Every search, every read, every e-mail or other form of messaging, every product or service purchased leaves hundreds of thousands of electronic tracks about an individual which are capable of being aggregated into forming a very accurate profile of that individual's likes, dislikes, moods, ... shopping patterns... interest(s) and sometimes even the relevant opinions... access to such data or exploitation of such data in a variety of ways is now one of the world's largest industries generating revenues calculated in hundreds of billions most usually in the form of targeted advertising.<sup>8</sup>

However, individuals are rarely conscious of, nor would most consent to, the sale and continuous re-sale of their data. Despite the existence of so-called 'privacy' policies, children of all ages and their parents are rarely able to make informed decisions about participation online that might protect them from adtech firms' extensive extraction and sale of their personal data. The OECD has noted that policies are so vague regarding data extractive practices that it is impossible for users to assess "short or long-term costs of divulging information because they do not know how the data will be used and by whom". It is often suggested that making privacy policies more accessible to children, so they can better understand what they are signing up for, is a solution. Yet this devolves responsibility from the companies who create these systems, to children and families who have no power to act in response, because (i) the uses to which data will be put are not articulated and indeed are impossible to predict longer-term; and (ii) opting out of data extraction is in fact rarely possible.

In line with Article 18 CRC, States must ensure that digital environments are supportive of parents. The duty of States to respect, protect and fulfil the right of the child to privacy must meet the current global realities of pervasive collection, storage and retention of their data, and the aggregation of their data. This should include requiring service providers not only to limit to the bare minimum any collection, processing and retention of children's data<sup>9</sup> but importantly, as articulated by the Guidelines of the Council of Europe in 2018 to respect, protect and fulfil the rights of the child in the digital environment,<sup>10</sup> including privacy and data protection. Crucially, the Guidelines assert that "Profiling of children, which is any form of automated processing of personal data which consists of applying a 'profile' to a child, particularly in order to take decisions concerning the child or to analyse or predict his or her personal preferences, behaviour and attitudes, should be prohibited by law".

### ***Evolving capacities and vulnerabilities: the limits of advertising literacy***

Media literacy is often offered as the solution to these pervasive digital marketing and data extraction practices. However, it is no substitute for a robust regulatory framework aimed at reducing the exposure of children to all forms of harmful marketing.

There is no evidence for the effectiveness of media literacy to guard against marketing effects: it does not account for children's complex, diverse relationships with media content, and despite raising scepticism about ads, this has not been found to reduce food advertising effects. Discussion about children's advertising vulnerability typically takes an 'evolving capacities' perspective. Research on marketing in traditional media, that focused on stages of cognitive ability, concluded that by about 12 years of age, children typically understood advertising's persuasive intent. Based on these findings, regulators continue to assume that advertising literacy confers self-protection after this 'magic age'<sup>11</sup>. However, to counteract marketing influence, children must not only understand intent to persuade, but

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<sup>8</sup> Cannataci, J., 'Report of the Special Rapporteur on the Right to Privacy' (advance unedited version), A/HRC/31/64, United Nations, 8 March 2016, paragraph 9.

<sup>9</sup> State of the World's Children 2017, page 93.

<sup>10</sup> Recommendation CM/Rec(2018)7 of the Committee of Ministers to member States on Guidelines to respect, protect and fulfil the rights of the child in the digital environment.

<sup>11</sup> Nairn, A. and Fine, C. (2008) Who's messing with my mind? The implications of dual-process models for the ethics of advertising to children. *International Journal of Advertising* 27(3): 447–70.

also be aware of marketing and have the ability and motivation to resist it. Furthermore, developmentalists have long noted that with evolving capacities come evolving vulnerabilities. In their teens, children may in fact be as vulnerable to advertising or more so. Food marketing, particularly in digital media, appeals to contemporary teen identities with the engaging, humorous, powerful peer-based content, social media 'influencers' and other celebrities, and popular entertainment, local events and 'memes' described above. In LMICs, fast food marketing positions young people as those who eat modern foods in contrast to older generations. Such emotional strategies are more effective than informational ads, even for adults, and this applies even more so in digital media. Advertising also works through subconscious routes, which cannot be guarded against with cognitive strategies. Advertising and media literacy certainly have a crucial part to play in active citizenship in media-saturated cultures – but cannot form an effective 'shield' against the appealing, persuasive, overwhelming food advertising being targeted at children, including teens, today.

Finally, it should also be noted that although media and privacy literacy skills are vital for children to acquire, they do not provide solutions to data extraction from children in the current media environment where a few major global actors dominate and options to opt out of data extraction and profiling are not offered. For young people's views on this issue as well as digital food marketing, see the box on p.6.

Ultimately, exposure to digital marketing and negative effects on rights should have more prominence in the work of the international human rights community. We hope it can feature explicitly and prominently in the Committee's General Comment on children's rights and digital environments.

## 2. Recommendations

- The notions of 'online safety' and 'online harms' should be defined broadly to include the concerns we have highlighted. Harmful digital marketing should be identified as a safety risk for children by States and by business actors themselves.
- **States** should regulate the digital marketing of goods, services and brands that harm children and protect them effectively from exposure to such marketing. In particular:
  - o States, not business actors, should define the scope of regulations restricting harmful digital marketing in their countries, and ensure these are effectively implemented (including enforcement mechanisms and appropriate sanctions).
  - o States should ensure that children of all ages are protected from harmful digital marketing.
  - o States should aim to develop comprehensive policies on harmful digital marketing to children, to limit the opportunities to divert marketing investment from regulated to unregulated media and/or marketing techniques.
  - o States should – at the very least – ban the collection, processing and use of children's personal data for direct marketing purposes.

**International cooperation** is needed to support and complement national efforts to protect children from the harmful effects of digital, cross-border marketing.

To uphold their responsibility to respect all the rights of the child, **business actors** should refrain from marketing practices that harm children, adopt more transparent business practices and share data required to effectively monitor digital marketing when such requests originate from relevant public authorities. Voluntary industry pledges may only complement, never replace, the implementation of State-led legally binding rules.

Once again, we would like to thank the Committee on the Rights of the Child for the opportunity to contribute to its work on children's rights and digital environments. To assist the process, we provide (see Annex) a list of references on which our response has drawn and which may be helpful. Please do

not hesitate to contact us if you would like further information or clarification regarding the points we have raised.

### **Digital marketing: What young people say**

Research and policy discussions on issues affecting children should include their views, in line with Article 12 CRC. However, studies of young people's experiences with and views of digital marketing are still scarce. We have summarized findings from two recent studies exploring young people's views of food marketing in digital media.

The **Norwegian Consumer Council's study of digital marketing techniques (2017)** found that young people think advertisers are exploiting them in order to promote their brands and messages. In four focus groups, young people aged 13 to 15 years described being exposed to high levels of advertising online, including ads for processed foods high in sugar, salt and fat. On an open question, they recalled ads where the brand, product and price were shown, whereas content marketing e.g. in social media went under their radar. Regarding the formats and techniques of digital advertising, the young people characterized methods such as social media competitions with indirect exhortations to purchase, user-generated marketing, and social media 'influencers' as being subtle, indirect, 'secret' messages that were often very appealing but not perceived as advertising. Where personalized advertising was concerned, young people expressed ambivalence. They considered it positive to receive offers for things they were interested in and liked. Yet they also described feelings of being 'monitored'. Overall, however, in this study, the 13-year-olds were generally more critical and sceptical of commercial brand practices online, compared to the 15-year-olds. This supports other studies showing that there is not necessarily a linear relationship between age and the way online marketing is perceived.

In the UK the **Adwareness study (2019; forthcoming)** conducted focus groups with 38 young people aged 13 to 17 years exploring their views of digital food marketing in the surveillance economy. Although participants recalled 25 food and drink brands after a process of peer discussion, their low levels of spontaneous recall of food brands suggested that this marketing was not processed with high levels of conscious awareness. Yet many described *wanting* the food, *remembering* ads when buying food at the weekend, and *sharing* the advertising content and 'tagging' their peers with it in social media. Young people displayed substantial advertising and digital media literacy in discussing marketing techniques in digital media, describing many routes by which they received such marketing, whether in particular social media (YouTube, Instagram and Snapchat were mentioned most), via people they follow or loyalty apps they have downloaded, competitions, promotional codes and ads featuring new products and flavours among others. Top of the list however were the 'influencers', where young people described feeling that *'if they can have one, I can have one'*, and also wanting to reward influencers for their hard work by buying the products they were promoting, suggesting parasocial relationships between young people and the digital media celebrities they admire. Young people also described nine different routes by which they might receive digital marketing, spanning *'it adapts to what you like'* to *'they know my gender'* and more.

Despite these high levels of literacy about the formal features of advertising in digital media, young people were not aware of the personalized nature of the data held on them, or combined about them, by advertising technology companies. Once this was outlined in each focus group, they described this as *'weird'*, *'creepy'* and *'dodgy'*. They were frustrated at the loss of control: *'It's our thing, it's what we're using, so it should be us really who decide what's on it, we should say.'*; *'We should have more control, because I feel like we've got literally no control over what's happening'*; *'And it's our data'*. Interestingly, they also pointed to the global nature of this issue, requiring an international response: *it's such a worldwide thing it couldn't be like, 'well our government will decide'*, and they emphasized that as this was an issue beyond their control, it was for the adult world to devise solutions.

**ANNEX: LIST OF SUPPORTING REFERENCES**

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<http://tacd.org/tacd-publishes-policy-resolution-on-the-protection-of-children-from-digital-food-marketing/>
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