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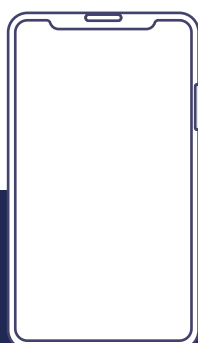
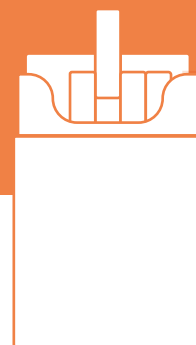
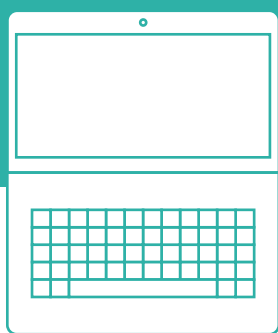
World Health Organization

#### **Publication Date**

2024-05-02

# Restricting digital marketing

in the context of tobacco, alcohol, food and beverages, and breast-milk substitutes: existing approaches and policy options



World Health Organization



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ISBN 978-92-4-007724-9 (electronic version)

ISBN 978-92-4-007725-6 (print version)

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# Foreword

We live in an age of digital transformation where governments are increasingly called upon to respond to and enable digital transitions occurring within the economy and society. These transitions create obvious opportunities, such as to make health systems more efficient and sustainable, or to reach large audiences with health campaigns and messages. But they also create and exacerbate health risks, such as risks to children's mental and physical health, or the risk that we are targeted with marketing of unhealthy products in a way and when doing so would maximize the possibility and ease of purchase.

Like the economy and society, health promotion and public health must also undertake digital transitions to maximize the opportunities and minimize the risks. This means translating existing public health approaches to the digital environment and developing new approaches fit for digital spaces.

This publication takes a step in that direction by describing the ways in which Member States can translate marketing restrictions to the digital environment. In this respect, World Health Organization has long recommended marketing restrictions in the contexts of tobacco and nicotine products, alcoholic beverages, foods and beverages with respect to children, and breast-milk substitutes. But the question of how to implement these recommendations has become more complex as digital media has grown and large online platforms have centered their businesses around advertising, and specifically around targeting of advertising to consumers based on their activity online or personal data they have shared.

The good news is that there are policy options available for governments and that many of these are described in this publication. For some product categories, such as tobacco and

nicotine products, comprehensive restrictions on marketing are essential to protect health. For others, such as alcoholic beverages and unhealthy foods, we know that comprehensive restrictions are likely to have a larger impact on protecting health than partial restrictions. But irrespective of the level of health protection pursued, there are some common policy options for governments, including:

- Coordinating product specific health laws and their enforcement with more general marketing laws such as those on advertising, consumer protection, data protection, and digital markets.
- Giving careful consideration to the jurisdictional scope of restrictions in parallel with how compliance will be monitored and enforced.
- Ensuring that (where comprehensive restrictions are not in place) strong laws are put in place to regulate targeted marketing, such as age verification requirements, prohibitions on collection or use of personal data for certain types of advertising (including where more general consent based approaches are used), prohibitions on the targeting of vulnerable groups or even positive obligations to target any permitted advertising away from those groups.
- Restricting influencer marketing (just as any other form of marketing is restricted) and limiting user engagement techniques, such as the ability of alcohol manufacturers to use online posts by users in their own marketing or stimulate viral campaigns through user engagement.
- Adopting new monitoring techniques, including use of artificial intelligence to supplement online inspections by humans,



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and requiring online platforms and product manufacturers to disclose permitted marketing.

- An array of enforcement mechanisms, most obviously to be applied to the advertisers / product manufacturers themselves, but also to online platforms and other actors in the marketing supply chain.

But a mindset shift founded on rights and duties is also necessary. Protecting the right to the highest attainable standard of health and the rights of children means placing strong and proportionate legal duties on companies in the product and marketing supply chains, monitoring

those duties and enforcing the law. It is possible for governments to do all of these things while also respecting other rights, such as privacy rights and the right to free expression. In fact, it is essential for governments to act using a rights-based approach to keep pace with the broader digital transformation while protecting public health.



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# Acknowledgements

This publication was authored by Dr. Elisabet Ruiz Cairó, consultant, and Dr. Benn McGrady, Head of Unit, from the Public Health Law and Policies Unit (LAW), Health Promotion Department.

At various stages of preparation, the publication benefited from comments, discussions and inputs from Ma Luján Abramo (Global Health Advocacy Incubator), Jorge Alday, Dr. Tom Carroll, Trish Cotter, Dr. Alexey Kotov, and Dr. Nandita Murukutla (Vital Strategies), Dr. Tazeem Bhatia, Sakhi Dodhia, Rachel Elsom, Dr. Tharindu Fernando, Jennifer Garry, Clive Henn, Diya Mukherjee, and Casey Sharpe (United Kingdom Office of Health Improvement and Disparities), Prof. Nicholas Carah (School of Communication and Arts, The University of Queensland), Jeff Chester, Dr. Katharina Kopp, and Dr. Kathryn Montgomery (Center for Digital Democracy), Sandra Lárudóttir Gjernes

and Helena Wilson (Ministry of Health and Care Services of Norway), Monique Muggli (Campaign for Tobacco-Free Kids), Prof. Paula O'Brien (Melbourne Law School, The University of Melbourne), Katherine Shats (UNICEF), and Fiona Sing (University of Auckland).

WHO also recognizes the valuable contributions from colleagues across WHO: Dr. Eric Carlin, Dr. Nina Chad, Dr. Tim Chadborn, Dr. Katrin Engelhardt, Dr. Carina Ferreira-Borges, Kathrin Hetz, Daniel Hougendobler, Daniel Hunt, Kritika Khanijo, Monika Kosinska, Dr. Ruediger Krech, Alicia Nicolai, Paba Piyarathne, Kathryn Robertson, Sebastian Rositano, Dr. Juan Tello, Amber Van Den Akker, Dr. Kremlin Wickramasinghe, Olga Zhiteneva, and the Legal Team from the WHO FCTC Secretariat.



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# Abbreviations

<b>AANA</b>	Australian Association of National Advertisers
<b>AI</b>	Artificial intelligence
<b>AiMCO</b>	Australian Influencer Marketing Council
<b>ARB</b>	Advertising Regulatory Board of South Africa
<b>ASA</b>	Advertising Standards Authority of the United Kingdom of Great Britain and Northern Ireland
<b>ASAS</b>	Advertising Standards Authority of Singapore
<b>ASCI</b>	Advertising Standards Council of India
<b>AVMS Directive</b>	EU Audiovisual Media Services Directive
<b>CAP Code</b>	Code of Non-broadcast Advertising and Direct & Promotional Marketing
<b>CETA</b>	EU-Canada Comprehensive Economic and Trade Agreement
<b>CJEU</b>	Court of Justice of the European Union
<b>CPC</b>	Consumer Protection Cooperation network
<b>DMA</b>	EU Digital Markets Act
<b>DMCA</b>	Digital Millenium Copyright Act of the United States
<b>DSA</b>	EU Digital Services Act
<b>EU</b>	European Union
<b>FDA</b>	Food and Drug Administration
<b>FTA</b>	Free trade agreement
<b>FTC</b>	Federal Trade Commission
<b>GDPR</b>	EU General Data Protection Regulation
<b>ICPEN</b>	International Consumer Protection and Enforcement Network
<b>ISBA</b>	Incorporated Society of British Advertisers
<b>ISP</b>	Internet service provider
<b>OECD</b>	Organisation for Economic Co-operation and Development
<b>SCAP</b>	Singapore Code of Advertising Practice
<b>TERM</b>	Tobacco Enforcement and Reporting Movement
<b>TRIPS Agreement</b>	Agreement on Trade-Related Aspects of Intellectual Property Rights
<b>UCPD</b>	EU Unfair Commercial Practices Directive
<b>UN</b>	United Nations
<b>UNICEF</b>	United Nations Children's Fund
<b>WHO FCTC</b>	WHO Framework Convention on Tobacco Control
<b>WTO</b>	World Trade Organization



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# Executive summary

## **WHO** guidance addresses restrictions on marketing (including digital marketing) in the contexts of tobacco and nicotine products, alcohol, unhealthy foods and beverages, and breast-milk substitutes.

In the WHO Framework Convention on Tobacco Control (WHO FCTC), Parties recognize that a comprehensive ban on domestic and cross-border advertising, promotion and sponsorship would reduce the consumption of tobacco products. The Action Plan to Effectively Implement the Global Strategy to Reduce the Harmful use of Alcohol as a Public Health Priority proposes that Member States implement comprehensive and robust restrictions or bans on alcohol marketing. The Set of Recommendations on the Marketing of Foods and Non-Alcoholic Beverages to Children calls for global action to reduce the impact on children of marketing of foods high in saturated fats, trans-fatty acids, free sugars or salt. The International Code of Marketing of Breast Milk Substitutes recommends prohibiting marketing of breast milk substitutes to ensure the protection of exclusive breastfeeding for the first six months of life and continued breastfeeding of 24 months or beyond. The Set of Recommendations on the Marketing of Foods and Non-Alcoholic Beverages to Children calls for global action to reduce the impact on children of marketing of foods high in saturated fats, trans-fatty acids, free sugars or salt. The Action Plan to Effectively Implement the Global Strategy to Reduce the Harmful use of Alcohol as a Public Health Priority proposes that Member States implement comprehensive

and robust restrictions or bans on alcohol marketing.

Prior to the internet, the technical difficulty of implementing marketing restrictions was relatively low. Traditional media (such as newspapers, television and radio) was highly concentrated, meaning that enforcement efforts could be focused on a limited set of actors in the marketing supply chain. The advertisers themselves, such as tobacco companies, often formed part of highly concentrated industries, thereby limiting the number of actors against which marketing restrictions might be enforced. But the advent of digital media and new marketing techniques has increased exposure to marketing, increased the power of marketing, and has resulted in Member States taking action to update marketing restrictions, monitor digital marketing and enforce restrictions.

Digital marketing is pervasive. Display advertising features prominently on websites. Search engines make search ads appear. Native ads, which are designed not to look like commercial content, appear in online news and similar sites. Influencers offer product endorsements through social media platforms with differing degrees of disclosure regarding the commercial character of the endorsements. Advertising features in apps, such that use of some apps is suspended while ads are displayed. Products are placed in online content, including content directed at children or to which children are exposed. And online retail is increasingly integrated with digital marketing. Through digital marketing, consumers are therefore more frequently and intensively exposed to advertisements than through marketing in traditional media.

**Through digital marketing, consumers are therefore more frequently and intensively exposed to advertisements than through marketing in traditional media.**



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The pervasiveness of digital marketing can be seen in Figure 1.








Digital marketing is also powerful. Digital platforms such as social media platforms facilitate user engagement and participation in unique ways. Marketing is targeted at recipients based on collection and use of their personal and other data, much of which has been gathered in digital spaces such as through smartphones,

web search history, browsing history, use of apps and wearables such as smartwatches.

The contexts in which marketing occurs, such as on social media, can also differ substantially from marketing in 'traditional media'. This combination of targeting and context can lead recipients to view marketing and identify with it in personalized ways that differ from responses to marketing in traditional media.

## Figure 1. The pervasiveness of digital marketing

More than traditional marketing, digital marketing exposes consumers to advertisements frequently and intensively through multiple channels.

	<b>Display advertising</b> is prominent on websites
	<b>Search ads</b> appear on search engines
	<b>Native ads</b> are designed to not look like commercial content and appear on sites like online news
	<b>Influencer product endorsements</b> are offered through social media platforms
	<b>In-app advertising</b> is featured in many applications
	<b>Products are placed in online content</b> , sometimes directed at children
	<b>Online retail</b> is increasingly integrated with digital marketing

WHO's guidance on marketing restrictions on tobacco and nicotine products, alcohol, unhealthy food and beverages, and breast-milk substitutes, and international legal obligations stemming from WHO instruments, differ across these contexts, and there is no cross-cutting WHO guidance on how to restrict digital marketing. Nonetheless, the growth of digital marketing and the way some Member States have regulated it so far provide policy options for countries to consider.

In Member States, digital marketing is often regulated through a variety of laws under the supervision of multiple government agencies, thus requiring legislative coordination. Collectively, these laws contain many elements, and often:

- **Have a broad scope of application** covering all forms of digital marketing, including influencer marketing, and technological innovations in marketing.
- **Define a jurisdictional scope** (the geographic scope of restrictions or prohibitions) enabling enforcement within that scope.
- **Restrict** the use of commercial user-generated content in digital marketing.
- **Restrict targeting techniques** in specific contexts where marketing is permitted to protect children and other vulnerable populations.
- **Establish mechanisms** that better enable marketing to be monitored in the online environment, including dark and ephemeral marketing.
- **Delegate authority** for enforcement and define enforcement measures against unlawful marketing practices.

Figure 2 summarises some of the functions of laws regulating digital marketing.

## Figure 2. Scope and Functions of laws that regulate digital marketing

Digital marketing is often regulated through a range of laws, supervised by multiple government agencies, thus requiring legislative coordination. Collectively these laws often exhibit the following features and functions.

### Scope of digital marketing laws

#### Can have a broad scope

covering all forms of digital marketing, including influencer marketing, and technological innovations in marketing.

Read more on Defining digital marketing in Section 3



#### Have a defined a jurisdictional scope

enabling enforcement within that scope.

Read more on Jurisdictional scope in Section 5



### Functions of digital marketing laws

#### Restrict

Adopt comprehensive restrictions on specific product categories.

Restrict the use of commercial user-generated content in digital marketing.

Restrict targeting techniques in specific contexts where marketing is permitted to protect children and other vulnerable populations.



Read more on Legislating to Restrict in Sections 6 and 7



#### Monitor

Establish mechanisms that better enable marketing to be monitored in the online environment, including dark and ephemeral marketing.



Find tools and information on Monitoring in Section 8



#### Enforce

Delegate authority for enforcement and define enforcement measures against unlawful marketing practices.



Read more on Enforcement in Section 8



This publication examines how restrictions on digital marketing are implemented by Member States as part of broader marketing restrictions, describes current challenges specific to digital marketing and provides policy options to be considered in addressing those challenges. Policy options are summarized in Annex 1.

There is no single, simple step Member States can take that will address the challenges associated with digital marketing, and as is the case with traditional marketing, there will always be some gaps in implementation and some level of non-compliance with restrictions. Nonetheless, this publication has identified policy options and approaches that Member States can adopt to strengthen the design and implementation of restrictions.

**Coordinating fragmented laws applicable to digital marketing** (Please refer to Section 4.). At the national level, digital marketing regulation is typically fragmented, as many pieces of legislation and government agencies are involved. Some Member States have sector specific restrictions on marketing in place to some degree, such as laws governing marketing of tobacco products, alcoholic beverages, foods and non-alcoholic beverages and breast-milk substitutes. The implementation of these laws is typically assigned to health agencies such as ministries of health or regulatory agencies, although other actors may also be involved.

But laws and rules applicable to digital marketing practices can also be found in laws or other instruments that are not specific to alcohol, tobacco, foods and non-alcoholic beverages or breast-milk substitutes, for example those governing advertising, consumer protection, broadcasting, data protection or the internet. These laws and rules are important components of some marketing restrictions in that they regulate digital marketing, prohibit specific advertising practices, impose disclosure obligations, regulate targeted advertising and the use of profiling techniques for advertising purposes, and grant strengthened protection to children in advertising. These laws also allocate

enforcement authority to agencies other than health agencies and respond to policy concerns more general than marketing of the specific products mentioned.

The involvement of different laws and authorities can result in gaps in the coverage of laws, as well as gaps in monitoring and enforcement activities carried out by different government agencies. Each applicable law will define different restrictions, impose different sanctions in case of non-compliance, and assign authority to different agencies.

Legislative coordination is a policy option available to Member States to close these gaps, and involves considering how laws restricting marketing of specific product categories can be coordinated with other more general laws governing marketing to achieve a Member State's policy goal. For example:

Laws restricting marketing of specific product categories can:

- Define forms of marketing that are prohibited or restricted with respect to specific product categories or explicitly define forms of marketing that are allowed for specific product categories.
- Include cross references to general marketing laws where appropriate to establish restrictions.
- Establish any rules specific to the product category that enable health agencies to supervise the market and supply chain for *the products* in question, such as by:
  - Requiring public disclosure of marketing by brands, manufacturers, distributors and retailers so as to facilitate monitoring of marketing.
  - Using supply side controls such as licensing measures or strict liability provisions to place responsibility on



brands, manufacturers, distributors and retailers, where appropriate.

- Allowing consumers, civil society organizations and economic operators (usually competitors) to bring actions for violation of sector specific marketing restrictions before national courts.
- Establish the jurisdictional reach (the geographic scope) of sector specific marketing restrictions.
- Allocate enforcement authority among government agencies, by means such as using cross-references to other legislation to allocate enforcement authority to non-health agencies, where appropriate.
- General marketing laws can:
  - Restrict or prohibit the marketing of specific product categories.
  - Include cross references to sector specific laws to enable agencies with enforcement powers to enforce those sector specific restrictions through marketing laws.

As this suggests, health agencies can take an important first step by considering how sector specific laws interact with other relevant laws governing digital marketing and move towards overcoming any challenges posed by fragmentation.

### **Defining an effective jurisdictional scope for regulation of digital marketing and enforcement**

(Please refer to Section 5.). Questions often arise concerning whether and how a country has jurisdiction over marketing in digital environments. This concern results from the cross-border nature of digital marketing, as brands, ad agencies, publishers (websites, search engines, social media platforms, influencers) and customers are often established in different countries.

In legal terms, countries have the policy option to legislate, adjudicate disputes and sanction digital marketing within their scope of jurisdiction to cover:

- actions by their nationals
- actions occurring inside their territory
- actions that have effects or likely effects in their territory

Member States also sometimes define a jurisdictional scope that is more limited than this, but that can be effectively enforced by public authorities, such as to cover actions targeting consumers in their territory but not all actions that have effects in their territory. Although all actors involved in digital marketing (brands, advertising agencies, websites, search engines, social media platforms, influencers, distributors, retailers) may be liable for violations of the law, laws and enforcement actions often focus first on those actors directly linked to the products themselves (manufacturers, distributors, retailers). These actors often have assets located in the jurisdiction, manufacture, import or distribute the products posing risks to health, and fall within the oversight of health agencies. Put differently, there are often actors within a jurisdiction against which the laws can be enforced.

### **Restricting digital marketing to children and other vulnerable populations**

(Please refer to Section 6.). Comprehensive product-specific restrictions on marketing are likely to cause the greatest reduction in exposure of children and other vulnerable populations to digital marketing.

Where comprehensive restrictions are not in place, protecting vulnerable populations, including children, is a challenge in the regulation of digital marketing. In the context of partial restrictions, requiring effective age-

verification mechanisms to prevent access to age-restricted content online is a first step. To protect vulnerable populations, one policy option is to ban all targeted advertising of specific product categories through restrictions on data collection, processing and use.

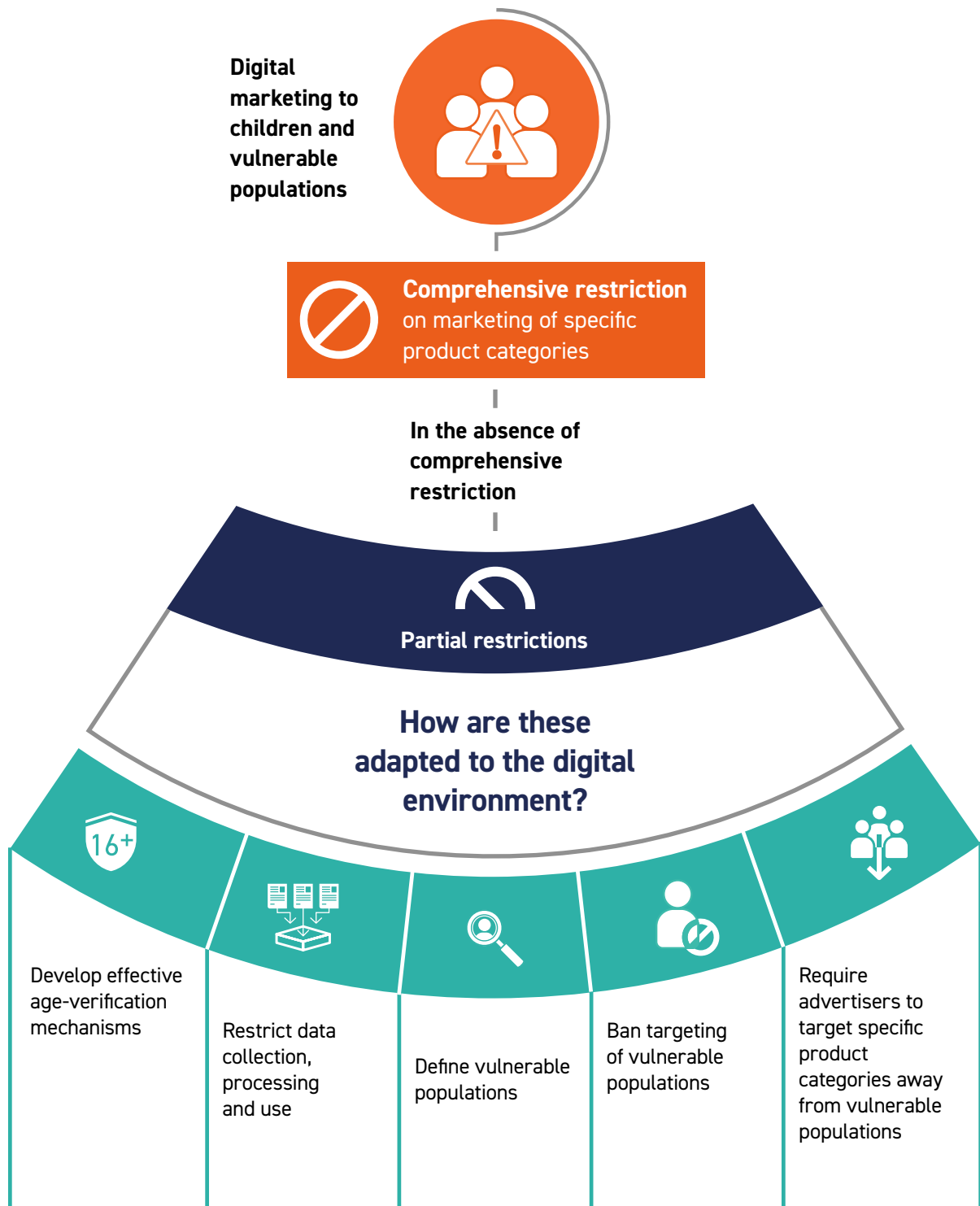
In the absence of a ban on targeted advertising of specific product categories, countries policy options include:

- Restricting data collection by brands/ advertisers of specific product categories to reduce the power of their marketing through targeting.

- Defining vulnerable populations in need of strengthened protection from targeted advertising in the law.
- Banning targeting of vulnerable populations with respect to specific product categories.
- Require that advertisers proactively target advertising of specific product categories away from defined vulnerable populations.

Please refer to Figure 3 to understand how to restrict digital marketing to children and other vulnerable populations.

**Figure 3. Restricting digital marketing to children and vulnerable populations**



**Restricting influencer marketing and user engagement** (Please refer to Section 7.). Laws governing digital marketing also address influencer marketing and user engagement techniques, particularly on social media platforms.

Governments have policy options to restrict marketing by influencers or use of user-generated content, including:

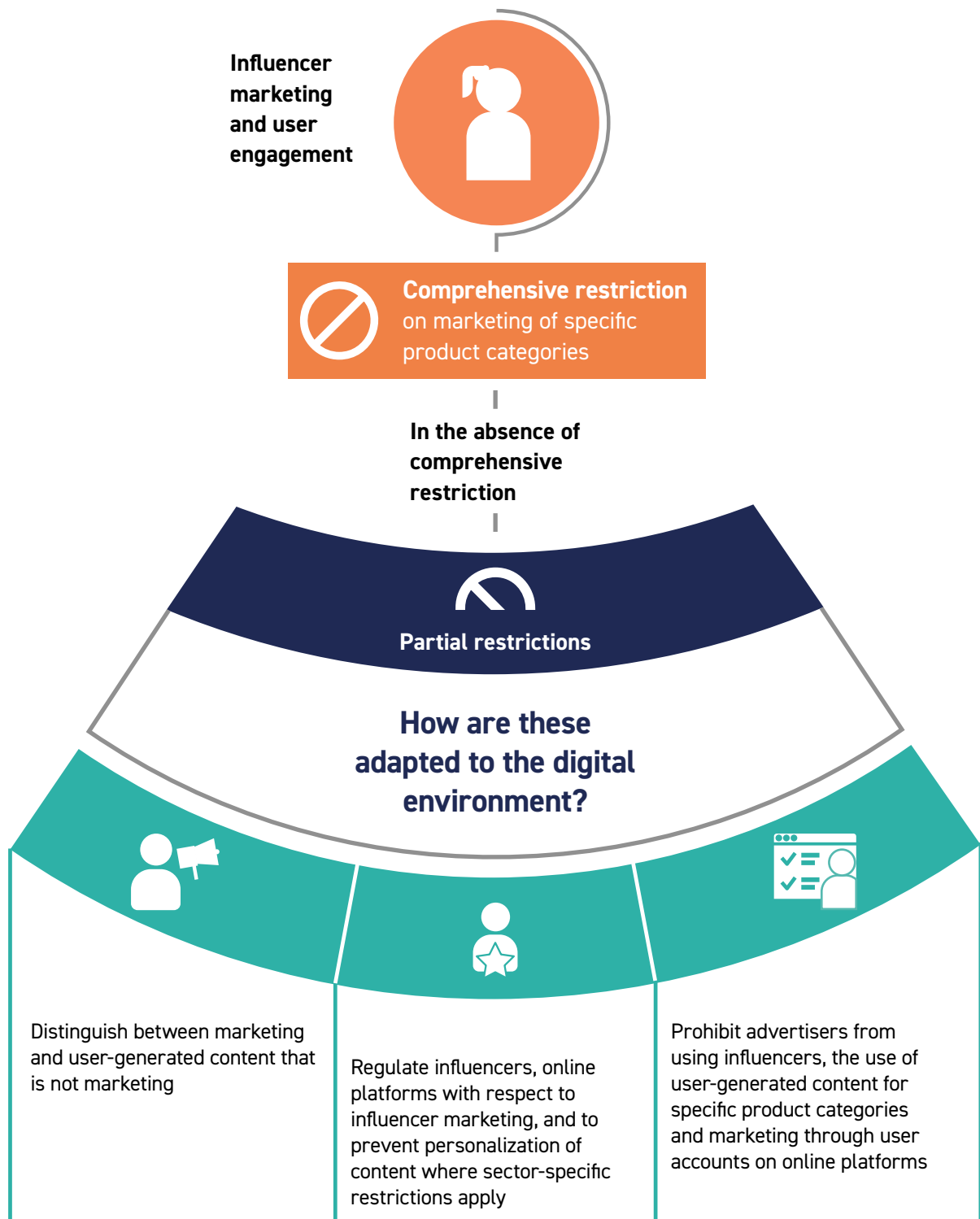
- Regulating influencers directly, especially those influencers that are a national or present in the jurisdiction.
- Prohibiting advertisers from using influencers for prohibited forms of marketing (in line with prohibitions on paid ads on social media platforms).
- Regulating online platforms and placing obligations on them with respect to influencer marketing.
- Drawing a distinction between marketing and user-generated content that is not

marketing, by reference to whether the content is commercial in character. In this respect, marketing involves some commercial element, such as the exchange of payment, gift or incentive for marketing undertaken.

- Prohibiting or restricting the possibility of using user-generated content for specific product categories, by restricting online competitions, sharing users' comments on a product, permitting users to share an advertiser's content, or from engaging actively with consumers in social media.
- Regulating online platforms to prevent prioritization or personalization of content where sector-specific restrictions apply.
- Prohibiting marketing through user accounts on online platforms (in line with prohibitions on paid ads).

Please refer to Figure 4 to better understand how to restrict influencer marketing and user engagement.

**Figure 4. Restricting influencer marketing and user engagement**



**Monitoring digital marketing** (Please refer to Section 8.). Digital marketing is often visible only to individual consumers and for short periods of time, meaning that authorities are not ordinarily exposed to the same digital marketing as consumers. Monitoring approaches include online inspections using a variety of online profiles or the use of artificial intelligence tools to detect prohibited content. Cooperation between public authorities and non-State actors, in particular civil society, may also facilitate the monitoring of digital marketing.

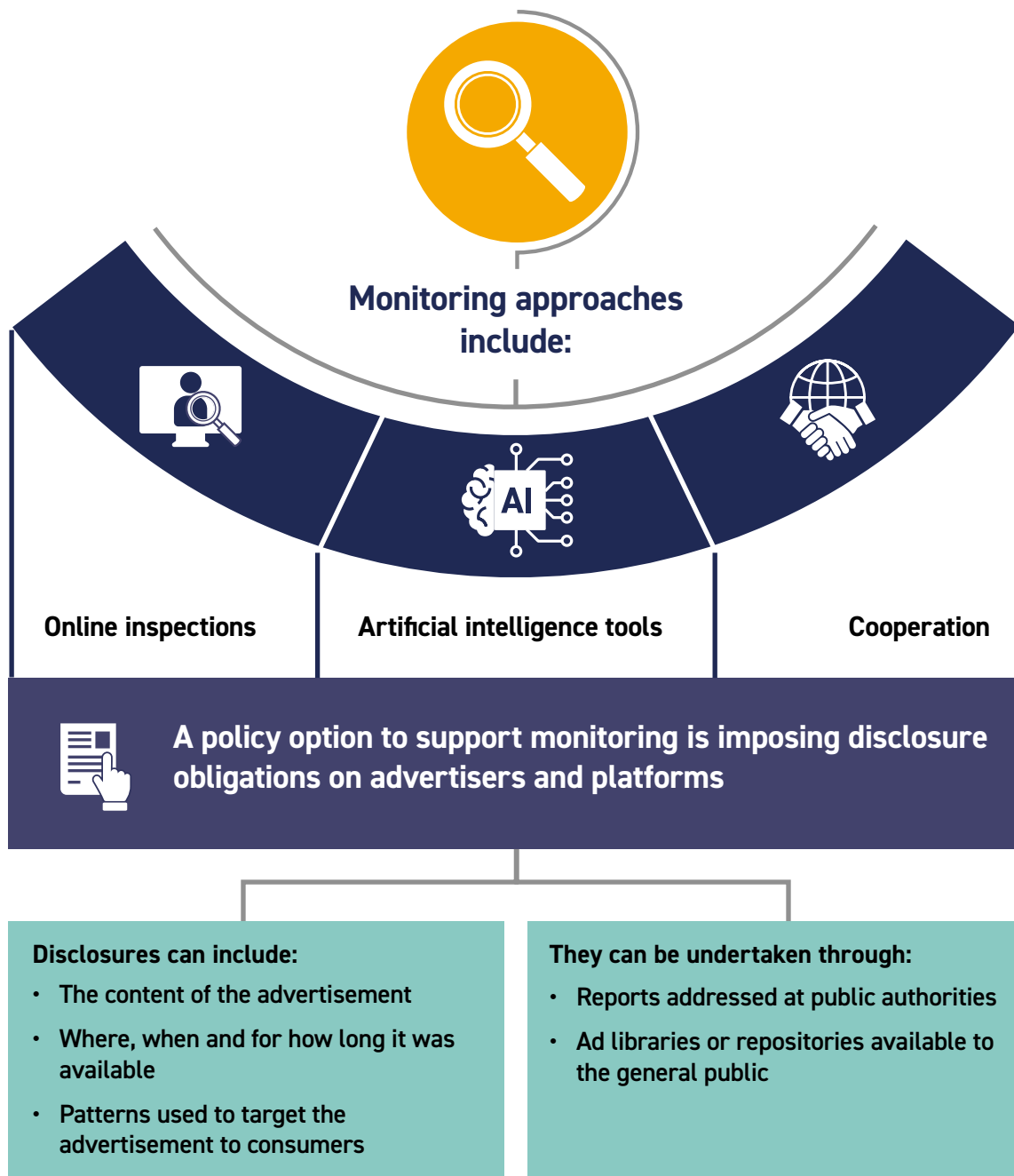
Imposing disclosure obligations on advertisers and platforms is a policy option to support monitoring. Disclosure can be undertaken through reports addressed at public authorities

or ad libraries/repositories available to the general public. Disclosures could include the content of the advertisement, where, when and for how long the advertisement was available, and the patterns used to target the advertisement to consumers. Figure 5 summarizes the monitoring approaches of digital marketing.

Laws may also allocate monitoring functions among public authorities. This includes defining the appropriate monitoring functions of the Ministry of Health or health-related agencies and delegating monitoring functions to other relevant government agencies where appropriate, with a clear separation of functions and coordination mechanism.

**Imposing disclosure obligations on advertisers and platforms is a policy option to support monitoring.** 

**Figure 5. Monitoring digital marketing**



**Enforcing digital marketing rules** (Please refer to Section 8.). Enforcement measures relating to digital marketing restrictions are diverse. These include voluntary measures adopted by online platforms, tools established in industry self-regulatory instruments and sanctions provided by law. In order to facilitate enforcement, Member States can allocate appropriate enforcement

functions to Ministries of Health and to other government entities, with a clear separation of functions and coordination mechanisms.

Options for enforcement procedures include allowing a variety of information sources that can constitute a basis for investigation and enforcement, granting authorities broad

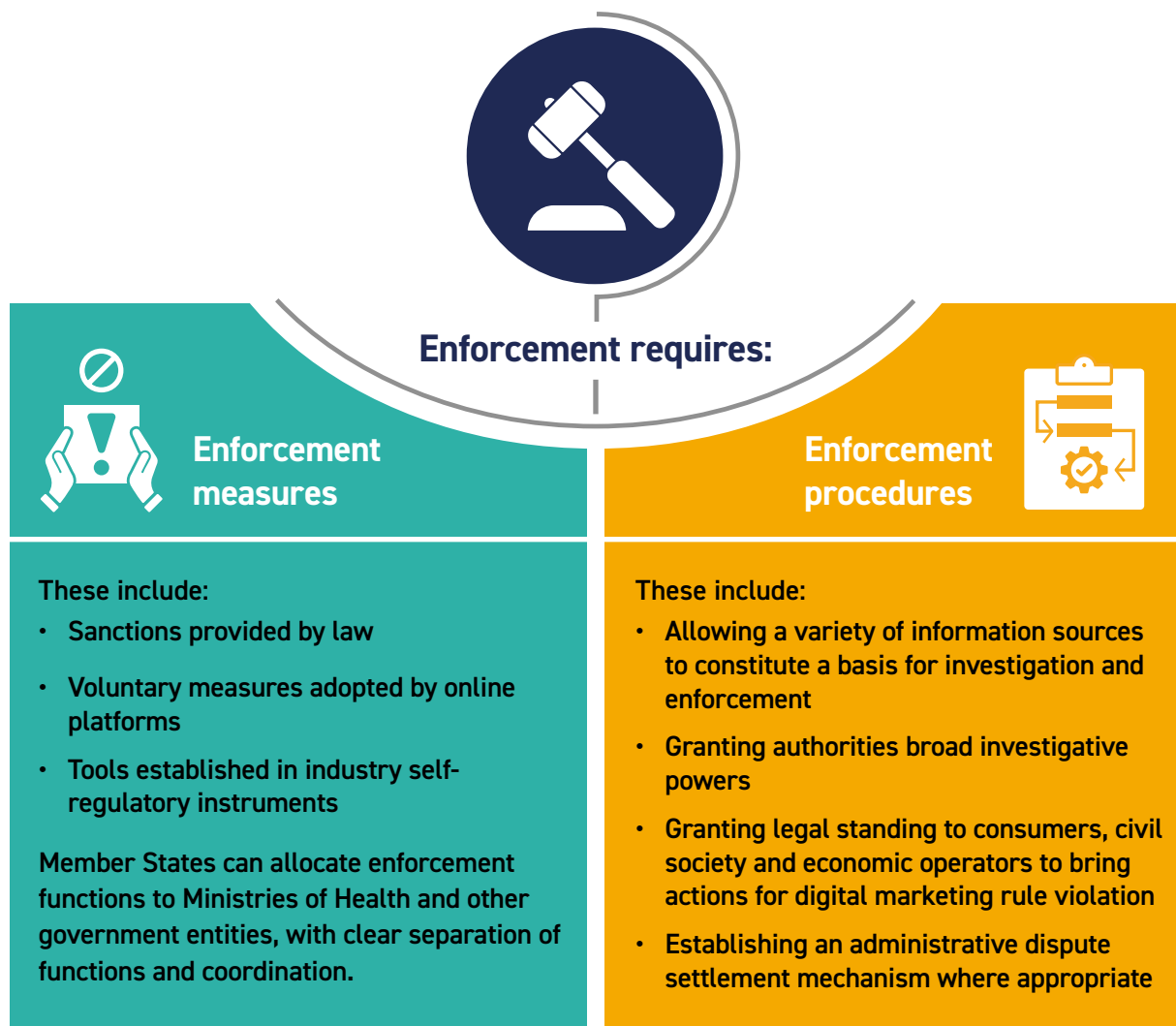
investigative powers, and granting legal standing to consumers, civil society organizations and economic operators to bring actions for violation of digital marketing rules. Countries may also consider establishing an administrative dispute settlement mechanism where appropriate.

Enforcement measures can be imposed against all actors in the marketing supply chain including upon brands, online platforms and/or influencers. They can be adopted before the product is marketed as preventive measures, or after publication as reactive measures. Enforcement

measures include automated preventive warnings, warning letters, content moderation obligations, orders for amendment or removal of marketing, civil or criminal liability, and blocking and filtering measures, amongst others. Figure 6 summarizes the enforcement measures and procedures.

In some instances, cross-border cooperation on enforcement matters can be useful to ensure the effectiveness of enforcement measures through the entire marketing supply chain.

**Figure 6. Enforcing digital marketing rules**





**Legal considerations in restricting digital marketing** (Please refer to Section 9.). National constitutions and legislation, international human rights law and international trade agreements all establish legal duties, rights and restrictions on government action that may be relevant to controlling digital marketing.

In designing and implementing marketing restrictions governments may need to consider, in particular, their duty to protect the right to health, food, privacy, consumer protection and children's rights. However, they may also need to consider limits imposed by the freedom of speech, the freedom to conduct a business, the right to property and commitments and exemptions provided in trade agreements, while keeping in mind that those rights and freedoms are not absolute and can ordinarily be restricted for public health reasons.

Sector specific marketing restrictions have been implemented in many countries that comply with these domestic and international legal obligations. Any prior litigation that Member States have had with respect to marketing restrictions may be relevant in designing and implementing restrictions on digital marketing. Marketing restrictions will generally be lawful if the measures are non-discriminatory and appropriate and necessary to attain the public health objectives pursued, proportionate to those objectives, and if they provide adequate procedural safeguards. A government's legal position may be strengthened by, among other things, establishing clear health objectives and collecting evidence of the risks associated with digital marketing (exposure, power, consumer perceptions and behaviour) and the impact of any restrictions.



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# 1. Introduction

**WHO** guidance addresses restrictions on marketing (including digital marketing) in the contexts of tobacco and nicotine products, alcohol, unhealthy foods and beverages, and breast-milk substitutes.

The WHO guidance on marketing restrictions and the contexts in which that guidance is set differs across each of these product categories. But digital marketing has become increasingly important to each product category because it increases the power of marketing through consumer targeting and user engagement techniques and increases exposure to marketing because of how pervasive marketing is in digital environments.

There is no cross-cutting WHO guidance on how to restrict digital marketing. This publication seeks to fill that gap by describing:

- how marketing, including digital marketing, is typically regulated at the national level;
- challenges posed by digital marketing, monitoring compliance with the restrictions and enforcing them;
- policy options available to Member States; and
- legal considerations that Member States may wish to take account of in policy design and implementation.

Digital marketing is often regulated through a variety of laws under the supervision of multiple government agencies, thus requiring legislative coordination. These laws typically:

- Have a broad scope covering all forms of digital marketing and allowing for technological innovation.
- Define a jurisdictional scope (the geographic scope of restrictions or prohibitions), enabling enforcement within that scope.
- Regulate the use of commercial user-generated content in digital marketing.
- Restrict targeting techniques in specific contexts where marketing is permitted.
- Establish mechanisms that better enable marketing to be monitored in the online environment, including dark and ephemeral marketing.
- Delegate authority for enforcement and define enforcement measures against unlawful marketing practices.

By describing these practices and policy options, this publication provides information on the question of how to restrict digital marketing. This publication describes how governments have and can restrict digital marketing without prescribing or recommending a single generalizable approach, or set of approaches, for all Member States to follow.

**Digital marketing is often regulated through a variety of laws under the supervision of multiple government agencies, thus requiring legislative coordination.**



## 2. Audience, scope and methodology

**A range of policy options are presented throughout the paper. The options most relevant or appropriate for each Member State may differ depending on domestic circumstances, including priorities and capacities. The publication is primarily aimed at government officials designing or implementing marketing restrictions, including policy and legal officers.**

Comparative legal analysis is the primary methodology underpinning this publication. This methodology involves comparing laws and legal approaches to restricting digital marketing in different jurisdictions in order to describe the most prominent legal approaches. This comparison and analysis are carried out point-by-point to produce a description specific to a given point or issue. The most prominent approaches are highlighted, meaning that the methodology favours presentation of common approaches over presenting and considering every approach. Similarly, the methodology groups issues for analysis, rather than purely describing country approaches side-by-side.

Comparative legal analysis is supplemented with legal reasoning by analogy. This involves drawing on analogous laws from other domains, such as regulation of gambling advertising or restrictions on digital content, in order to analyse their relevance and potential

application to marketing restrictions in the context of existing WHO guidance.

Finally, comparative legal analysis is used to describe legal considerations for governments when restricting digital marketing. This analysis draws on case law from different jurisdictions to consider the potential legal challenges to restrictions on digital marketing and the legal considerations governments may wish to consider.

Notably, this publication does not evaluate the evidence of the risks posed by digital marketing to health, or the evidence of the impacts of restricting digital marketing, or of different approaches to restricting digital marketing.<sup>1</sup> These are empirical questions beyond the scope of this publication.

This publication does not seek to extend or alter the scope of existing WHO guidance on restricting marketing. Nor does this publication change the media neutrality of existing WHO guidance on restricting marketing. WHO guidance (and legal instruments) on marketing of tobacco and nicotine products, alcoholic beverages, unhealthy foods and beverages to children, and breast-milk substitutes, apply irrespective of the medium through which marketing is transmitted. The purpose of this publication is not to suggest that digital marketing should be restricted above and beyond other media. Rather, this publication

<sup>1</sup> Evidence has however been evaluated in other WHO documents on specific risk factors; see Scope and impact of digital marketing strategies for promoting breast-milk substitutes. Geneva: World Health Organization; 2022 (<https://www.who.int/publications/i/item/9789240046085>, accessed 16 March 2023); Digital marketing of alcohol: challenges and policy options for better health in the WHO European Region. Copenhagen: WHO Regional Office for Europe; 2021 (<https://apps.who.int/iris/handle/10665/350186>, accessed 16 March 2023).



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seeks to assist Member States to address the reality that restrictions on digital marketing often lag behind restrictions on other media in the sense that comparable restrictions are either not legislated, that digital environments are not monitored in a comparable way, or restrictions are not enforced as effectively as for other media.

Similarly, this publication does not seek to alter WHO guidance on mandatory versus voluntary approaches to restricting marketing. Nonetheless, it is worth observing that approaches enforced through law and applied to all actors in the marketing supply chain are designed to regulate actors in the marketing supply chain in a consistent way. In contrast,

by their nature, purely voluntary approaches that are not enforced through law do not apply consistently across the marketing supply chain, leaving space for economic operators to opt in or out of the restrictions. With this in mind and recognizing that the purpose of this publication is to support governments in restricting digital marketing, the focus is on legislation, regulation, monitoring and enforcement. In short, the goal of this publication is to illustrate how marketing restrictions can be legislated, regulated, monitored and enforced across a range of product categories in the digital environment and to present these as policy options for Member States to consider in their specific national contexts.

**This publication seeks to assist Member States to address the reality that restrictions on digital marketing often lag behind restrictions on other media.**

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# 3. Defining marketing, including cross-border marketing and digital marketing

**T**here is no uniform definition of marketing, cross-border marketing, or digital marketing within WHO. These

concepts are defined in this report by reference to several WHO instruments and reports.

## 3.1 How is marketing defined in this report?

The notion of marketing is understood in a broad sense in WHO instruments as comprising any form of commercial communication to advertise,

promote or sponsor a product, a service or a brand. The following table summarizes how marketing is defined in WHO instruments.

**Table 1. Marketing definition in WHO instruments**

WHO instrument	Marketing definition
<p><b>International Code on Breast-Milk Substitutes (1981)</b></p> <p><a href="#">Click to view</a></p>	<p>Article 3 defines marketing as “product promotion, distribution, selling, advertising, product public relations, and information services”.</p>

### WHO Framework Convention on Tobacco Control (WHO FCTC)



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The FCTC does not use the term “marketing”.

Article 13 of the WHO FCTC requires Parties to undertake a comprehensive ban on “tobacco advertising, promotion and sponsorship”.

Article 1(c) of the WHO FCTC defines tobacco advertising and promotion as “any form of commercial communication, recommendation or action with the aim, effect or likely effect of promoting a tobacco product or tobacco use either directly or indirectly”.

Article 1(g) of the WHO FCTC defines tobacco sponsorship as “any form of contribution to any event, activity or individual with the aim, effect or likely effect of promoting a tobacco product or tobacco use either directly or indirectly”.

Marketing under the WHO FCTC can be understood as comprising all of the above-mentioned elements.

### Global Strategy to Reduce the Harmful Use of Alcohol (2010)



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Marketing is defined as “any form of commercial communication or message that is designed to increase, or has the effect of increasing, the recognition, appeal and/or consumption of particular products and services. It could comprise anything that acts to advertise or otherwise promote a product or a service”.

Paragraph 29 of this instrument provides a non-exhaustive list of elements that constitute marketing, including “linking alcohol brands to sports and cultural activities, sponsorships and product placements, and new marketing techniques such as e-mails, SMS and podcasting, social media and other communication techniques”, as well as marketing messages on satellite television and the internet, and sponsorship of sports and cultural events.

### Set of Recommendations on the Marketing of Foods and Non-alcoholic Beverages to Children (2010)



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Paragraph 12 defines marketing as “any form of commercial communication or message that is designed to increase, or has the effect of increasing, the recognition, appeal and/or consumption of particular products and services. It could comprise anything that acts to advertise or otherwise promote a product or a service”.

Paragraph 13 provides a non-exhaustive list of examples of marketing techniques, including “advertising, sponsorship, product placement, sales promotion, cross-promotions using celebrities, brand mascots or characters popular with children, web sites, packaging, labelling and point-of-purchase displays, e-mails and text messages, philanthropic activities tied to branding opportunities, and communication through “viral marketing” and by word-of-mouth”.

Marketing is therefore characterized by three main elements:

1. It includes any form of commercial communication: marketing activities can be

undertaken via written or oral messages, via traditional or modern media platforms, and via advertising, promotion or sponsorship activities.



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2. It has as its aim, effect, or likely effect increasing the recognition, appeal and/or consumption of a product, a service or a brand: the intention is not a necessary element for a message to constitute marketing, and even the hypothetical effects of a communication can lead to a message being defined as marketing.
3. Marketing can aim at advertising a specific product, normalising the product category more generally, or increasing brand recognition for brands that include several products in brand portfolios.

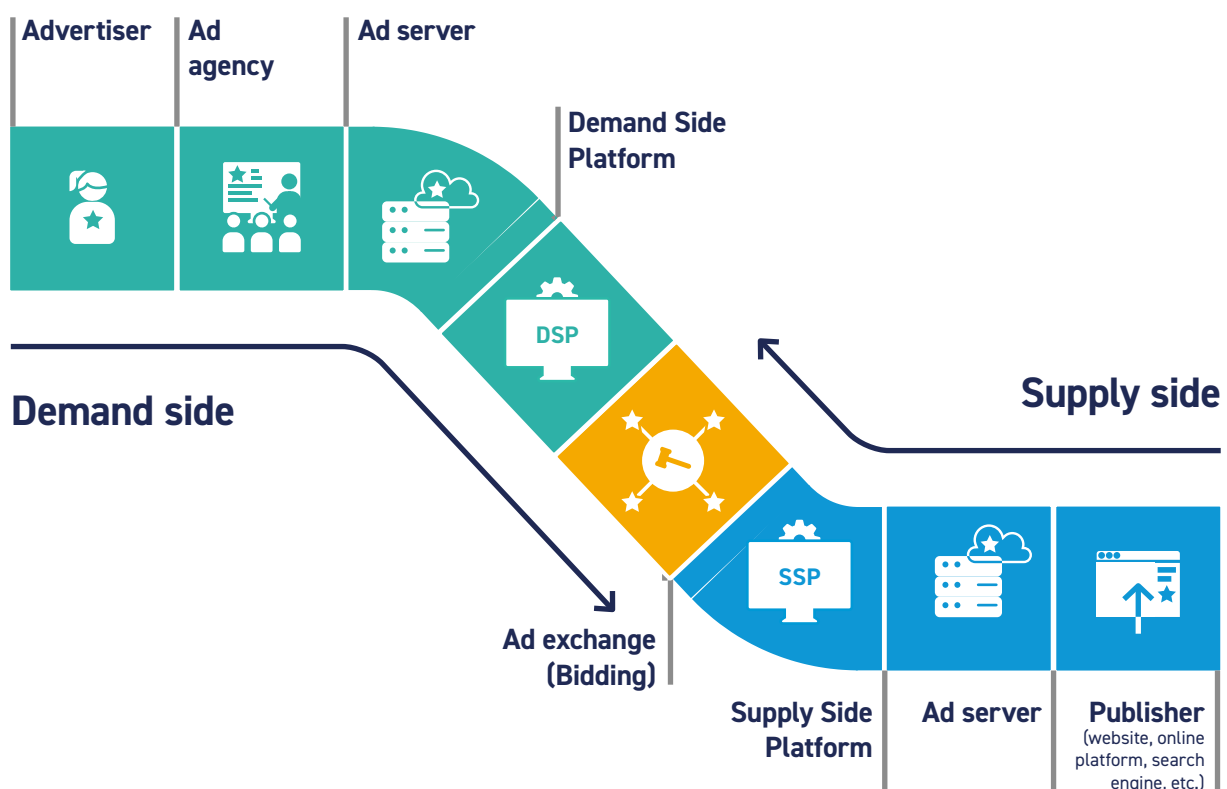
## 3.2 Digital marketing

For purposes of this report, digital marketing refers to marketing distributed in a digital form. Digital marketing is distributed to the public through digital channels, such as display on websites, apps, social media platforms, games and films, and accessible through digital devices such as desktops, laptops and mobile phones. Digital marketing evolves over time with technological developments in digital platforms. Digital marketing is also characterized by collection and processing of data, which gives a degree of control over its distribution in terms of customization and targeting. Digital

marketing is typically cross-border in nature, as websites, apps and social media platforms are often accessible worldwide. Digital marketing may overlap with traditional marketing, such as with QR codes or other links in physical content (posters, magazines, events...) to digital content.

The digital marketing supply chain involves a variety of actors, as Figure 7 illustrates. Yet, the supply chain is increasingly disintermediated by a few actors that assume most of the activities within that process.

**Figure 7. Digital marketing supply chain**



The actors in the digital marketing supply chain cannot be understood without considering those in the product supply chain, which are summarized in Figure 8. For example,

advertisers fall within both supply chains and digital marketing restrictions can often be enforced against them directly.

**Figure 8. Typology of actors in the product supply chain**


	<b>Manufacturers</b> use the raw materials to manufacture the final product that will be distributed, marketed and ultimately sold to customers.
	<b>Importers/Exporters</b> are the persons or businesses responsible for transporting goods from one country to another. An importer or exporter is present in the product supply chain whenever marketing is cross-border.
	<b>Distributors</b> are persons or businesses that ensure that the final goods are distributed to retailers. They often promote the products too.
	<b>Retailers/licenced venues</b> are the persons or businesses responsible for the point-of-sale marketing and sale of the product to customers. Retailers can have a physical and/or online presence.
	<b>Customers</b> are the final recipient of the product; those who buy goods or services.
	<b>Users</b> are persons that are active in online settings (websites, search engines, online platforms, etc.) either to post online content, to interact with content posted online (liking and sharing content), or just to see that content without any interaction.
	<b>Brands</b> a brand is a name, symbol or other marker that distinguishes one business's good or service from others. The (tobacco/nicotine/alcohol/food and beverages/breast-milk substitutes) brands are usually responsible for the manufacturing of the product. However, brands may also be responsible both for the production and the distribution of the product, or they may also conduct the sale of the product. The term "brand" can therefore refer to manufacturers, distributors and/or retailers. Brands may also license production or distribution to third parties.



WHO instruments and reports addressing marketing have not addressed digital marketing in a comprehensive way. As Table 2 illustrates,

WHO documents refer to marketing techniques that use digital technologies, although without precisely defining this notion.<sup>2</sup>

**Table 2. Digital marketing in WHO instruments**

Document	Digital marketing references
<p data-bbox="220 577 424 607"><b>WHO FCTC (2005)</b></p>  <p data-bbox="245 909 357 931">Click to view</p>	<p data-bbox="603 577 1377 678">Article 13(4)(e) of the WHO FCTC requires Parties to comprehensively ban tobacco advertising, promotion and sponsorship on radio, television, print media “and, as appropriate, other media, such as the Internet”.</p> <p data-bbox="603 701 1366 831">The WHO FCTC guidelines for implementation of Article 13 state that a comprehensive ban on tobacco advertising, promotion, and sponsorship should cover traditional media “and all media platforms, including Internet, mobile telephones and other new technologies as well as films”.</p> <p data-bbox="603 853 1366 1021">The WHO FCTC requires Parties to ban “advertising, promotion and sponsorship originating from [their] territory with cross-border effects” (out-flowing marketing) (1). The WHO FCTC Article 13 Guidelines adopt a broad understanding of what constitutes cross-border out-flowing marketing. It includes, for example:</p> <ul data-bbox="603 1032 1366 1216" style="list-style-type: none"> <li>• printed publications targeting or used in other jurisdictions and originating from the Party’s territory;</li> <li>• internet communications, whether the material is targeting persons outside or inside the Party’s territory; or</li> <li>• broadcasted material that could be received in another jurisdiction (2).</li> </ul> <p data-bbox="603 1238 1366 1346">The WHO FCTC also notes the sovereign right “to ban those forms of cross-border tobacco advertising, promotion and sponsorship entering their territory” (in-flowing marketing) (3). In-flowing marketing includes:</p> <ul data-bbox="603 1357 1366 1541" style="list-style-type: none"> <li>• publications printed or produced in other jurisdictions and entering the territory of a Party or targeting persons in that Party’s territory;</li> <li>• all internet content that is accessible within a Party’s territory; and</li> <li>• any audio, visual or audiovisual material received in a Party’s territory, whether it targets persons in that territory or not (4).</li> </ul>

2 An exception can be found in the 2022 WHO report “Scope and impact of digital marketing strategies for promoting breastmilk substitutes”, where digital marketing is defined as “promotional activity, delivered through a digital medium, that seeks to maximize impact through creative and/or analytical methods”. However, this definition is not comprehensive either, as it does not define the methods that are used in digital marketing and does not refer to data processing. The 2022 WHO Europe report “Digital marketing of alcohol: challenges and policy options for better health in the WHO European Region” does not define digital marketing but provides several examples of techniques that fall within the scope of digital marketing, such as digital sponsorship, viral content, augmented reality, native advertising, online contests, influencer marketing, or localized digital marketing, amongst others.

### Global Strategy to Reduce the Harmful Use of Alcohol (2010)



[Click to view](#)

### Framework for Implementing the Set of Recommendations on the Marketing of Foods and Non-Alcoholic Beverages to Children (2012)



[Click to view](#)

### International Code of Marketing of Breast-Milk Substitutes (1981)



[Click to view](#)

Paragraph 29 refers to “new marketing techniques”, which include “e-mails, SMS and podcasting, social media and other communication techniques”.

Paragraph 17 of the Action Plan 2022-2030 for the implementation of the Global Strategy to Reduce the Harmful Use of Alcohol (2022) provides that “satellite and digital marketing present a growing challenge for the effective control of alcohol marketing and advertising”. Although it does not define digital marketing as such, it provides some of its features:

- It can be implemented through social media platforms;
- It comprises an infrastructure that allows programmatic native advertising, is data-driven, and is participatory.

This document defines digital marketing through a non-exhaustive list of examples: branded pages on social media platforms, personal websites, messaging services, pop-up advertisements, search engine advertisements, and advergames.


The Code bans advertising or other form of promotion of breast-milk substitutes to the general public, but does not directly address specific strategies used in digital marketing.






Following a mandate from the World Health Assembly in 2020, it has however been exposed that digital marketing is extensively used for the promotion of breast-milk substitutes (5).

Digital marketing is thus addressed differently in each of the instruments described above. Approaches to digital marketing will continue evolving in the future, making it difficult to define a comprehensive list of different types of

digital marketing. However, some examples of marketing and digital marketing techniques that will be mentioned in this report are provided in the following table.

**Table 3. Examples of digital marketing**

Name		Definition
	Display advertising	Display advertising is online advertising using banner ads and other visual ad formats (6). It is usually interactive and can be displayed on websites, apps, or social media platforms.
	Native advertising	Native advertising is a technique that embeds branded content designed to resemble non-commercial online content and similar to the platform in which it is published, for example, news articles or social media posts (7).
	Social media advertising	Social media advertising includes all advertising posted on social media platforms, including influencer advertising, native advertising, display advertising and branded pages of manufacturers.
	Influencer advertising	Influencer advertising is a form of social media advertising involving user-generated ads, endorsements and product placement aimed at social media users that have a large number of followers and can thus influence consumer trends. Influencer advertising does not include all content posted by influencers, but solely content involving some commercial relationship between a brand and an influencer (8).
	Search advertising	Search advertising is advertising placed amongst search engine results. It is targeted to meet the keywords used by the consumer (9). Search advertising can be merely included among the search results or prioritized to appear as a first result (10).
	Video advertising	Video advertising is advertising that occurs before, during and/or after a video stream on the internet. It also encompasses online display advertisements that have video within them.
	Audio advertising	Audio advertising refers to advertising in audio content such as podcasts, digital radio, and streaming music services.
	In-app (or mobile app) advertising	In-app advertising refers to advertising placed within a mobile app, generally allowing app developers to keep their content free for users. It is a popular monetization strategy for app developers, in which app developers get paid to serve ads on their app. These ads include video units, display ads and native ads.

	 <p>Email advertising</p>	<p>E-mail advertising is a type of marketing performed via email whereby the recipient should have consented to receive promotional messages from a brand. It is the act of sending promotional messages to people in via e-mail, using manual or automated messaging (11).</p>
	 <p>SMS messaging advertising (or text messaging advertising)</p>	<p>SMS messaging advertising is the process of communicating business news, sales, promotion or other relevant information to customers via SMS text messages on their mobile devices (12).</p>
	 <p>Online retail</p>	<p>Online retail is a form of electronic commerce which enables consumers to buy goods or services from a seller over the internet using a web browser or a mobile app.</p>
	 <p>Product placement</p>	<p>In the digital environment, product placement typically occurs through brand placement in on-demand videos and influencer content.</p>
	 <p>Advertising in augmented reality environments</p>	<p>Advertising in augmented reality environments (AR advertising) uses a smartphone camera to superimpose virtual objects, products or game characters with some marketing content onto the real-world environment. For example, AR advertising could add a cigarette to a user's picture to make the user look as if she/he was smoking.</p>

## 4. Coordinating fragmented laws applicable to digital marketing

**M**arketing practices are generally not regulated by a single piece of legislation. Instead, rules applicable to marketing practices are usually incorporated into consumer protection laws, to media (broadcasting) laws or laws specific to tobacco control, alcohol or foods and beverages (sector-specific laws).

When examining digital marketing, rules applicable to data protection and to digital markets, telecommunications, or the internet







are also relevant. This section describes each of these bodies of law to illustrate how some jurisdictions have regulated this area. As is illustrated below, the diversity of laws involved necessitates legislative and institutional coordination.

The following figure depicts relevant laws that frequently regulate digital marketing practices in Member States. These laws are described in the following sub-sections. Member States can assess what their current legal environment is in this regard using the Legal Environment Assessment provided in Annex 2.

**...rules applicable to marketing practices are usually incorporated into consumer protection laws, media laws or laws specific to tobacco control, alcohol or foods and beverages.**



Figure 9. Laws regulating digital marketing

	 Sector-specific laws	 Advertising laws/codes	 Consumer protection laws	 Broadcasting laws	 Data protection laws	 Digital markets laws
Jurisdictional reach	Broad or based on connecting factors	Variable - sometimes only national advertising, sometimes all advertising, often not clarified in the law	Narrow - often based on nationality	Narrow - often based on nationality	Broad - sometimes global	Broad - sometimes global
Topics covered	Prohibited or restricted advertising practices, disclosure obligations, provisions protecting vulnerable populations	Prohibited advertising practices, disclosure obligations, child protection, allowed advertisements	Prohibited advertising practices, child protection, disclosure obligations	Prohibited advertising practices, child protection	Consent requirements, health data, child protection	Disclosure obligations, child protection, automated decision-making, consent requirements
Enforcement authority	Ministry of Health or health agency with express delegation of powers to other authorities where needed	Ministry of Consumer Protection, Ministry of Economic Affairs, advertising associations...	Ministry of Consumer Protection, Ministry of Economic Affairs, Ministry of Trade...	Ministry of Communication, Ministry of Economic Affairs, Ministry of Industry, Ministry of Trade...	Data protection authorities	Ministry of Trade, Ministry of Economic Affairs, competition/antitrust authorities...

## 4.1 Advertising laws and codes

Some jurisdictions have adopted advertising laws, either applicable to advertising in general or advertising by specific sectors. Advertising standards and codes have also been developed by some advertising associations representing the interests of the advertising and media industry.

### 4.1.1 General advertising laws and codes

Some countries have specific laws on advertising applicable to all advertising and media including Spain (13), China (14), Azerbaijan (15), Georgia (16), or Lithuania (17). Advertising laws typically:

- Prohibit illicit advertising, which can be defined in accordance with certain values, certain advertising practices or certain products. For example, the Spanish law on advertising qualifies subliminal advertising as illicit advertising (18).
- Prohibit misleading advertising, which is sometimes defined by reference to consumer protection laws (19).
- Restrict the advertising of specific products. For example, Viet Nam's advertising law bans the advertising of cigarettes, some alcoholic beverages, breast-milk substitutes for children under 24 months old, dietary supplements for children under 6 months old and artificial feeding bottles and pacifiers (20).
- Impose or prohibit the use of disclosures or claims for certain advertisements. For example, the Advertisement Law of the People's Republic of China (PRC Advertisement Law) requires advertising for prescribed drugs and medical devices to include certain health claims (21).
- Provide an enhanced level of protection for vulnerable populations, such as children (22).

Advertising laws do not typically refer to digital marketing, but they have in practice been applied

to it, for example in Norway and Sweden (23). However, some laws include specific provisions on digital advertising. The PRC Advertisement Law provides that internet advertising should not affect the user's normal use of the internet, and that pop up advertising should include obvious signs for turning it off. The law also contains detailed rules for endorsers (that are not restricted to online endorsers) (24), and for e-mail advertising (25). The Estonian Advertising Act was amended in 2018 to prohibit the advertising of alcohol in social media networks, except on the website and social media account of the alcohol handler (26). Alcohol digital marketing rules have also been introduced in general advertising laws in the Russian Federation, for example (27).

Many advertising associations have also established advertising codes. These are often not legally binding in the sense that they do not create general advertising laws applicable to all economic operators, but they can be compulsory for undertakings that belong to the association or advertising sector. Examples of such codes include:

- **United Kingdom:** United Kingdom Code of Non-Broadcast Advertising, Sales Promotion and Direct Marketing (CAP Code), established by the Advertising Standards Authority (ASA) (28);
- **Singapore:** Singapore Code of Advertising Practice (SCAP), established by the Advertising Standards Authority of Singapore (ASAS) (29);
- **Australia:** Australia Association of National Advertisers (AANA) Code of Ethics (30);
- **South Africa:** Advertising Regulatory Board (ARB) Code of Advertising Practice (31);
- **India:** Advertising Standards Council of India (ASCI) Code for Self-Regulation in Advertising (32); and

- **Spain:** Code of Advertising Behaviour Autocontrol (33).

All these codes require advertising to be honest, decent, and truthful (34). Other typical provisions in advertising codes concern the identification of advertisements to enable consumers to recognize them, the prohibition of misleading or harmful advertising, or specific rules for advertising aimed at children.

#### 4.1.2 Sector- and product-specific marketing laws and codes

In the absence of general advertising laws, some jurisdictions adopt laws regulating marketing in specific sectors or with respect to specific product categories. Under a broader approach, jurisdictions can regulate the marketing of all health-related products and services. Mexico has followed this path by adopting the Regulation of the General Law on Health in Matters of Advertising (35). Under a narrower approach, jurisdictions regulate the marketing of one product category. Examples of this model are the European Union (EU) Tobacco Advertising Directive and

the Chilean Law on the nutritional composition of foodstuffs and their advertising (36).

These laws regulate the advertising of specific products in at least three ways:

- They plainly prohibit the advertising, promotion and sponsorship of that product category. This is typically the case with tobacco products (37) but is also found in some alcohol control laws (38) and breast-milk substitutes laws (39).
- They strictly regulate such advertising by requiring or prohibiting the use of health claims or warnings,<sup>3</sup> prohibiting certain messages,<sup>4</sup> providing strengthened protection for children,<sup>5</sup> or restricting digital marketing explicitly.<sup>6</sup>
- They explicitly define what advertising is permitted by requiring, for example, that advertising may only contain factual or informative data and objective qualities.<sup>7</sup>

- 
- 3 For example, the Mexican General Health Law requires the use of health claims in advertising, both in traditional and digital media; in Chile, the Law on the composition and advertising of foodstuffs requires all food advertising in mass media to include a health warning promoting a healthy lifestyle; in Viet Nam, the Decree on nutritious products for infants, feeding bottles and teats requires complementary foods for under 24 month infants to include the claims “breast milk is the best food for health and all-sided growth of infants” and “the product is a complementary food and may be used as a supplement to breast milk for infants over 6 months”(Art. 6(2)(a) and (b)).
  - 4 In Chile, the law on the composition and advertising of foodstuffs prohibits breast-milk substitutes advertising that disincentivizes breastfeeding.
  - 5 In Chile, the law on the composition and advertising of foodstuffs prohibits the advertising of food high in calories, fat, sugar or salt in schools; the offer of such products for free to children under 14; their advertising if targeted at children under 14; or the use of promotional elements such as toys, accessories or other incentives.
  - 6 Finland’s Alcohol Control Act incorporates special regulations on social media alcohol advertising; see Section 7.
  - 7 For example, in France, alcohol advertising can only describe the alcohol content, origin, name, composition of product, name and address of manufacturer, agent and stockists, the method of production, methods of sale, and methods of consumption. Alcohol advertising can also refer to production areas, awards obtained, designations of origin or geographical indications, and objective references related to the product’s colour, smell and taste; see Code de la santé publique (<https://www.legifrance.gouv.fr/codes/id/LEGITEXT000006072665>, accessed 16 March 2023), Art. 3323-4.



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In some jurisdictions where marketing is not comprehensively restricted, law requires manufacturers to provide clear and transparent information about their marketing campaigns.<sup>8</sup> For example, in the United States, tobacco manufacturers are obliged to report on their domestic advertising and promotional activity to the Federal Trade Commission (FTC), which then publishes regular reports aggregating all information received (40). In Nigeria, a disclosure obligation applies to manufacturers, wholesale

distributors, importers and any other seller of tobacco products (41).

Typically, sector specific laws such as those governing tobacco advertising are set out in legislation governing that sector more broadly, such as a national tobacco control law. Unlike laws governing advertising more broadly, sector specific laws of this type usually sit within the domain of ministries of health or other health-related agencies.<sup>9</sup>

**Figure 10. Policy options in sector-specific advertising laws**



Beyond formal legal instruments, some bodies have also adopted codes to regulate advertising practices of specific products including, but not limited to, those that are harmful to health (42).

The adoption of such codes may be contemplated in the law itself. For example, the Online Safety and Media Regulation Bill in Ireland provides

that a media service code may be made to ensure that commercial communications protect the interests of the audience. This may result in prohibitions or restrictions of commercial communications relating to foods or beverages of public concern in respect of the general public health interests of children, in particular infant formula, follow-on formula, or foods

8 This obligation applies to tobacco products, for example, in Canada, Ireland, Israel, Nigeria, Thailand, and the United States.

9 Note that health-related agencies may operate under ministries other than the Ministry of Health. For example, food safety authorities sometimes sit within ministries of agriculture or trade.

and beverages which contain fat, trans-fatty acids, salts or sugars (43). It also provides that commercial communications relating to those products may be prohibited or restricted in programmes or user-generated content through an online safety code (44). Where industry codes are adopted, linking them to laws and/or making them enforceable through legislation is a policy option for governments to consider. The merits of this approach may depend on a range of factors, including the extent to which industry codes are government led and capable of government objectives, such as a high level of health protection. Where this is not the case, governments might opt to regulate marketing directly through law.

#### 4.1.3 Standalone laws prohibiting specific advertising techniques: Spam control laws

Some jurisdictions have adopted specific legislation to control one specific digital marketing practice, "spam", which can be defined as "unsolicited commercial communication sent in bulk by email or by text or multimedia messaging to mobile telephone numbers" 45. Examples of jurisdictions that have adopted such legislation are Singapore (46), Australia (47), Japan (48), and Canada (49). In other jurisdictions, direct marketing and/or spam advertising are regulated within more general laws, such as on data protection or consumer protection.<sup>10</sup>

Anti-spam laws usually impose three main obligations.

- Requirement of expressed consent from recipients before sending unsolicited messages. The request for consent must be clear and specific. For example, Canada's anti-spam law requires the request for consent to include: a clear and concise description of the purpose in obtaining consent; a description of

messages that will be sent; requester's name and contact information (physical mailing address and either a telephone number, an e-mail address or a website URL); a statement that the recipient may unsubscribe at any time (50).

- Requirement of clear identification of the message. For example, the Singapore Spam Control Act requires all unsolicited commercial communications to be titled "ADV", so that recipients know they are an advertisement before opening the message (51).
- Availability of a facility to unsubscribe at any moment. For example, in Chile, SMS advertising needs to include a quick mechanism for recipients to be able to request not to receive such commercial communications (52).

#### 4.1.4 Digital marketing codes and guidance

Some governments have adopted guidelines on digital advertising in order to clarify application of advertising and consumer protection laws. For example, the Department of Consumer Affairs of India has released a set of guidelines called "Endorsements know-hows!" for celebrities, influencers and virtual influencers on social media. They clarify the extent and content of disclosure obligations to ensure that endorsers do not mislead consumers. Non-compliance with those obligations constitutes a violation of the Consumer Protection Act (53). The United States FTC has adopted the Guides Concerning the Use of Endorsements and Testimonials in Advertising, which address the application of Section 5 of the FTC Act to, among others, influencer advertising (54).

Some advertising associations have also adopted publications focusing on digital marketing or on specific features of digital

10 For example, South Africa includes provisions on unsolicited direct marketing via e-mail or SMS in its data protection legislation; Chile includes such rules in its consumer protection law.

marketing, such as influencer advertising or social media advertising. These codes have been adopted by several bodies, as the examples below illustrate.

- **The European Advertising Standards Alliance** published, in 2008, a Digital Marketing Communications Best Practice Recommendation (55).
- **The Singapore ASAS** adopted, in 2016, the Guidelines on Interactive Marketing Communication and Social Media, which were added to the SCAP (56).
- **The Australian Influencer Marketing Council (AiMCO)** adopted, in 2021, the Australian Influencer Marketing Code of Practice (57).
- **The United Kingdom Incorporated Society of British Advertisers (ISBA)** adopted, in 2021, the Influencer Marketing Code of Conduct (58).
- **The Indian ASCI** adopted, in 2021, the Guidelines for Influencer Advertising in Digital Media (59).

Sometimes, specific sections on digital marketing have been added to general marketing codes without adopting a new instrument to address this issue (60).

Whatever the approach, all provisions on digital marketing focus on the identification of advertisements. For example, in the United States, the FTC has published the report “.com Disclosures: How to make effective

disclosures in digital advertising”, which provides recommendations to better identify digital advertising (61). This is particularly the case regarding influencer marketing, which is often addressed through specific guidelines on labelling and disclosure recommendations (62). For example, in India, the ASCI Guidelines for Influencer Advertising in Digital Media require all advertisements published by social media influencers or their representatives on the influencer’s account to carry a clearly identifiable disclosure label (63). These guidelines contain specific rules to determine whether a disclosure is required and where the disclosure has to appear (64). They also permit a limited number of labels to be used as disclosure (65).

In addition to advertising industry codes, some online platforms, including Facebook, Instagram, Twitter or Google, have adopted their own voluntary, intra-firm advertising and promotion codes. These may implement national laws but may also restrict marketing to a greater extent than what is required by national legislation. One limit of those voluntary rules is that social media platforms often do not restrict branded pages and accounts of restricted products (for example, e-cigarettes brands accounts and pages) as falling under their advertising bans. Therefore, exposure to marketing remains. Different platforms also have different policies, meaning that deferring to them is not a policy option likely to produce a consistent approach to regulation of marketing. Rather, voluntary rules typically implement mandatory measures in some countries.

## 4.2 Consumer protection laws

Consumer protection laws regulate marketing activities, and commercial practices more generally, including when carried out through digital marketing. These instruments are targeted at brands advertising their products. They usually prohibit unfair commercial practices

and misleading, deceptive or unconscionable actions and omissions. The main rule is that advertising cannot mislead consumers as regards the composition and characteristics of a product, its purpose or its price (66).

## Box 1. Case study: the EU Unfair Commercial Practices Directive



Region: EU

Law: The EU Unfair Commercial Practices Directive (UCPD)

In the EU, the UCPD is structured as follows (67):

- 1) a list of unfair commercial practices that are always prohibited (blacklisted practices); and
- 2) a prohibition of any other commercial practice not included in the list that is misleading or aggressive.

The UCPD contains rules on two elements that can have implications for digital marketing.

- **Disclosure obligations:** The blacklist of unfair commercial practices includes using editorial content in the media to promote a product without making that clear (68), providing search results in response to a consumer's online search query without clearly disclosing any paid advertisement or payment for achieving higher ranking of products (69), falsely claiming that a product cures illnesses, dysfunction or malformations (70), or hidden advertising (71). Social media platforms present increased risks for hidden advertising, native advertising, or problematic algorithmic practices. Therefore, all forms of commercial communications in social media must be clearly disclosed to avoid falling within one of those categories (72). The failure to disclose information may also lead to misleading advertising. For example, marketplaces must clearly inform whether the third party offering the product is a trader or not (73). Online interfaces showing several search results must inform about the parameters determining the ranking of products and the relative importance of those parameters (74). As influencers fall within the notion of "trader" under the UCPD, they also have an obligation to declare any commercial practice and make clear that a brand has paid for the promotion of a product (75). However, the UCPD does not impede influencers from conveying their personal opinion on unhealthy products if there has not been any agreement with the producer (76).
- **Prohibition of unsolicited messages or exhortation:** the UCPD prohibits persistent and unwanted solicitations (77), or direct exhortation to children to buy advertised products (78), Displaying advertisements in the inbox of an email service in a form similar and in the same position as real emails falls within the concept of persistent and unwanted solicitations if the display of the advertising is frequent and if the consumer has not given consent (79).



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### 4.3 Audiovisual, broadcasting and other media laws

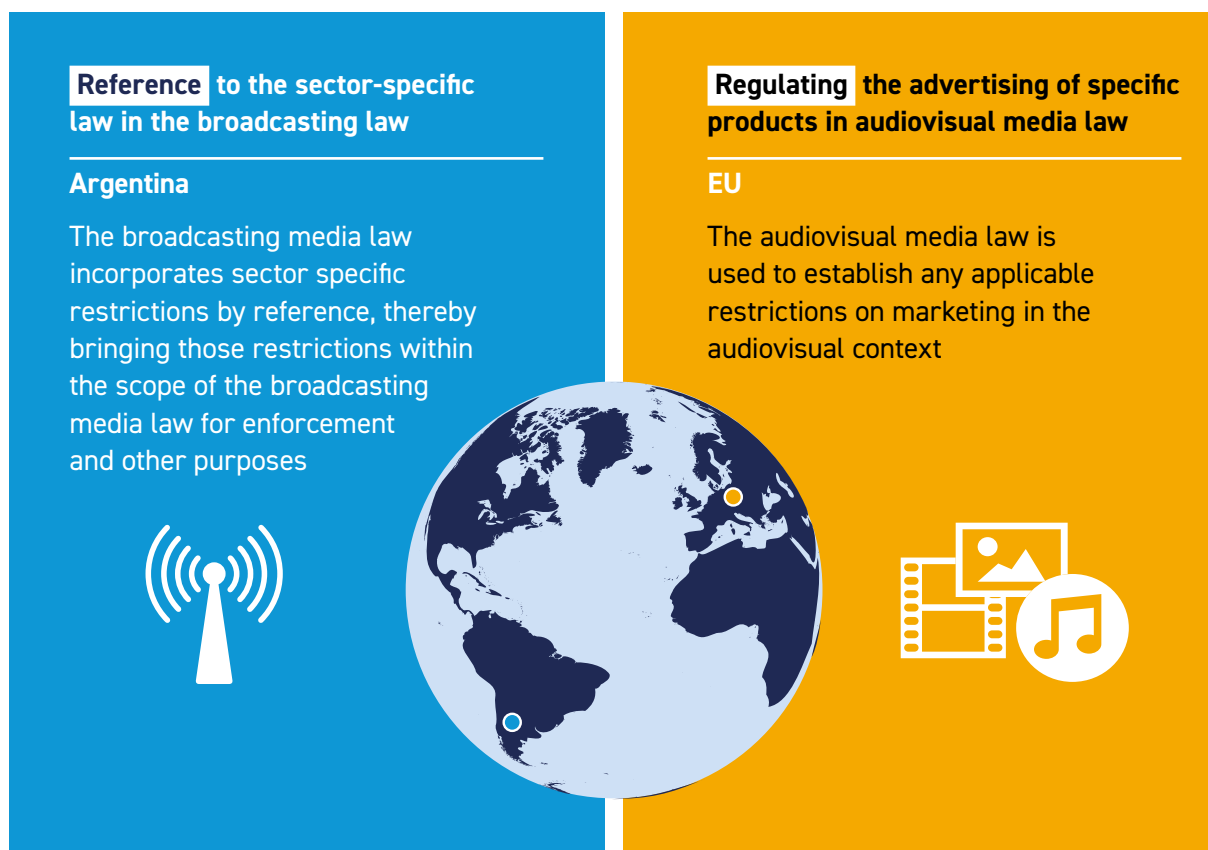
Audiovisual media legislation usually regulates conditions to advertise products, including those that are harmful to health in television, on-demand audiovisual media services, and video-sharing platforms. These rules are targeted at advertisers. The EU Audiovisual Media Services Directive (AVMS Directive) provides an interesting regulatory example in that regard (80). It regulates the advertising of harmful commodities in the following manner.

- **Tobacco products:** all advertising, sponsorship and promotion is prohibited (81).
- **Alcoholic beverages:** advertising on TV, on-demand audiovisual media services and video-sharing platforms cannot be specifically aimed at children and cannot encourage immoderate consumption of alcohol (82).
- **Unhealthy food and beverages:** self-regulatory codes should reduce the exposure of children to advertising of unhealthy food and beverages (83).
- **Other unhealthy commodities:** advertising on TV, on-demand audiovisual media services and video-sharing platforms should not encourage behaviour prejudicial to health or safety (84); video-sharing platforms should take measures to protect minors from

programmes, videos and advertising which may impair their physical, mental or moral development (85).

Other jurisdictions cross-reference sector-specific rules in their broadcasting laws. For example, in Argentina, the Audiovisual Media Services Law provides that those who produce, distribute, broadcast or benefit economically from the broadcasting of tobacco and alcohol advertising have to comply with the laws regulating those products (86). It further provides that audiovisual media services licensees or authorized audiovisual media services can only broadcast alcohol and tobacco advertising that complies with the laws regulating those products (87). The Law to Fight against Alcoholism prohibits any marketing communication targeting minors under 18, featuring minors under 18, implying that alcohol strengthens physical or intellectual abilities, using alcohol as a sexual stimulant, using violence, and not including health warnings specified in the law (88). The Tobacco Advertising Law bans all advertising, promotion and sponsorship of tobacco products (89). Non-compliance with the Audiovisual Media Services Law may result in sanctions for audiovisual media service providers, including warnings, fines, advertising suspensions, and licence withdrawals (90).

## Figure 11. Policy options for regulating the advertising of specific product categories through media laws



### 4.4 Data protection laws

Digital advertising is also subject to privacy or data protection laws which determine how brands and online platforms can obtain data and to what extent users must be aware of their data being processed. For example, alcoholic beverages brands gather data from social media, apps, e-commerce, or social listening strategies. This data allows brands and platforms, amongst others, to understand the brands or topics that can be better leveraged for marketing, to profile users and target advertising to them and develop promotional campaigns that are highly personalized in terms of individual profiles, activities, behaviours and geographical location

(91). Targeted advertising through the use of personal data increases the power of marketing, especially on children (92). Several elements in data protection laws can affect how digital advertising is conducted:

#### **Concept of personal data**

Legislation can have a broader or narrower approach to personal data. For example, some rules govern a broad range of online identifiers such as cookies, IP addresses and radio frequency identification tags, which play a crucial role in profiling and targeted advertising (93).

### ***Sensitive or special personal data***

Enhanced protection for sensitive personal data, including health data, is provided in a number of jurisdictions and may influence targeted advertising of tobacco, nicotine, alcohol, unhealthy food and beverages, and breast-milk substitutes (94).<sup>11</sup> For example, protecting the collection, use or disclosure of information about addictions or medical history by requiring explicit consent, prohibiting use or disclosure of sensitive personal data in some settings (e.g. contact details of nursing mothers to producers of breast-milk substitutes) or general prohibitions on use or disclosure of sensitive personal data except for specified purposes (e.g. for provision of health care) can avoid that information being used for targeted advertising directed at vulnerable consumers.

However, protecting sensitive personal data may not be sufficient in itself to avoid vulnerable consumers from being exposed to advertising of harmful commodities. Artificial intelligence (AI) allows linking observable behaviour (online activity, purchases, likes and shares...) to inferred non-observable sensitive data (psychological attitudes, health condition, sexual orientation, religious and political preferences...). In most jurisdictions, this type of data collection and use would fall outside the scope of protections for sensitive or personal data. This is no longer the case in the EU, where the Court of Justice of the European Union (CJEU), in the *Vyriausioji tarnybinės etikos komisija* judgment of 1 August 2022, has established that such inferred data also constitutes sensitive personal data and is subject to increased protection (95). This broad

interpretation provides a strengthened layer of protection for vulnerable consumers.

Some data protection laws protect sensitive data from profiling and automatic decision-making. For example, in the EU, the General Data Protection Regulation (GDPR) prohibits automated decision-making based on sensitive data (96).

### ***Concept of consent***

While all data protection laws define consent as the main criterion for the processing of personal data, they do not all have the same understanding of what consent is. A stricter interpretation of this term contributes to more informed consumers and reduces the risk of unintended processing of personal data. Several jurisdictions require that consent should be freely given, specific, informed and unambiguous (97).<sup>12</sup>

The need for consent for targeted and behavioural advertising has been recently reaffirmed in the EU. In January 2023, The Irish Data Protection Commission imposed a €390 million fine on Meta (parent company of Facebook and Instagram) for violating the GDPR through its targeted and behavioural advertising policy (98). Meta did not ask for consent when processing personal data for the purpose of behavioural advertising and, instead solely required customers to accept the terms of reference. Meta considered the contract with its customers was based on the premise of the provision of a personalized service that includes personalized or behavioural advertising. The European Data Protection Board and the Irish Data Protection Commission did not accept

11 Enhanced protection for sensitive personal data is granted in the EU, Thailand or Brazil, for example.

12 Each of the conditions are typically provided in the law. For example, in the GDPR, consent has to cover all processing activities carried out for the same purpose, the data subject has to be informed of the existence of the processing operation and its purposes, and consent should be given by an unambiguous indication of the data subject's agreement to the processing of personal data, such as a written or oral statement, but not a pre-ticked box or inactivity. The data subject also needs to be informed of the existence of profiling and the consequences of such profiling.

Meta's reasoning. They decided that Meta is required to obtain consent to provide targeted and behavioural advertising. Similarly, in July 2022, the Italian authority issued a formal warning against TikTok for basing t11 Enhanced protection for sensitive personal data is granted in the EU, Thailand or Brazil, for example. Processing of personal data for the purposes of targeted advertising on its legitimate interests and not on consent. The Italian authority was also concerned by the protection of children, as difficulties in implementing effective age verification mechanisms in the platform entailed the risk that personalized advertising would be served to children without consent (99). A limitation of the extent to which data protection laws restrict targeting of digital marketing is that the obtaining consent is sufficient to process data for marketing purposes. Individual users may receive numerous consent requests, making their acceptance routine and thus limiting the protective purpose of legislation.

#### ***Protection of vulnerable data subjects, in particular children***

Most data protection laws, but not all of them, provide stricter rules for the processing of children's data (100).<sup>13</sup> These rules generally require consent from the holder of parental responsibility to process children's data (101). They sometimes also require information addressed to children to be accessible to them (102). Brazil's data protection law has strict rules on children's data protection. The processing of

children and adolescents' personal data must take account of their best interests. This results in the following requirements (103).

- Specific consent must be granted by at least one parent or responsible person.
- The controller must publish information on the kind of data collected, their use, and the procedure to exercise data rights.
- Information on data processing must be published in a simple, clear and accessible manner.
- Controllers cannot subject games, apps or other activities to more children and adolescents' data processing than strictly necessary.

The above-mentioned data protection rules may help to protect children from targeted advertising, as they restrict the amount of data collected and the ability of brands to personalize their advertisements to target children more effectively, thus reducing the power of marketing. However, the effective protection of vulnerable data subjects, including children, requires the ability to properly identify them which can constitute a challenging task.

## 4.5 Digital markets laws

A recent development influencing digital marketing concerns the adoption of laws addressing online platforms and regulating

digital markets. Instruments in the EU and in the United States illustrate this point.

<sup>13</sup> The age covered by child-protection clauses varies from one law to the other. For example, Australia defines rules for children under 15 years old, the EU grants strengthened protection to children under 16 years old, and Thailand establishes two sets of rules (minors and under 10 years old).



## Box 2. Case study: the EU digital markets and digital services acts



**Region: EU**

**Law: Digital Markets Act and Digital Services Act**

In the EU, two parallel instruments have been adopted, the Digital Markets Act (DMA) and the Digital Services Act (DSA) (104). Both instruments introduce rules for digital services including digital advertising.

The DSA primarily concerns online intermediaries and platforms – such as online marketplaces, social networks, content-sharing platforms or app stores. The DMA governs gatekeeper online platforms providing core platform services. These are digital platforms that function as bottlenecks between businesses and consumers for important digital services, such as search engines or social networks with a strong turnover or capitalization.<sup>14</sup>

The DMA complements the GDPR, as it adds new consent requirements for the processing of personal data (105). It also adds disclosure obligations by requiring gatekeepers to submit to the European Commission an independently audited description of any techniques of profiling of consumers that the gatekeeper applies in its core platform services. An overview of such description should be publicly available (106).

The DSA has a more direct impact on digital marketing by regulating two main aspects. On the one hand, it provides detailed rules for online platforms to make users aware that they are viewing advertising (107). Article 24 requires online platforms engaging in advertising to disclose the authors and the parameters used to determine the recipient of the advertisement. Very large online platforms (as defined in Article 25(1) of the DSA) that use recommender systems should display the parameters used for such systems (108). Very large online platforms that display advertising should also create and make publicly available a repository containing information on the advertisement displayed in their interfaces. Such repository should provide whether the advertisement was targeted at specific categories of recipients and, if so, the main parameters used for the targeting (109).

On the other hand, the DSA limits targeted advertising. Providers of online platforms cannot present advertising based on profiling when they are aware with reasonable certainty that the recipient of the service is a minor (110). Moreover, they cannot present advertising based on profiling conducted using sensitive data (111).

14 Under the DMA, a gatekeeper is a provider of core platform services that serves as an important gateway for business users to reach end users, enjoys a durable position in its operations and has a significant impact in the internal market (Art. 3).

In the United States, a Digital Advertising Act was proposed in May 2022 (112). This proposal regulates competition and anticompetitive practices among digital advertising platforms, rather than data protection and targeting practices. Digital advertising is dominated by a few undertakings that are active in all sides of the supply chain. The proposed Act would prohibit large digital advertising companies from owning more than one part of the digital advertising ecosystem, which is comprised of the digital advertising exchange, the sell-side brokerage, the buy-side brokerage, and the buyer or seller of digital advertising space. The Digital Advertising Act would also require medium and large digital advertising companies to abide by several obligations to protect their customers and competition. If adopted, this instrument would require companies such as

Google, Meta or Amazon to divest significant portions of their advertising businesses (113). This would result in companies collecting and processing a more limited amount of data and therefore not being able to fully personalize and target their advertising.

Similar legislation has been proposed in other jurisdictions, such as Republic of Korea and Australia (114). Rules regulating digital markets therefore have the potential to limit targeted advertising and strengthen disclosure obligations.

A recent development in the regulation of digital markets concerns the adoption of content moderation laws, which are examined in section 8.

## 4.6 Observations and policy options

A variety of laws influence how digital marketing can be conducted. Different laws regulate different aspects of digital marketing, thus leading to a strong fragmentation. An examination of all those instruments reveals three main categories of rules.

- **Advertising restrictions:** some laws either fully ban the advertising of certain products or specific marketing techniques, either they regulate the content of advertising, marketing techniques, or advertising to vulnerable consumers.
- **Strengthened protection of relevant interests:** most laws provide strengthened protection either for vulnerable populations, in particular children, or for legitimate interests, such as health data in data protection laws.
- **Disclosure obligations:** several laws impose disclosure obligations to consumers

(informing that an advertisement is an advertisement, or that their data will be processed for advertising purposes), to governments (reporting marketing expenditure for certain products) or to the public more generally (having advertising repositories available for everyone).

However, each of the applicable laws will vary in terms of:

- their addressees (brands, audiovisual media or online platforms)
- their jurisdictional reach (broader or narrower)
- the authorities competent for their administration (government, advertising associations, online platforms)
- the enforcement measures.

## Box 3. Policy options



### Legislative coordination to restrict marketing and allocate authority for effective monitoring and enforcement

Restrict digital marketing of specific product categories in a sector specific law specifying:

- prohibited and restricted practices
- jurisdictional reach
- liability provisions
- enforcement powers, procedures and measures (including those linked to other provisions of sector specific laws, such as licensing measures)

Include cross-references in sector specific laws to other relevant laws governing marketing, coordinating the substantive restrictions, monitoring and enforcement.

Strengthen existing laws applicable to marketing (including consumer protection,

data protection, media, digital markets / regulation of the Internet) to create sector-specific restrictions where they do not otherwise exist and enable their monitoring and enforcement. Alternatively, include cross-references in laws applicable to marketing to sector specific laws establishing marketing restrictions to ensure coordination and bring sector specific restrictions within the scope of laws applicable to marketing and their enforcement regimes.

Adopt a broad and (non-exhaustive) definition of marketing covering digital marketing and future innovation to the greatest extent possible.

Include enabling provisions in legislation granting regulatory powers to government agencies that enable them to adapt to future innovations in digital marketing, including by prohibiting and restricting practices and using monitoring mechanisms.

Where industry codes are in place, link them to formal laws to make them enforceable.

# 5. Defining an effective jurisdictional scope for regulation of digital marketing and enforcement

**D**igital marketing often involves more than two jurisdictions, as brands, advertising agencies, publishers and customers may all be established in different territories. This characteristic raises jurisdictional concerns: who can

regulate digital marketing? Who can investigate and gather information? Who can impose sanctions and enforce those sanctions? Governments have adopted different approaches to this issue, as the following sub-sections reveal.

## 5.1 The concept of jurisdiction

The concept of jurisdiction in public international law comprises three different elements: jurisdiction to legislate, to adjudicate and to enforce (115). These three types of jurisdiction are also of relevance to private law concerns and must be considered when examining marketing regulation.

***Jurisdiction to legislate: when does a State have jurisdiction to restrict marketing?***

The first type of jurisdiction defines the limits on the law-making powers of governments. Rules on jurisdiction to legislate determine which activities a State can regulate and whether a State's regulation can have extra-territorial effects.

Example:

Country A has a comprehensive ban on tobacco advertising. A tobacco manufacturer established in country B launches an advertising campaign using influencers. None of those influencers live

in country A but they have a well-established reputation among the youth and their posts reach country A. Is country A's legislation applicable to this advertising campaign? Can a tobacco manufacturer, advertising agency, influencer or platform, be made subject to country A's rules prohibiting tobacco advertising?

***Jurisdiction to adjudicate: when is a court or a tribunal competent to rule on a marketing dispute?***

The second type of jurisdiction regulates the authority of the judiciary. Rules on jurisdiction to adjudicate determine when a court or a tribunal may hear a case, determine which law should govern the dispute, and rule on the merits.

Example:

An alcoholic beverage manufacturer established in country A advertises its products through a social media platform established in country B.



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The advertisement is targeted at an audience comprising customers residing in several countries. The advertisement has, in particular, reached citizens of country C, which bans alcoholic beverage advertising. Can a court from country C adjudicate a dispute about the compliance by the alcoholic beverages manufacturer with the law?

***Jurisdiction to enforce: when are authorities competent to enforce sanctions imposed for a failure to comply with marketing regulation?***

The third type of jurisdiction defines the limits on the executive branch of government responsible for implementing the law. Enforcement jurisdiction in international law is almost exclusively territorial. The police or similar forces may only operate within the limits of their territory, in the absence of an authorisation from other States or a special permissive rule under international law (116).

Example:

A cereal manufacturer established in country A has launched an advertising campaign on social media. This campaign targeted children aged 5-10, in violation of country B's legislation, which

prohibits all unhealthy food advertising targeting children under 12. The cereal manufacturer is found to have violated the law and is ordered to take down the campaign, publish a corrective statement warning against the impact of unhealthy food, and pay a fine. The cereal manufacturer does not follow the required actions. Can the authorities of country B enforce these sanctions against company A? Otherwise, are there any other mechanisms to implement such sanctions?

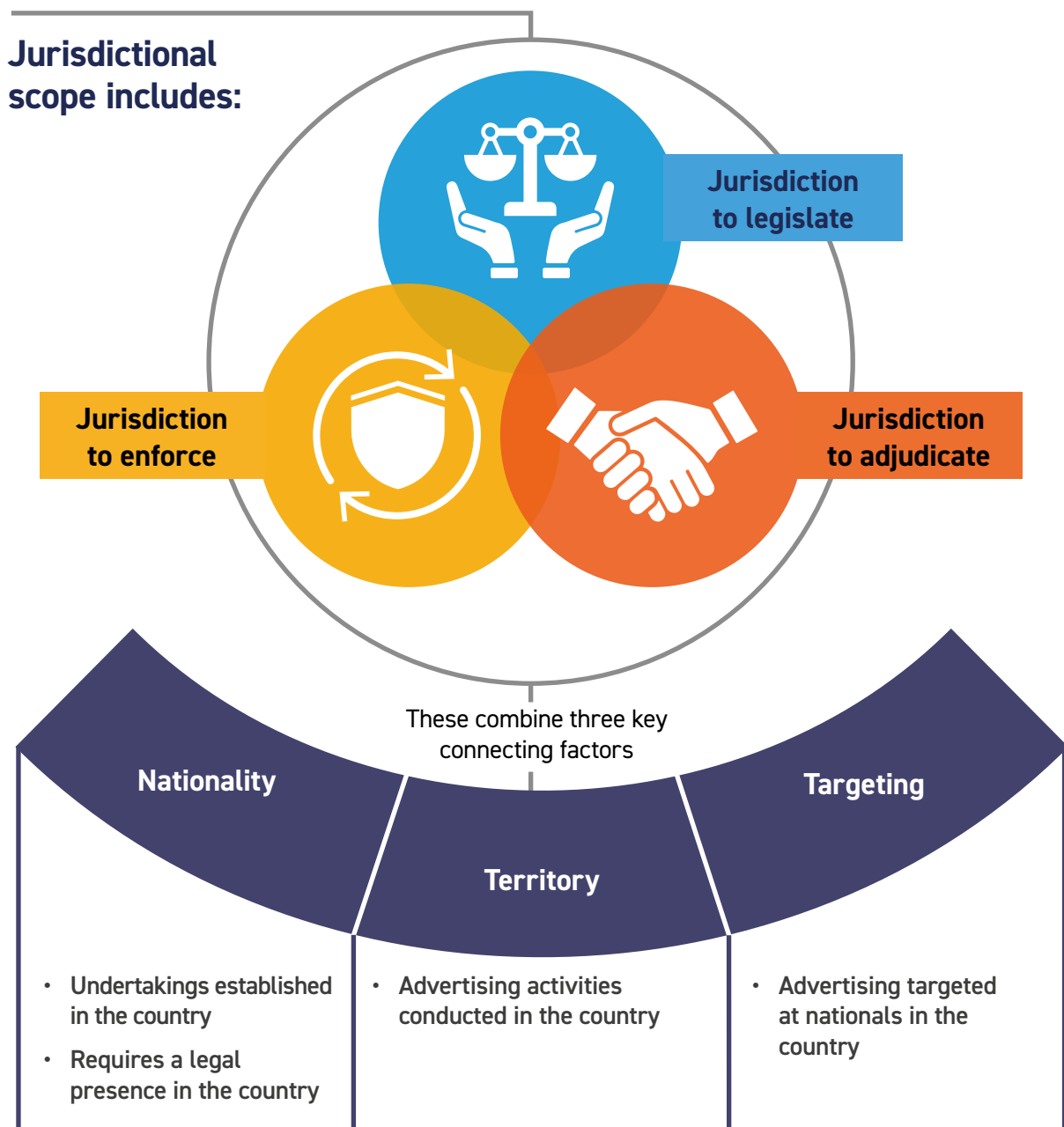
The scenarios above underline some of the questions that can arise when adopting and implementing legislation in a digital context, as actions take place in several jurisdictions and the question of what authorities are competent to address arises. While the three categories of jurisdiction are distinct, laws need to address all of them in their provisions, to avoid situations where the law defines a number of prohibited practices but does not grant the necessary powers to public authorities to implement, monitor and enforce the rules. It is thus relevant to describe if and how different countries have approached this question. This section examines the jurisdiction to regulate and adjudicate. The jurisdiction to enforce is addressed in Section 8.

## 5.2 Jurisdictional rules in practice

Laws regulating digital marketing use a variety of approaches to jurisdiction. These approaches are classified, for the purposes of this publication, depending on the factors that enable an authority to act (exercise jurisdiction). They

combine traditional connecting factors found in public international law, namely nationality and territoriality (117), and connecting factors specifically addressing the online environment.

**Figure 12. How to define the jurisdictional scope**



### ***No references to jurisdiction***

Several laws leave the question of jurisdiction open. In such cases, the law simply provides an obligation or a prohibition but does not clarify the territorial scope of the rule. There are numerous examples of this scenario. The Tobacco Products Control Act of Thailand provides that “no person shall advertise or convey any marketing message for tobacco products” (118). However, the act

does not elaborate on whether this prohibition applies to advertising produced and published in another jurisdiction but targeted at, or visible from, Thailand.

### ***Nationality as the connecting factor***

Some laws provide for the exercise of jurisdiction over natural and legal persons that have the nationality of the country, wherever

they are located and wherever their activities are conducted. Nationality is understood here in a broad manner, as it may cover the nationality of natural persons, the place of establishment of legal persons but also the place of residence.

In Australia, the Competition and Consumer Act provides the extended application of the Act, including most of its consumer law, to conduct outside Australia by Australian citizens, legal persons incorporated or carrying on business in Australia or persons ordinarily resident in Australia (119).

EU Member States laws transposing the AVMS Directive also define the place of establishment of service providers as the main connecting factor to exercise jurisdiction. However, they do so by following a broad interpretation of the notion of “place of establishment”. For example, the Spanish Law on Audiovisual Communication (120) determines the place of establishment based on the provider’s central establishment, where the provider conducted its first activities, or where the satellite uplink used by the provider is based. Video-sharing platforms are also considered to be established in Spain if they have a parent company, a subsidiary or a partner company in Spain. A service provider established in another EU Member State that targets its services to the Spanish market is also subject to some of the rules provided in the law (121). Similar provisions are found in other national laws transposing the AVMS Directive (122).

### ***Territory as the connecting factor***

Other instruments bring conduct within their jurisdiction where that conduct occurs in the territory concerned. For example, the PRC Advertisement Law provides that “advertisers, advertising agents and advertisement publishers shall abide by this law in engaging in advertising business within the territory of the People’s Republic of China” (123).

### ***Targeting as the connecting factor***

A broader jurisdictional claim is established by laws that subject all advertising directed at their nationals, wherever the undertakings are established and wherever the advertisements are produced, edited or published. It assesses jurisdiction based on the effects that an online action has produced in a certain territory.

The Mexican Regulation to the General Health Law on Advertising follows this approach. It provides that “advertising aimed at being disseminated in the national territory, independently of its origin, must abide by this law, the regulation and other applicable provisions” (124). Similarly, the ASCI code for self-regulation in advertising “applies to advertisements read, heard or viewed in India even if they originate or are published abroad as long as they are directed to consumers in India or are exposed to significant number of consumers in India” (125).

### ***Combining several connecting factors***

More complex jurisdictional clauses result from the combination of a variety of connecting factors, which allows broader jurisdictional claims.

The Singapore Spam Control Act combines territoriality and nationality as a basis for jurisdiction. In accordance with section 7, the Act does not apply unless an electronic message has a Singapore link. It is considered that a message has a Singapore link if one of the following conditions is met (126).

- The message originates in Singapore.
- The sender of the message is an individual physically present in Singapore when the message is sent.
- The sender is:
  - an entity formed or recognized under the law of Singapore; or

- An entity with an office or a place of business in Singapore.
- The computer, mobile phone, server or device used to access the message is located in Singapore.
- The recipient of the message is an individual physically present in Singapore when the message is accessed.
- The recipient of the message is an entity that carries on business in Singapore when the message is accessed.
- paid-for marketing communications from or by marketers targeting people in the United Kingdom; and
- direct marketing communications (e-mails or SMS advertising) sent from marketers established in the United Kingdom.

Consequently, non-paid for marketing communications on websites, apps or cross-border platforms from or by marketers based outside the United Kingdom as well as paid-for marketing communications on websites, apps and cross-border platforms not targeted at British consumers are excluded from the CAP Code's jurisdiction.

The CAP Code of the United Kingdom combines traditional jurisdictional rules (undertakings established in the United Kingdom, marketing communications sent from the United Kingdom) and the targeting factor (marketing communications targeting British consumers). In accordance with its jurisdictional rules, the CAP Code applies to:

- non-paid marketing communications from or by marketers with a United Kingdom registered company address;
- marketing communications appearing on a website with a ".uk" top-level domain, regardless of where marketers are based;

Courts and tribunals may also combine several connecting factors to adjudicate a dispute. For example, a French tribunal ruled on a dispute opposing the association Addictions France and Meta (established in Ireland) on influencer alcohol advertising. The tribunal decided that it could adjudicate the dispute because the concerned influencers were French, and the content posted was directed at French users (127).

#### Box 4. Case study: Defining a global jurisdictional scope in Brazil



**Country: Brazil**

**Law: Law of the Internet**

Brazil's Law of the Internet considers Brazilian data subjected to Brazilian jurisdiction, wherever it is actually stored (128). In accordance with this legislation, the collection, storage, retention and treating of personal and communications data by connection providers and internet application providers, where at least one of those activities is conducted in the national territory, is subject to Brazilian law, even if the activities are carried out by an entity established abroad, provided that it offers services to the Brazilian public or that at least one member of the same economic group is established in Brazil.



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Brazil illustrates broad jurisdictional rules in data protection legislation. However, this is not an exception, and the same model has been followed by other countries such as Colombia, Mexico, or Thailand, and by the EU (129). By contrast, the Nigerian Data Protection Regulation

has a much more limited extraterritorial effect, as it applies to natural persons residing in Nigeria or Nigerian citizens residing outside of Nigeria and no further provisions are established on extraterritorial scope in respect of controllers and processors (130).

## 5.3 Challenges and policy options

Governments have a variety of options when deciding how to exercise jurisdiction over digital marketing practices. Box 5 summarizes them.

The choice between one or the other of those options will depend on a variety of factors, as described below.

### Box 5. Policy options



#### Exercise jurisdiction over digital marketing practices

Define a broad jurisdictional scope encompassing all restricted digital, or at least that targeted at nationals or reaching nationals.

Where appropriate and enforceable under a sector-specific law, go beyond the jurisdictional reach of other marketing laws in so far as they apply to that specific sector.

In the absence of a broad jurisdictional scope, establish a more limited jurisdictional scope that is effectively enforceable.

#### Level of consumer protection

Different approaches will achieve different levels of protection. Laws that only regulate undertakings established or marketing goods produced in the regulating State will cover only a sub-set of digital marketing, as digital marketing is frequently conducted by actors that are located, incorporated or established outside that State. While the targeting criterion is better adapted to the digital landscape, it still leaves several actions unregulated, such as:

- advertisements not directed at one's nationals but still visible from one's jurisdiction; or

- global advertisements not targeted at any country in particular but which advertise services or goods that are available in the State.

Adopting a broad interpretation of a connecting factor or combining several connecting factors may contribute to having a more encompassing approach. However, countries may also consider adopting more extensive connecting factors. For example, digital marketing practices can be covered by a State's laws as soon as the advertising is visible, or accessible, within that State's jurisdiction (whether by reference to nationality, residents or territory) (131).

### **Enforcement capacity**

When defining jurisdictional rules, account must be taken of enforcement capacity. For example, rules defined in data protection laws have been described as “jurisdictional trawling” because they are so expansive that they cannot be effectively enforced. The enforcement challenge does not mean that regulators should not advocate for broad jurisdictional rules, but rather that they must ensure that sufficient enforcement capacities are allocated. In some circumstances, it may be more appropriate to define a more limited jurisdictional scope that can be effectively enforced by authorities against local actors. This is particularly the case considering that, for the products examined in this publication (tobacco, nicotine, alcohol, food and beverages, breast-milk substitutes), there is ordinarily some kind of material retail in the country.

### **Jurisdictional consistency among applicable laws**

As highlighted in the previous section, the domestic regulation of digital marketing is often strongly fragmented. This fragmentation raises concerns in terms of jurisdiction, as each of the applicable laws may have different jurisdictional limits. For example, the data protection law may have broad extra-territorial effects whereas the consumer protection law may limit jurisdiction to actions undertaken within the national borders.

This highlights the role of coordination between sector-specific laws and other laws regulating digital marketing, as well as between government agencies. The following issues may be considered in designing sector-specific laws.

- Whether sector-specific restrictions will be stand-alone restrictions to be monitored and enforced through health agencies and, if so, what will be the jurisdictional limits.
- Whether sector-specific restrictions will be linked to other legislation outside the

remit of health agencies requiring other government agencies to monitor and enforce the restrictions under other laws and, if so, whether the jurisdictional limits of those other laws are broad enough to effectively enforce the sector-specific restrictions without leaving gaps.

Given that many sector-specific laws will link to other laws and depend on their enforcement by agencies other than health agencies, one policy option is for health agencies to consider how gaps can be filled through sector-specific laws. The Legal Environment Assessment tool provided in Annex 2 can be used to develop an overview of existing legislation and gaps. For example, governments use sector-specific laws to create additional enforcement powers for health agencies, or other agencies where possible. Alternatively, governments might use licensing or other laws to regulate the conduct of the domestic product supply chain in a way that fills enforcement gaps.

### **Overlaps of jurisdictional claims**

Regulators also need to be aware that broad jurisdictional rules will necessarily lead to overlaps of jurisdictional claims. Taking the example of the cereals advertising above, if the cereal manufacturer has a global presence, virtually all regulators could claim jurisdiction over its marketing activities. The manufacturer would then be required to comply with all marketing rules for all its digital marketing practices. This may result in the strictest regulation becoming the global standard if implementing it is the only way to comply with all requirements. This is not necessarily a bad thing from a consumer protection perspective, as it may lead to a race to the top. In terms of enforcement, it may however lead to several enforcement authorities claiming jurisdiction to prosecute an undertaking for the same activity. In such case, enforcement cooperation may be needed.

## 6. Restricting digital marketing to children and other vulnerable populations: targeting and data protection

**I**n the absence of comprehensive restrictions on marketing, governments frequently restrict marketing to vulnerable groups. Children are the most often protected

group in instruments regulating marketing in this partial way. For example, sector-specific marketing restrictions or other laws might:

- Prohibit marketing being directed at children, such as marketing in conjunction with children's content (as opposed to behavioural targeting).
- Prohibit marketing that appeals to children, although this leaves open to argument the question of what content is considered to appeal to children.<sup>15</sup>
- Prohibit marketing to which children are exposed.

In the physical environment, these rules are implemented through, among others, verifications of official identifications when entering certain premises or buying certain products, watersheds on broadcast advertising, the prohibition of advertising in certain media,

or permitting certain types of marketing only in specific settings. The question that follows is how to implement these approaches to protecting vulnerable populations, including children, in the digital environment. Policy options depend on being able to identify

<sup>15</sup> For example, the ASA considered that a Heineken advertising on Twitter using a goat character, the G.O.A.T. acronym (Greatest of all times), and garage music was not likely to have more appeal to people aged under 18 than to over 18; see ASA ruling on Heineken UK Ltd [website]. London: Advertising Standards Authority; 2022 (<https://www.asa.org.uk/rulings/heineken-uk-ltd-g22-1155950-heineken-uk-ltd.html>, accessed 16 March 2022). By contrast, the ASA considered that a Captain Morgan advertising campaign on Snapchat allowing users to add a pirate lens to their picture to look like Captain Morgan was of particular appeal to children due the bright colour and character features of the lens, and to the fact that Snapchat is particularly popular among under 18; see ASA ruling on Diageo Great Britain Ltd [website]. London: Advertising Standards Authority; 2018 (<https://www.asa.org.uk/rulings/diageo-great-britain-ltd-a17-390017.html>, accessed 16 March 2023).



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vulnerable populations including children. In this context, national laws seek to establish effective online age-verification mechanisms (6.1) and

to regulate collection, processing and use of personal data (6.2).

## 6.1 Protecting children from accessing content: online age-verification mechanisms

Partial restrictions that seek to protect children from marketing depend on the ability of economic operators to identify children. This is true if economic operators are to ensure that marketing is not directed at children or that children are not exposed to it, as well as in the context of online retail.

The first policy option to protect children from accessing age-restricted content is to require effective age-verification mechanisms in specific contexts. For example, while most social media platforms include a minimum age between 13 and 16 years old, they solely require entering a valid date of birth when signing up, without requesting any proof of the veracity of such information (132). Children can therefore easily register on social media under false ages, leading to marketing being directed at them or them being exposed to marketing that they should otherwise be protected from (133).

This problem is encountered in all age-restricted sectors. The overall consequence of these challenges is that even if advertisers formally restrict advertisements to consumers above a certain age, these will de facto be visible to children (134). In this respect, partial restrictions that permit marketing to adults but not children are likely to result in children being exposed to a greater volume of marketing than comprehensive restrictions. An option provided in the United Kingdom code of practice for online services is to adopt a risk-based

approach to recognizing the age of users which involves that:

- either online service providers are able to establish age with a level of certainty that is appropriate to the risks to the rights and freedoms of children that arise from the data processing; or
- they must apply the higher standards applicable to children to all users (135).

A similar problem is encountered by online marketplaces, which may sell products such as tobacco or alcoholic beverages that may not be sold to children. In these contexts, in order to enforce sales restrictions in the digital environment, effective mechanisms to verify age are required. Usual methods in age-restricted sectors involve requiring a passport, ID or driving licence copy, as established for example in British rules on online gambling. Under such rules, operators must verify, at a minimum, the name address and date of birth of a customer before allowing him or her to gamble. If operators think there may be fraudulent activity, they may also ask for a selfie to verify identity (136).

However, these types of mechanisms do not prevent all under-age activity and there is concern that detection may be more difficult given the anonymity experienced in digital environments. Several options exist including:

- using biometric data to verify age: speech, fingerprints, facial traits, iris or ear features (137);
- conducting long-term age assessments that go beyond signing up in an online platform: once a user has signed up, the platform can still take messages, posts and activity into account to reassess the age (138);
- requiring users to enter the age on the device upon acquisition and using that birthdate to allow or deny installing applications (139);
- requesting an ID scan, verifying its authenticity and matching it to the user through a live picture with a webcam or a phone camera (140);
- requiring a picture or a video of the user and verifying it with an age-checking AI technology (141); or
- for online purchases, using credit card details to verify age (142).

One challenge with these approaches, however, is that they require consumers (including children) to share highly sensitive data. This can run contrary to the objectives underpinning data protection and privacy laws, thereby requiring governments to balance those objectives against effective age-gating (143). AI technologies have also raised concerns about potential biases and discrimination, as the accuracy of facial analysis software can depend on the individual's gender or skin colour, amongst others (144). Accordingly, the French Commission on Informatics and Liberty has recommended that age-verification systems comply with principles such as proportionality, minimal intervention, robustness, simplicity, or standardisation. It also recommends prioritising third-party age-verification systems, which would avoid directly providing personal data to the site the user is trying to enter (145).

These recommendations are made in parallel to a legal dispute in France, in which pornographic sites have challenged the legal requirements for age verification which are general in nature, arguing instead, that French law should specify distinct methods for doing so.<sup>16</sup> The dispute highlights one challenge in legislating for effective age-gating, which is that imposing a general obligation may leave open the space for argument on whether an economic operator has taken sufficient steps. On the other hand, requiring specific techniques may not be future proof as ways to circumvent those techniques become known over time. This also highlights the absence of an international standard or other instrument that could evolve over time and be a point of reference for domestic laws or regulations.

16 A dispute is currently open in France for the failure of pornographic sites to effectively verify age. Legal concerns are related with the absence of guidance in French legislation on age-verification tools, the proportionality of remedies adopted for failure to effectively verify age, and the impact of such remedies in the freedom of expression; see Tribunal judiciaire de Paris, *Jugement de transmission de la question prioritaire de constitutionnalité, MG Freesites LTD c. ARCOM*, 4 October 2022, and Conseil d'État, *aff. N° 463163*, 29 November 2022, FR:CECHR:2022:463163.20221129.

## 6.2 Protecting vulnerable groups from being reached by digital marketing: regulating the collection, processing and use of personal data

In the digital context, the collection of personal data based both on personal characteristics (age, gender, origin, location...), behavioural aspects (friends, networks, sports...) and online activities (pages liked, people followed, interactions with content...) allows brands to target their advertising at the person most sensitive or vulnerable to a certain product or marketing technique. For example, an alcohol brand may target an advertisement linking alcohol to social and sexual success to a person that frequently attends social events. Similarly, a breast-milk substitutes brand may target its advertisements to all women aged 25 to 35 years old, or to women that have interacted with pregnancy content online (search results, content on social media, etc.). In addition to concerns that targeting can increase the power of marketing generally, there is a risk that targeting stimulates demand among vulnerable populations. Targeting is also poorly understood in the sense that the processes (algorithms) used to push content to users and their effects are not in the public domain.

In this context, governments have used a variety of approaches to regulate targeting, including:

- Limiting the *collection and processing* of data that might be used for purposes of targeting in the context of specific population groups or product categories.
- Prohibiting *use* of personal data / targeting for specific population groups and / or product categories.

These approaches are often found in laws that govern data protection and seek to address broader concerns around privacy.

### 6.2.1 Defining vulnerable populations in the digital environment

Traditional marketing rules (partial restrictions) frequently provide strengthened protection to children. Consumer protection and other laws may also provide protection to vulnerable groups. For example, this can be observed in the context of retail banking and financial services, or with respect to service or sale of alcohol to those who are intoxicated or have an alcohol use disorder. However, vulnerable populations in need of strengthened protection may be broader in the digital environment and governments may wish to consider differences between traditional media and digital media in defining vulnerable populations.

The very functioning of the online environment has introduced the concept of “digital vulnerability”. The personalized environment created by online platforms and marketplaces, the need to consent to complex terms and conditions with limited possibility to go through them, as well as the speed at which online purchases occur, can contribute to the vulnerability of all consumers (146). Additionally, online platforms have the ability to analyse when consumers are particularly vulnerable because of stress, anxiety or other circumstances that are specific at a certain time (147). This broad concept of vulnerability is not recognized in current legal instruments although the review of the Australian Privacy Act may include a non-exhaustive list of individual characteristics and situational factors that indicate that an individual may be experiencing

vulnerability. External comments submitted for the review of this instrument mentioned that the concept should embrace the ways in which data is processed to target consumers and create vulnerability, that it should not be confined to mental or physical capacity, nor be associated to a specific group. Taking other instruments as a model, such as the Australian Banking Code of Practice or the General Insurance Code of Practice, vulnerability factors in the new Online Privacy Act could include domestic violence, financial abuse, language and literacy barriers, or cultural background amongst others (148).

Legislation can also have special regard for populations that are intrinsically vulnerable in a specific sector, notably consumers of dependence-forming substances (149). While no examples have been found in current legislation, it is technically possible to restrict alcoholic beverages advertising from being targeted at people with drinking disorders or people who abstain (150);<sup>17</sup> 17 unhealthy food advertising from being targeted at children, and advertising of breast-milk substitutes or infant and young child food products from being targeted at pregnant women or mothers of children aged under 3 years. Laws and regulations could also restrict advertising from reaching populations that are most at risk of being influenced by such practices and thus developing certain health conditions. Sector-specific vulnerability has been recognized in other areas, such as energy or the financial sector and there is a live debate about prohibiting targeting of weight loss advertisements to people with eating disorders<sup>18</sup>. But to date, no sector-specific

vulnerability provisions have been identified in legislation related to digital marketing.

please add before note 16 and update number: "17 People targeted most aggressively by alcohol companies are those who already buy alcoholic products in high amounts. "Online targeted advertising may also exacerbate discrimination that is already present offline. The intentional or unintentional discrimination resulting from targeted advertising can exclude minorities from opportunities (ie housing) and push them towards exploitative products (e.g. payday loans). This can be done by explicitly targeting or excluding an advertisement, for example, based on 'ethnic affinity'. But even where there is no discriminatory intention, the system is optimized to show advertisements to users that are most likely to click on them, which can lead to racist or sexist predictions. In the United States, Meta and the US Department for Housing and Urban Development reached a settlement in 2022 to restrict Meta's ability to use certain targeting tools in housing ads. Meta announced it would extend similar measures to employment and credit ads (151). Similar concerns can be raised for tobacco, nicotine, alcohol, food and beverages and breast-milk substitutes. For example, food and beverage brands have intensified marketing efforts towards racial minorities in the United States, leading to increased exposure to digital marketing of unhealthy foods (152). In short, laws could recognize a range of characteristics as a source of vulnerability for purposes of restrictions on marketing specific product categories.

17 People targeted most aggressively by alcohol companies are those who already buy alcoholic products in high amounts.

18 In the EU, the Electricity Markets Directive and the Gas Directive require Member States to ensure there are adequate safeguards to protect vulnerable customers, leaving the definition of vulnerable customers to Member States; this vagueness aims at protecting against energy poverty. The Basic Payment Account Directive requires Member States to ensure that unbanked vulnerable consumers (people with no access to a basic bank account) are sufficiently informed about the availability and characteristics of payment accounts with basic features. See Sajin N. Vulnerable consumers. Brussels: European Parliament ; 2021 ([https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/690619/EPRS\\_BRI\(2021\)690619\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/690619/EPRS_BRI(2021)690619_EN.pdf), accessed 16 March 2023).

Once a country has defined specific vulnerable groups to be afforded strengthened protection, it may consider the policy options below to protect those groups more effectively.

### 6.2.2 Limiting the collection and processing of personal data that may be used for targeting

Where comprehensive restrictions are not in place, targeted advertising for specific product categories can be regulated by restricting data collection and processing.

On the one hand, general data protection laws in some jurisdictions restrict data collection and processing. Data protection and privacy laws often grant a special level of protection to sensitive data, which generally includes health data. Thus, these laws can prohibit the collection, processing, use or disclosure of personal data in ways that can reveal information on health conditions that could be used for marketing purposes. Data protection and privacy laws also restrict the processing of children's data. This can contribute to protecting them from profiling and targeted advertising (153). For example, in the EU, the AVMS Directive prohibits personal data of minors collected or generated by audiovisual media service providers and by video-sharing platform providers from being processed for commercial purposes, such as direct marketing, profiling and behaviourally targeted advertising (154). The United Kingdom has developed a code of 15 standards that organizations providing online services likely to be accessed by children in the United Kingdom should conform to. The code includes taking the best interests of the child as a primary consideration, transparency obligations, and switching geolocation or profiling off by default, amongst other requirements (155).

On the other hand, Member States could also consider restricting the data that can be

collected and processed by manufacturers of specific product categories. For example, the food industry continuously monitors children and teens. They follow their interactions with acquaintances, their engagement with digital devices and platforms, and their relationship with brands. Through branded mobile apps they track children's geolocation, purchasing and eating patterns, and interact directly with them. Manufacturers therefore amass big amounts of data that are then used to develop the most effective marketing strategies (156).

### 6.2.3 Limiting the use of personal data for targeted advertising

In addition to restricting the collection or processing of data, governments can limit the use of personal data in marketing. In this context, a comprehensive ban on all targeted marketing of tobacco, nicotine, alcohol, unhealthy food and beverages, and breast-milk substitutes is a policy option open to governments. A ban on targeted advertising in general has been advocated in Europe and in the United States (157). Imposing such a ban to specific product categories would partially implement those calls.

A comprehensive ban on targeted advertising would not per se affect contextual advertising.<sup>19</sup> For example, a banner advertising a fast-food restaurant could be displayed when visiting the website of a cinema located nearby that restaurant. Hence, restrictions on contextual advertising may still be needed even where a comprehensive ban on targeted advertising is in place (158).

Where a general ban on all targeted advertising is not in place, countries can still ban marketing targeted at specific population groups. This can be implemented through data protection laws. For example, In the EU, the AVMS

19 Contextual advertising is advertising that is shown in accordance with the website being visited or the content being viewed.



Directive requires Member States to ensure that audiovisual commercial communications on alcoholic beverages are not specifically aimed at minors (159). Moreover, personal data of minors collected or generated by audiovisual media service providers and by video-sharing platform providers cannot be processed for commercial purposes, such as direct marketing, profiling and behaviourally targeted advertising (160).

Alternatively, these types of restrictions can be implemented through the standards established in sector specific laws. For example, in Brazil, a 2014 resolution considers all commercial communications targeted at children and adolescents to be abusive (and therefore prohibited) (161). Similarly, in Chile, the Law on nutrition and composition of foodstuffs and their advertising bans advertising of food high in calories, fat, sugar or salt directed at children under 14 (162).

Whether digital marketing is 'directed at' children might involve analysis of the content of the marketing and the contexts in which it appears. For example, in 2018, the ASA considered that rum advertising by Diageo on Snapchat was directed at people under 18 because it provided a lens that allowed users to look like buccaneers (163). But beyond content and context, the prohibition of marketing directed at children implies a prohibition on targeting of children (even though these laws do not explicitly focus on targeting in digital marketing). Similarly, in determining whether marketing 'appeals to' children, the primary consideration might be the content of that marketing, but how marketing is targeted may also be a relevant consideration.

Other jurisdictions protect children from marketing by providing watershed times in their legislation. For example, the United Kingdom prohibits TV and on-demand programme services provided between 5.30 am and 9 pm from including advertisements for less healthy food and drink products (164). These watershed times are intended to reduce exposure to marketing and might be transposed into

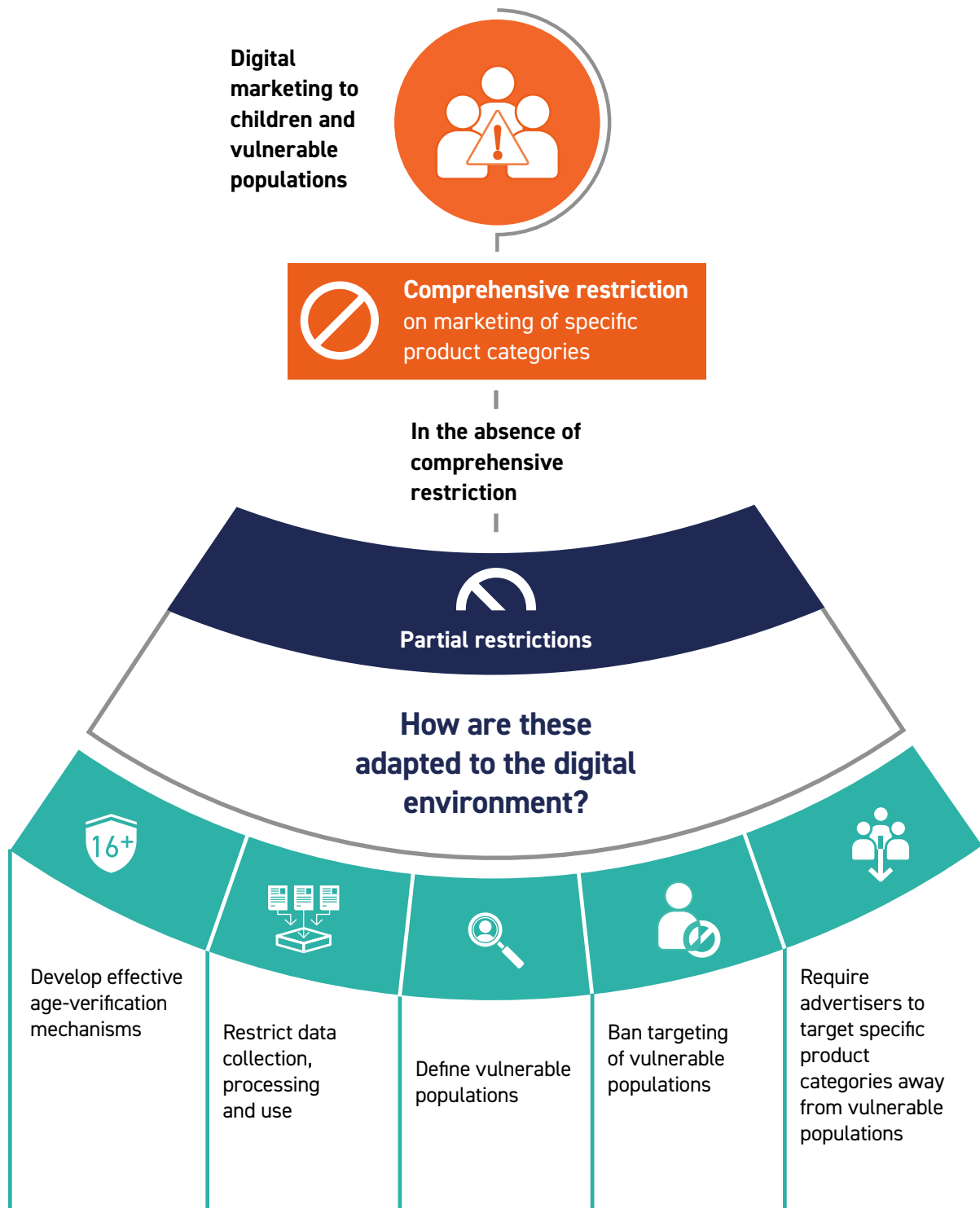
the digital environment. For example, in the United States, Utah has recently adopted a law prohibiting children under 18 years old to use social media between 10.30 pm and 6.30 am and requiring social media services to block Utah minors from accessing their accounts during the watershed, a default setting that only parents or guardians can modify (165). However, use of watershed times is less adapted to regulate targeting.

#### 6.2.4 Targeting marketing away from vulnerable populations

Proactively targeting marketing away from children and other vulnerable populations is another practice available for advertisers. A very broad example of this can be found in the above-mentioned law adopted in Utah, which also prohibits social media platforms to display any advertising on accounts held by Utah minors (166). In this case, brands or online platforms are required to process users' data to determine their age and make sure that certain advertisements do not reach children. In a narrower example, the ASA has highlighted the merits of taking several factors into account in addition to age when targeting age-restricted advertising. Those factors should be interest-based. For example, an alcoholic beverages advertiser may target its campaign at customers that have a registered age above 18 years old and are interested in house buying. Conversely, they may de-select from their campaign customers that have a registered age above 18 years old but are interested in a clothing brand that is particularly appealing to teenagers (167).

Whether an advertiser has taken steps to target marketing away from vulnerable populations might be a factor for consideration in determining whether marketing is 'directed at' or 'appeals to' a vulnerable group. Alternatively, positive obligations could be established to target marketing away from these groups to reduce their exposure. Please see a summary graphic in Figure 13.

**Figure 13. Restricting digital marketing to children and vulnerable populations**



## Box 6. Policy options



### Restrict targeted advertising and protect children and other vulnerable populations from unlawful digital marketing practices:



Implement comprehensive restrictions on marketing of specific product categories to ensure a high level of health protection and reduce exposure of children and other vulnerable groups to marketing of those products

In the absence of comprehensive restrictions:

- Require effective age-verification mechanisms by law to protect children from accessing age-restricted online content and to limit their exposure to marketing
- Ban targeted advertising of specific product categories through restrictions on data

collection, processing and use, sector specific laws or a combination of the two

In the absence of a comprehensive ban on targeting of specific product categories:

- Restrict data collection by brands / advertisers of specific product categories
- Define vulnerable populations in need of strengthened protection from targeted advertising
- Ban targeting of vulnerable populations with respect to specific product categories
- Require that advertisers proactively target advertising of specific product categories away from vulnerable populations.

Figure 13 summarizes these policy options

# 7. Restricting influencer marketing and user engagement

**B**eyond paid marketing directly by brands on digital platforms, social media platforms enable advertisers to market their products through other means, including influencer marketing and user-engagement. Influencer marketing involves a direct commercial collaboration between a brand and an influencer to market a product or the brand itself. User engagement techniques encourage users to participate actively with a brand or product online, including by commenting, sharing or liking content.

Today, national laws restrict influencer marketing, including by requiring disclosure where social media posts by an influencer are linked with a commercial relationship and by applying marketing restrictions to influencers. As a general rule, where there is a commercial relationship (a material connection) between an influencer and an advertiser the content

can be considered paid-for advertisement subjected to marketing restrictions.<sup>20</sup> This can be contrasted with user-generated content, which is not distributed pursuant to a commercial relationship and is not restricted in the same way as influencer marketing.

For purposes of this discussion, user-generated content is material produced or shared by consumers (users), which does not qualify as advertising or prohibited promotion by the user because there is no commercial relationship with the brand, but this content nonetheless contributes to promoting products and normalising their consumption (168). Brands themselves can also produce their own content in their social media profiles, which might not always be characterized as advertising or prohibited promotion, but may still be a way to promote their products, as such content contributes to brand recognition and the normalization of products. This content can typically be liked and shared by consumers and is thus capable of broad dissemination.

20 What constitutes a material connection may vary from one country to the other but India, for example, includes the following non-exhaustive list: monetary or other compensation; free products, discounts, gifts; contest and sweepstakes entries; trips or hotel stays; media barter; coverage and awards; family, personal or employment relationships. See Endorsements know-hows!. Delhi: Department of Consumer Affairs; 2023 ([Endorsement Know-Hows \(consumeraffairs.nic.in\)](https://consumeraffairs.nic.in), accessed 16 March 2023). In France, the proposal for a law to fight against scams and the excesses of influencers in social media defines influencers as a natural or legal person that creates and disseminates content through online communication tools against remuneration or for a benefit in kind in order to promote goods, services or a cause (Article 1) [unofficial translation by the authors]. See Proposition de loi visant à lutter contre les arnaques et les dérives des influenceurs sur les réseaux sociaux [Proposal for a law to fight against scams and the excesses of influencers in social media], 2023 (790-i-380-PPL-Delaporte-Vojetta- influenceurs réseaux sociaux\_pastillé\_publication ([assemblee-nationale.fr](https://assemblee-nationale.fr)), accessed 11 April 2023).



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Where countries decide to regulate user-generated content, a distinction needs to be drawn between two categories of content.

- The use of user-generated content for commercial purposes, which is subject to restrictions in some jurisdictions. This category includes: sharing users' comments of a product by the brand; organising contests that require users to promote the brand; allowing users to 'like' and share the brand's posts and content; etc.
- User-generated content that is not of a commercial nature. This category includes users', including influencers', comments or posts regarding a certain product without being linked to that product by any commercial relationship.

The need to identify commercial user-generated content was at the heart of the *Glo Hyper*

dispute before the Italian Competition Authority. In this case, the competition authority alleged that British American Tobacco Italia (BAT) and individual social media influencers violated the Italian Consumer Code through Instagram posts promoting a heated tobacco product. Influencers encouraged their followers to post content using several hashtags without asking them to disclose the commercial nature of the posts. Influencers then re-posted the 'best' user-generated content (169). Ultimately, BAT and the influencers committed, amongst other things, to removing the posts, using appropriate hashtags in future influencer advertising, and asking followers to use hashtags when sharing content. The regulatory authority declined to find an offense following these commitments. This case illustrates how user-generated content can be used for commercial purposes and the challenges this poses to the application of marketing rules. Some jurisdictions have attempted to regulate this area.

### Box 7. Case study: Finland's regulation of social media marketing of alcoholic beverages



**Country: Finland**

**Law: Alcohol Control Act**

**In 2015, Finland regulated social media under its Alcohol Act (170). The provision prohibits marketing alcoholic beverages if:**

"The advertising commercial operator in an information network service administered by itself uses any textual or visual content produced by consumers or places into the service textual or visual content, produced by itself or by consumers, which is intended to be shared by consumers".



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## Restrictions:

The amendment to the Alcohol Control Act limits social media advertising and prohibits user-generated content in alcohol marketing by advertisers. It prohibits the advertising of alcohol in and with games, lotteries and competitions in any media, including online. Alcoholic beverages brands cannot distribute content that has been originally uploaded by a consumer via their own private profile, such as comments, pictures or videos containing alcoholic beverages. The amendment also restricts any content that is intended to be shared by consumers. Alcoholic beverages brands must therefore disable the sharing function on all their advertisements on social media, but users are still allowed to “like” contents. Sponsored advertisements in social media are allowed but the advertiser must ensure that the advertising is targeted at people of legal drinking age and the sharing function should be removed from sponsored ads. These restrictions apply to domestic marketing in Finland as well as any marketing from outside aimed at an audience in Finland. However, enforcing this legislation to inflowing marketing is challenging. An assessment of the implementation of this law has also revealed that brands elude legislation by using tags and hashtags, collaboration with retailers and restaurants, and sponsorship of music and sports events, all of which are still permitted.

**Despite the practical difficulties, the Finnish case provides an example of how jurisdictions can regulate user engagement by advertisers, including their use of third-party user-generated content, and thus ensure a more comprehensive approach to the regulation of digital marketing.**

Ireland has also attempted to regulate user-generated content in its Online Safety and Media Regulation Bill 2022, which provides the possibility to adopt online safety codes prohibiting or restricting commercial communications relating to unhealthy foods and beverages in user-generated content (171).

The distinction between commercial and non-commercial user-generated content is important for liability purposes. In the first case, brands, online platforms and influencers might be held liable for their commercial conduct violating rules on the use of user-generated content for commercial purposes. In the second case, however, brands are not ordinarily held liable for the content posted by users about their products, where the brands do not control the content.

The distinction between commercial and non-commercial content will also determine whether, and to what extent, such content is protected by the freedom of expression.

Whether online platforms that host user-generated content could themselves be liable for such content depends on content moderation rules applicable in the country.<sup>21</sup> In most jurisdictions, online platforms are not generally held liable for content posted on their sites by users. There can be caveats to this general rule in specific contexts such as with respect to distribution of child pornography, incitement to violence or disinformation, but these caveats have not altered the general rule when it comes to user generated content relating to the types of marketing addressed in this publication.

21 The legal debate whether platforms should be responsible for content posted by users is currently ongoing in the United States under the Supreme Court’s cases *Twitter v Taamneh* and *Gonzalez v Google*; Chotiner I. Two Supreme Court cases that could break the Internet. *The New Yorker*. 25 January 2023 ([Two Supreme Court Cases That Could Break the Internet | The New Yorker](#), accessed 16 March 2023).



## Box 8. Policy options



**Regulate influencer marketing and protect user-generated content from being used for commercial purposes in digital marketing:**



Implement comprehensive restrictions on marketing of specific product categories to ban influencer marketing and user engagement for commercial purposes.



Regulate influencers directly, such as where those influencers are a national or present in the jurisdiction



Prohibit or restrict advertisers from using influencers for prohibited forms of marketing i.e. extend marketing restrictions applicable to advertisers to use of influencer marketing



Regulate online platforms, placing obligations on them with respect to influencer marketing, including an obligation to disclose marketing and prevent or remove prohibited influencer marketing



Draw a distinction between marketing and user-generated content that is not marketing, by reference to whether the content is commercial in character



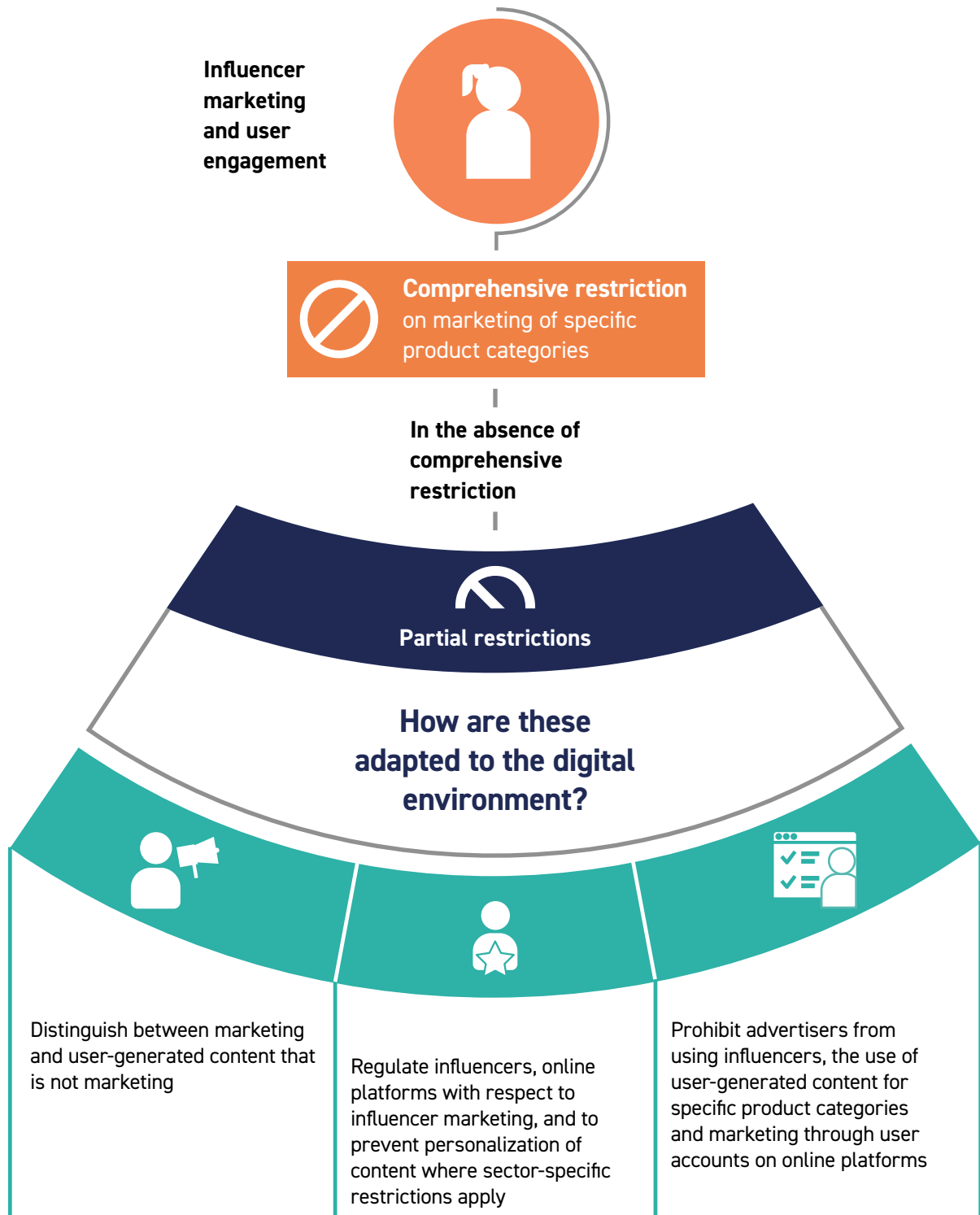
Prohibit or restrict advertisers from using user-generated content. For example, Member States may restrict the possibility of advertisers of using user-generated content for any commercial purposes, restrict advertisers from conducting online competitions, sharing or publishing users' comments relating to a product, limit the ability of users to share an advertiser's content, or restrict advertisers from engaging actively with consumers in social media



Consider regulating online platforms to prevent prioritization or personalization of content where sector specific restrictions apply e.g. prohibit prioritization or personalization of content on tobacco or nicotine products

Figure 14 summarizes these policy options.

**Figure 14. Restricting influencer marketing and user engagement**





# 8. Tools to effectively monitor and enforce restrictions on digital marketing

**T**he enforcement of digital marketing restrictions comes with a variety of challenges. First, monitoring digital marketing is complex because most practices are opaque (8.1). Second, a variety of enforcement measures can be adopted by a variety of actors, creating

a complex governance framework (8.2). Third, the fact that digital marketing is transmitted across borders can be a challenge to enforcement, as it requires enforcement cooperation among police and judicial authorities (8.3).

## 8.1 Monitoring digital marketing

Health agencies are often responsible for monitoring digital marketing of tobacco, nicotine, alcohol, food and non-alcoholic beverages, and breast-milk substitutes. Monitoring those practices is a precursor to enforcement of applicable rules and, hence, to deter violations. It is also a good way to keep an eye on

technological innovation in marketing and the need for potential legislative or policy reforms.

However, monitoring digital marketing is difficult because of the large amount of online content and the nature of that content, as most online marketing is opaque (172).

- Marketing is often only visible to the consumer who is being targeted and not to enforcement authorities.
- Enforcement authorities and consumers do not necessarily see the same content because consumers are targeted under specific algorithms based on their interests and online activity.
- Marketing is often ephemeral in nature (displayed for short periods of time) (173).

Despite these challenges, approaches to monitoring include:



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- online inspections by enforcement authorities,
- use of AI tools to identify online content,
- placing disclosure obligations on online platforms, and
- placing disclosure obligations on manufacturers, distributors or retailers of products concerned. Figure 15 summarizes the different approaches.

One approach to address monitoring is to designate a group of inspectors to monitor online content to detect any unlawful digital marketing activities. For example, Singapore and Bahrain have both specific monitoring teams that visit media platforms and monitor advertising based on keyword searches (174). However, this approach is resource intensive in the sense that the volume of online content concerned is large, making it difficult to monitor all content. Inspectors may also face privacy challenges when creating individual profiles to access and monitor social media. The use of individual inspectors is also easier in some contexts than others. For example, monitoring digital marketing of tobacco products is often easier than monitoring digital marketing of nicotine products because the tobacco market is highly concentrated with a few large manufacturers whereas the market for nicotine products is diverse and small scale. Similarly, this may be easier if licensing measures act as a complementary control on a sector.

The use of AI for monitoring purposes is another approach. For example, AI has been used in Viet Nam to sample digital content and recognize breast-milk substitutes advertising (175). The WHO Regional Office for Europe

is also developing an app to automatically scan advertising of unhealthy products in children's phones (176). However, AI systems also present some limitations, as they are not able to assess the context in which a certain content is posted and are sometimes biased, leading to discrimination (177). These limitations may however be less relevant for monitoring advertising than for monitoring civil and political online content.

The imposition of disclosure obligations, such as through establishment of advertising archives, is another important development that supports monitoring. Article 30 of the DSA requires very large online platforms to publish a repository detailing all advertisements sold on their service and certain information, such as the identity of the ad buyer, the period the ad was displayed, audience demographics, and information about how the ad was targeted.<sup>22</sup> Although the EU is not the first jurisdiction to enact such a rule, it is the first time archives are required for all advertisements and not only political advertisements.<sup>23</sup> This instrument can be useful to law enforcement officers, to monitor compliance with advertising regulations. For example, in a complaint for declaratory and injunctive relief before the United States District

22 A similar, more rudimentary, system has been established by Facebook through its Ad Library; see Carah N and Brodmerkel S. Regulating platforms' algorithmic brand culture: The instructive case of alcohol marketers on social media. In: Flew T and Martin FR, editors. Digital platform regulation: Global perspectives on Internet governance. Cham: Palgrave Macmillan. 2022; 111-131. [https://doi.org/10.1007/978-3-030-95220-4\\_6](https://doi.org/10.1007/978-3-030-95220-4_6), p. 126.

23 Canada and the State of Washington have established political ads archives.

Court of Columbia, the Campaign Legal Center used the advertising archives voluntarily established by Facebook to allege a violation of federal election law during the 2018 electoral campaign through a series of Facebook ads (178).

A limitation with the archives required by the DSA is that they are only imposed upon large online platforms but not upon manufacturers, distributors or retailers. In the context of sector specific restrictions, another approach is to require economic operators in that sector to disclose marketing practices to government. For example, in Canada tobacco manufacturers and importers must provide the government with information about their tobacco products, including their marketing campaigns (179). The same obligation is imposed in other countries. These sector specific marketing reports and repositories have inherent limitations in that:

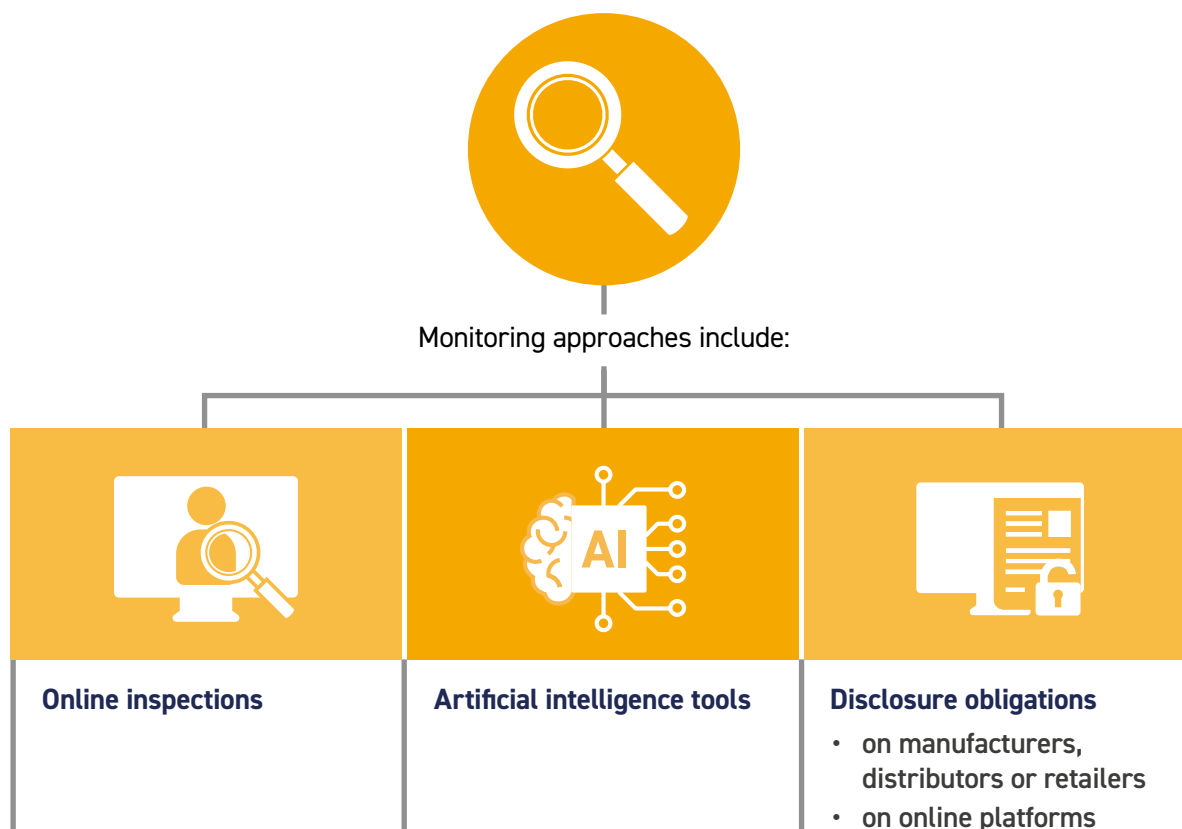
- They rely on information provided by manufacturers and online platforms and require authorities to verify that the information is complete and accurate.
- They tend to involve a high amount of information and require authorities to dedicate considerable resources for the analysis and monitoring.
- They provide information on the content of marketing campaigns launched by

advertisers, but they do not necessarily indicate specific patterns of targeting, volume of reach, or which particular population groups have been reached by the advertisements. Hence, while disclosure obligations may generally be effective at monitoring digital marketing, they may be of less relevance if applied to sectors where there are only partial restrictions. For example, disclosure of food and non-alcoholic beverages marketing by large online platforms might not permit regulators to observe whether the marketing has been targeted at children.

A policy option to partially address these challenges is to make the reports and repositories public, or permit sharing with civil society organizations to enable them to conduct the analysis and monitoring.





Policy options to support monitoring of online content, including ephemeral content, consist of a combination of all previous approaches, applied to all actors in the supply chain, as Figure 15 illustrates:

- the use of AI tools allowing the monitoring of large amounts of advertisements;
- the selection of humans in charge of overseeing AI decisions; and
- the obligation to keep and publish content archives for potential investigations.

**Figure 15. Monitoring digital marketing**

In addition to public monitoring, other actors may be responsible for monitoring digital marketing, as Figure 16 illustrates.

**Figure 16. Other actors responsible for monitoring digital marketing**

			
<p>Online platforms, hosting services and internet service providers (ISPs) are generally not subject to a general duty to monitor the information they transmit or stock, although they may be required to conduct targeted or temporary monitoring</p>	<p>Online platforms have developed their own terms of use, which usually involve conducting their own monitoring</p>	<p>Advertising associations may conduct their own monitoring</p>	<p>Civil society, academia and the general public, including competitors, may monitor digital marketing through advertising repositories if they are granted access to them.</p>

Non-State actors have proved particularly active at monitoring digital marketing, as the following box illustrates.

## Box 9. Case study: Non-State actors in the enforcement of digital marketing restrictions

### Non-State actors in the enforcement of digital marketing restrictions



The WHO FCTC recommends rigorous monitoring by multiple stakeholders, including non-State actors, to enforce existing regulations and facilitate international cooperation (180). One example of civil society led monitoring in formal partnership with Member States is the Tobacco Enforcement Reporting Movement (TERM), a continuous, real-time digital monitoring system that catches tobacco marketing as it happens. TERM can provide immediate information to governments so they may act in real-time. TERM data is made available to policymakers via situation reports and to media and other stakeholders via publications (181). Currently operational in Mexico, India and Indonesia, its modular approach is replicable anywhere and to products beyond tobacco. It is a freely available resource to governments and their partners.



Civil society also monitors the implementation of the International Code of Marketing of Breast-Milk Substitutes. In Viet Nam, for example, the Virtual Violations Detector (VIVID) automatically scans potentially unlawful advertising of selected breast-milk substitutes brands on Facebook (182). The app also allows any person to upload additional content for verification. While the app was initially limited to breast-milk substitutes in Viet Nam, it has now been extended to tobacco and alcoholic beverages in several different countries.



International organizations can also contribute to developing effective monitoring tools. The WHO Regional Office for Europe is developing the CLICK monitoring framework, which is a tool to monitor digital marketing of unhealthy products to children and adolescents (183). CLICK consists of an app that maps exposure to digital marketing and screen-captures content that children see on their smartphones. The CLICK monitoring framework is currently under development.



Overview

Restrict

**Monitor**

Enforce

Annex

In a system where monitoring is also conducted by non-State actors, granting legal standing to those actors to bring claims against unlawful digital marketing practices may also facilitate enforcement. This possibility is already provided by advertising associations, such as the ASA or ASCI, which usually allow any person to bring a claim under their dispute settlement systems.

The variety of existing monitoring mechanisms also reveals that different tools may be adapted to different digital marketing techniques. For example, monitoring display advertising may be easier and require less robust tools

than monitoring social media advertising. The appropriateness of one monitoring tool or another may depend on factors such as:

- the amount of advertising available
- the presence of user-generated content to be monitored
- the frequency at which advertising rotates content
- the visibility and transparency of advertising.

## 8.2 Defining an institutional framework to enforce digital marketing rules

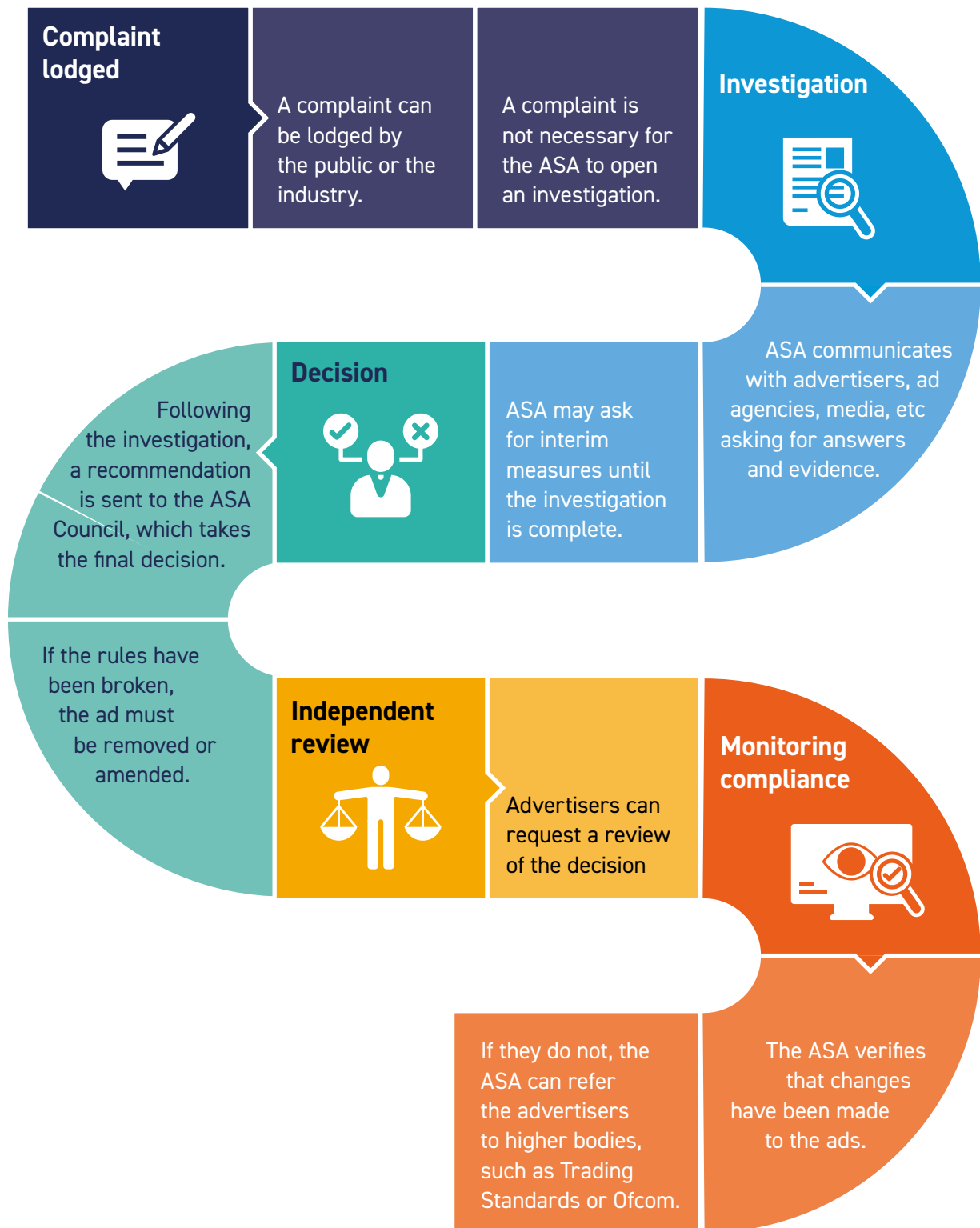
Enforcing digital marketing rules can be a complex task partly because of the fragmented governance frameworks described above. Different bodies of law may be administered and enforced by different government agencies and might have different jurisdictional limits. Different laws can also enable government agencies to take different actions to address or prevent prohibited marketing and may establish different penalties or sanctions for violators. In addition, enforcement in some countries can involve advertising associations and public authorities.

### 8.2.1 Enforcement by advertising associations

In some countries laws governing advertising, or rules established by advertising associations, may be a single entry-point or the primary entry point to address prohibited marketing.

In the case of advertising associations, they enforce their own advertising rules. The ASA is a prominent example and Figure 17 summarizes its enforcement procedure (184).

**Figure 17. Enforcement procedure in the ASA**





The ASA allows the public and the industry to lodge complaints, which can be a mechanism to partially delegate monitoring. For example, complaints lodged by Campaign for Tobacco-Free Kids, Action on Smoking and Health and Stopping Tobacco Organizations & Products against British American Tobacco's use of influencer marketing to advertise e-cigarettes on Instagram led to the ASA ruling against the tobacco manufacturer (185).

One distinct feature of this example is that the ASA is not completely independent from British law in the sense that the possibility of reference to government authorities exists in the event of non-compliance with an ASA decision. This links the CAP Code with consumer law and laws governing consumer protection, broadcasting and telecommunications. The links between the ASA and formal legal frameworks are even stronger for broadcast advertising. Since 2004, the ASA has the sole responsibility for regulating broadcast advertising in the United Kingdom. Although broadcasters can be referred to Ofcom, the government's Office of Communications, for further action when needed, this is extremely rare (186). Linking self-regulatory codes to formal laws may be a policy option to support enforcement of those codes (assuming they have a sufficiently high level of protection to achieve government objectives).

### 8.2.2 Enforcement of laws and regulations

Several authorities within a government are involved in the enforcement of different aspects of digital marketing laws. These include consumer protection, health, culture, anti-trust and data protection officers, amongst others. The enforcement of digital marketing rules by public authorities is hence fragmented. Differences across laws concern:

- Who can trigger investigations? Under consumer protection laws, investigations can usually be triggered by a variety of information sources, including individual, consumer organisations or business

complaints, media reports, internal recommendations from consumer protection authorities, or information from other domestic or foreign authorities. By contrast, other laws may limit the categories of actors entitled to request an investigation to competent authorities.

- What are the investigative powers of competent authorities? Consumer protection authorities are frequently able to request documents, testimonies or information from the undertakings concerned and from third parties, including ISPs. However, in some jurisdictions, such as in Canada, authorities need to obtain approval from a court to exercise such powers. Data protection laws typically provide large investigative powers upon data protection authorities.
- What are the enforcement powers of competent authorities? Consumer protection authorities may have administrative, civil and/or criminal enforcement powers, with strong differences across jurisdictions. Data protection authorities often have corrective powers to issue warnings or erasure mandates, and they typically have the power to adopt monetary penalties too. Some data protection laws, such as the Thai Data Protection Act, also grant authorities with criminal powers. Under the DSA, the European Commission and national digital service coordinators can request commitments and make them binding, and they can adopt a variety of sanctions such as interim measures, fines or periodic penalty payments.
- Do competent authorities have adjudication powers? Under data protection laws, some jurisdictions, such as Nigeria, have even established an administrative panel responsible for conducting the investigations, hearing parties' allegations and adopting decisions.

Figure 18 summarizes the differences across laws.

Under these circumstances, it is necessary to clearly define what health ministries and authorities can and should do to monitor digital marketing. Their role is most relevant in the enforcement of sector-specific marketing laws, which should create broad enough powers and ensure an adequate level of public health protection.

Additionally, regulatory fragmentation also results in a strong need for enforcement cooperation among all authorities involved in digital marketing within one jurisdiction (187). Sector-specific legislation can also favour this cooperation by linking rules to other applicable legislation and highlighting the role of other authorities to implement certain laws.

**Figure 18. Differences across laws**



### 8.3 Defining appropriate enforcement measures

The enforcement of digital marketing rules can result in a variety of measures, which can be distinguished based on several features:

- their potential object: each enforcement measure is likely to be more successful towards some digital marketing techniques than others;
- the potential enforcers: some of these measures can be adopted by online platforms themselves, whereas others need to be ordered by advertising associations or by public authorities; they usually do not require any court order before adoption, but they may do so in some countries; and
- their aim: some of them are directed towards preventing the activity to be conducted in the first place (preventive measures) whereas others aim at sanctioning unlawful practices that have been undertaken (sanctions).

A summary of the enforcement measures that may be adopted in the context of digital marketing is available in Table 4. These are enforcement measures specific to digital marketing but other sanctions such as fines, licence suspensions or civil or criminal liability are also provided in national laws (188).

**Table 4. Enforcement measures for the enforcement of digital marketing rules**

		Preventive			Reactive	
Remedy	Definition	Where is this remedy provided?	For which marketing technique is the measure most useful?	Who can implement the measure?		
<b>Content moderation</b>	Monitoring and removing content from an online platform.	Law, self-regulation	Social media Influencer	Online platforms		
	Example	EU: in the <i>Eva Glawischnig-Piesczek v Facebook Ireland Limited</i> judgment, the CJEU ruled that online platforms do not have general content moderation obligations, but they may be required to monitor a specific case (189).				
<b>Preventive warnings</b>	Warnings shown to users before uploading a post or when searching certain content.	Self-regulation	Social media Influencer Search advertising	Online platforms		
	Example	Instagram uses preventive warnings when users try to post potentially offensive comments (190). Instagram also uses pop-up warnings when users search certain materials, such as hashtags associated with images that could harm wildlife or the environment (191).				
<b>Filtering</b>	Removing content from an online platform.	Law, self-regulation	Social media Influencer	Online platforms		
	Example	EU: Directive 2019/790 on copyright and related rights requires content-sharing platforms to conduct preventive monitoring of all the contents which their users wish to upload, in order to be exempted from all liability for giving the public access to copyright-protected works in breach of copyright (192).				
<b>Warning letter</b>	Letter sent by public authorities to undertakings and requiring them to submit answers, documents or other evidence following an alleged unlawful practice.	Law, self-regulation	All	Governments Advertising associations		


Remedy	Definition	Where is this remedy provided?	For which marketing technique is the measure most useful?	Who can implement the measure?
Example	United States: in 2018, the FTC and the FDA jointly issued warning letters to manufacturers, distributors and online retailers for selling e-liquids used in e-cigarettes with labelling and/or advertising that resembled kid-friendly food products, such as candies, cookies or juices (193).			
<b>Naming and shaming</b>	Public lists of persons and/or undertakings that are not complying with the law.	Self-regulation	Influencer	Governments Advertising associations
Example	India: the ASCI has a list of social media influencers and brands that are in breach of ASCI Guidelines for Influencers Advertising in Digital Media. The influencers and brands included in that list were contacted by the complaints handling team, directing them to comply with the guidelines, but the said brands and influencers failed to respond or comply with requests (194).			
<b>Amendment of advertisement</b>	Request to modify the content of an advertisement.	Law	SMS and e-mail advertising	Governments Advertising associations
Example	Australia: the Australian Ad Standards Community Panel found that Heart Attacks Diner had violated the AANA Food and Beverages Advertising and Marketing Communications Code through a website advertising campaign that encouraged excess consumption through representation of a disproportionate burger size. The advertiser was required to add a disclaimer to the image indicating that the product was not intended for regular consumption (195).			
<b>Withdrawal of advertisement</b>	Measure aimed at the website operator (or host) to remove a non-compliant advertisement from the platform where it is posted.	Law	Display advertising Search advertising	Governments Advertising associations Online platforms
Example	France: in <i>Comité national contre le tabagisme v. BAT France</i> , the tribunal of Nanterre (France) declared that BAT France had violated the Public Health Code's provisions on vaping by promoting Vype in its website instead of merely presenting the product. BAT France was requested to delete certain elements from its website and was imposed a pecuniary sanction (196).			

Remedy	Definition	Where is this remedy provided?	For which marketing technique is the measure most useful?	Who can implement the measure?
<b>Restrictions on future advertisement</b>	Ban of a certain category of advertisement in the future	Law, self-regulation	All	Governments Advertising associations Online platforms
Example	India: in 2020, the ASCI found that several liquor brands had conducted surrogate advertising in digital media during the Indian Premier League (IPL) 2020, that is, using a liquor's brand name to sell other products, such as music CDs, water, other non-alcoholic beverages or merchandising (197). As a result of such investigation, the ASCI banned surrogate advertising of twelve liquor companies during the IPL 2021 (198).			
<b>Removal of brand from future search index</b>	Removing content in search browsers or from hashtags search in social media; downgrading content from search index.	Self-regulation	Search advertising Social media	Search engines Social media platforms
Example	Instagram removes false posts from its hashtag search (199).			
<b>Account suspension</b>	Account suspension implies that advertisements from the suspended account stop running and new advertisements are not accepted; related accounts and new accounts created by the same undertaking are also automatically suspended.	Law, self-regulation	Search advertising Social media Influencer	Online platforms
Example	Google ads policy provides the suspension of an advertiser's account for policy violations. Suspensions may or may not be preceded by prior warnings depending on the seriousness of the violation (200).			


Remedy	Definition	Where is this remedy provided?	For which marketing technique is the measure most useful?	Who can implement the measure?
<b>Blocking and filtering measures</b>	Technical measures to restrict access to information typically hosted in another jurisdiction. The measure is generally requested by public authorities, following a court order or not, and implemented by the ISP through hardware or software products that block specific targeted content from being received or displayed on the devices of customers of such ISP (201).	Law	Online retail Display advertising	Governments Internet Service Providers
Example	Russian Federation: the Federal Act on the Protection of Children from Information Harmful to their Health and Development prohibits, among others, the distribution of information, including on the internet, inducing children to desire tobacco and alcoholic beverages (202). The blocking measure is taken by the Roskomnadzor, which is a federal executive authority affiliated to the Ministry of Communications and Mass Media of the Russian Federation.			
<b>Take down of the brand's account or website</b>	Shutting down a website where a product has been unlawfully advertised.	Law	Online retail Social media	Governments Internet Service Providers
Example	Singapore: an enforcement action against the illegal sale of electronic cigarettes over the internet in Singapore led to shutting down the three websites where such cigarettes had been sold, in addition to fines addressed at the persons convicted (203).			

Remedy	Definition	Where is this remedy provided?	For which marketing technique is the measure most useful?	Who can implement the measure?
<b>Remedies linked to product distribution e.g. through licensing laws</b>	Restrictions on product distribution for violation of digital marketing regulations. Restrictions may include: <ul style="list-style-type: none"> <li>• Attaching conditions to licensing, where licensing systems are in place such as for tobacco and alcohol.</li> <li>• Creating strict liability obligations that make domestic manufacturers or distributors liable for violations of marketing restrictions by related entities or entities with which they are in a commercial relationship.</li> <li>• Applying penalties at point of release from customs or excise controls.</li> <li>• Adopting mandatory product recalls, especially for food products that are not typically subject to customs or excise bonding arrangements.</li> </ul>	Law	All	Governments


Countries will frequently include a variety of enforcement measures in their toolbox and the appropriateness of one measure over the other will be based in each country's context. However, countries may consider the following elements when designing their enforcement toolbox.

 **Enforcement measures might be progressive**, ranging from less to more intrusive. An example of this approach could be found in the United States in 2018. The FTC and the FDA jointly issued warning letters to manufacturers, distributors and retailers for selling


e-liquids used in e-cigarettes with labelling and/or advertising that resembled kid-friendly food products, such as candies, cookies or juices. The products were sold through multiple online retailers. The warning letters specified that the failure to correct violations could result in further enforcement actions (204).

 **Countries might adopt both preventive and reactive measures.** Preventive measures are adopted before the publication of the advertisement. These measures are more effective at preventing


harm, as the unlawful advertisement does not reach consumers. Reactive measures are adopted once the unlawful marketing has been published. They do not prevent the advertisement from reaching consumers unless they are sufficient to dissuade a violation. This reactive rather than preventive quality has inherent limits considering how fast online content can be spread worldwide.


 **Enforcement measures reflect the enforcement capacity of the country.**

Preventive measures may require stronger monitoring systems and good cooperation mechanisms with online platforms whereas reactive measures require less sophisticated monitoring mechanisms and can rely on external complaints filed by citizens or civil society. Depending on the legal system, some enforcement measures may only be adopted following a court order and may therefore be difficult to implement if the judicial system in the country is slow. Other enforcement measures will in such cases be more appropriate.

 **Enforcement measures should be proportionate**, as, in case of a legal challenge, they will be balanced against competing interests and rights. Hence, the procedure followed to adopt a measure, the period given to the addressee of the measure to comply with it, or the scope of the measures should be considered to evaluate the lawfulness of the measure. For example, under the Australian Online Safety Act 2021, public authorities can compel ISPs to remove serious harmful content within 24 hours of receiving a formal notice. Whether 24 hours is a reasonable period may depend on the harm to be avoided and the safeguards provided. Blocking orders

should also be imposed with caution. In some jurisdictions, the urgent blocking of unlawful material can be adopted by administrative authorities, police authorities or public prosecutors without a court order. In others, administrative authorities may adopt a blocking order, but they are required to obtain subsequent judicial approval of their order. Lastly, some jurisdictions require a court order to block content (205). The procedure to be followed may also depend on the grounds justifying the blocking order (for example, whether it is child pornography or intellectual property infringement).

 **Enforcement measures should be compatible with fundamental rights** protected in the country. For example, Switzerland allows blocking measures in the online gambling sector. The Swiss Gambling Law only allows Swiss-approved gambling companies to the market and the Gambling Surveillance Authority adopts blocking measures against unauthorized companies in Switzerland. In practice, these measures mean that the domain names are blocked. The Federal Tribunal confirmed the validity of such measures in May 2022, as it considered they did not violate economic freedoms and they were proportionate (206).

 **The power to impose enforcement measures might be granted to the most appropriate authority**, which can be health authorities, consumer protection authorities, data protection authorities or others. Countries should therefore evaluate what is the enforcement capacity of health authorities and how they can share their enforcement powers with other governmental bodies.



## 8.4 Enforcing digital marketing rules in a cross-border context

Because digital marketing often involves actors located in a variety of jurisdictions, public authorities may first want to enforce their laws through domestic supply chains including manufacturers, distributors and retailers (8.4.1). Where the advertiser does not have a domestic presence in the country where the marketing is conducted, public authorities will often need to enforce laws (8.4.2) and judgments (8.4.3) across borders. Enforcement cooperation is needed in such a situation and can take a variety of forms: international agreements, regional mechanisms, memoranda of understanding, informal exchanges of information, extradition treaties, mutual legal or administrative assistance agreements, etc (207).

### 8.4.1 Enforcement through the entire supply chain

Provided they are appropriately coordinated with laws restricting marketing, a variety of different laws governing actors in the domestic supply chain might be used to enforce bans or restrictions on digital marketing. These include licensing laws governing manufacturers, distributors, retailers and licensed venues, tax administration laws governing release of excise goods into the marketplace, or e-commerce laws governing contractual terms in online marketplaces. The supply chains of products for which marketing is restricted ordinarily have a domestic presence within the jurisdiction, including distributors, retailers, licensed venues or assets (such as the products themselves). In many instances, those present in the jurisdiction will be engaged in the prohibited

marketing in question. This presence provides a variety of opportunities for enforcement by government agencies. At times, having a local point of enforcement is facilitated by integration of marketing and retail activities. Digital marketing has become logistical, in the sense that marketing on digital platforms increasingly integrates the promotional aspect of the advertisement with the logistical aspect of organising a purchase. Online platforms do not only show advertisements but also allow the purchase of the product proposed through direct links to retail apps and websites (208). This evolution constitutes an opportunity for enforcement authorities, as they can prosecute retailers or distributors of products for their conduct. These entities are ordinarily located within the jurisdiction, as compared to brands or online platforms, that may be located abroad.

In some instances, governments have also taken steps to ensure that economic operators have a domestic presence. For example, in India, significant social media intermediaries have to appoint a nodal contact person resident in India for coordination with law enforcement agencies (209).<sup>24</sup> Significant social media intermediaries also have to appoint a resident grievance officer, who receives and resolves complaints by users, and receives and acknowledges any order, notice or direction from competent authorities or courts (210). Türkiye requires social media platforms with more than one million daily users to appoint a local representative (211). In Indonesia, all electronic systems operators that are accessible from Indonesia have to register with the Ministry of Communication and Information Technology (Kominfo) and obtain an ID certificate.<sup>25</sup>

24 Significant social media intermediaries are those with 500.000 users or more.

25 Electronic systems operators include, amongst others, social media platforms, digital marketplaces, search engines, financial service providers, data processing and communication service providers; see Schmon C and Pedersen H. Platform liability trends around the globe: recent noteworthy developments [website]. San Francisco: Electronic Frontier Foundation; 2022 (<https://www.eff.org/deeplinks/2022/05/platform-liability-trends-around-globe-recent-noteworthy-developments>, accessed 17 March 2023).

One question that may arise from time to time is whether domestic operators in the supply chain have effective control over incoming marketing that violates bans or restrictions. In this respect, to ensure protection of the rule of law and that liability is appropriately attributed, natural and legal persons are only held liable for acts that are within their control. For example, a distributor might not have control over marketing created by the manufacturer and distributed from abroad that enters the State in which a distributor has rights to distribute a product. Therefore, there may be limitations on the extent to which the distributor can be held personally liable. However, some potential mechanisms for attributing liability to distributors in this example are described below.

In this example, distributors have control over product distribution (the act of placing the product on the market) and distribution can be further controlled in the event of unlawful marketing in the same jurisdiction while also respecting the principle of effective control. In this respect, it is commonplace in some areas of law for domestic importers and distributors to be liable under domestic law for acts that begin or are completed earlier in the supply chain. In the context of product liability, for example, domestic distributors and other actors in the supply chain may be held liable for damage (personal injury) caused by a product they distribute even though they have not manufactured it or altered the product so as to cause the damage. Depending on national or sub national laws, this may include strict liability (where no fault by the distributors need be established for liability to arise) (212). In the food safety context, some States have established supplier verification programs that require importers to take proactive steps for verification of supplier compliance with food safety standards (213). Similarly, laws relating to sanctions and to addressing bribery and corruption often extend up the supply chain, making a domestic operator liable for actions of suppliers in some circumstances on the basis that there is a relationship of agency between the two (214). Additionally, anti-corruption and bribery laws often create extraterritorial

jurisdiction applicable to activities across global supply chains (215).

As these examples illustrate, there are legal approaches across different sectors to hold domestic actors liable for actions that occur abroad in their supply chains. These approaches regulate the offering of goods or services in the domestic market, often based on the actions of a manufacturer occurring abroad. In each of these examples, the domestic activities and presence of an economic operator are used to establish liability and effect enforcement. Domestic economic operators then manage their legal risk through contractual terms, foreign supplier liability insurance and other techniques.

In this context, and based on these examples, domestic laws can be used to control product distribution and sale in countries receiving incoming marketing. For example, if linked through legislation, licensing and tax administration laws could be used to secure payment of penalties or to suspend or prevent operation of a business in the supply chain.

#### 8.4.2 Enforcing laws across borders

Where it is not possible or practical to enforce laws against actors in the domestic supply chain, it may be necessary to undertake some form of foreign investigation and or enforcement. In this respect, when a jurisdiction seeks to enforce its laws, it will frequently need to investigate and collect data from other jurisdictions.

Enforcement cooperation is needed in all areas of consumer protection (216). Enforcement cooperation can be implemented through a variety of means.

- **Domestic legislation:** for example, the US Safe Web Act 2006 gives the FTC the authority to provide evidence to foreign law enforcement agencies regarding consumer protection matters (217). The FTC can share confidential information on consumer matters with foreign authorities, conduct

investigations to assist such authorities, and redress harm in the United States caused by foreign business or vice versa (218).

- **Memoranda of Understanding (MoU):** for example, the Mexican Office of the Federal Prosecutor for the Consumer signed an MoU with the Superintendence of Industry and Commerce of Colombia to strengthen cooperation for protecting consumer rights (219).
- **Bilateral agreements:** for example, the EU and Canada have developed a system of information exchange and enforcement measures on dangerous consumer products based on the EU-Canada Comprehensive Economic and Trade Agreement (CETA).
- **Regional cooperation networks:** several regions have developed enforcement cooperation networks, such as the Consumer Protection Cooperation (CPC) network in the EU, the Ibero-American Forum of Consumer Protection Agencies, comprising agencies in Latin America, Spain and Portugal, or the African Dialogue's Principles on Cooperation in Consumer Protection Enforcement (Livingstone Principles). At a more global scale, the International Consumer Protection and Enforcement Network (ICPEN) represents 70 countries around the world.

Cooperation often covers all stages of the enforcement procedure, from the notification of a potential violation to consumer redress, covering information sharing and investigative powers.

### 8.4.3 Enforcing judgments across borders

Where government agencies levy a sanction or penalty against an economic operator and the operator does not comply, authorities typically seek enforcement through domestic courts. Court orders can compel payment of fines,

for example, or enable government to seize property.

However, where court orders or judgements are necessary to compel enforcement and an actor has no assets in the jurisdiction, the question arises of whether this judgment can be enforced in another jurisdiction. Traditionally, the recognition and enforcement of judgments rendered by foreign courts has been a matter exclusively governed by the domestic law of each country. Consequently, judgments rendered by courts of one jurisdiction could ordinarily not be enforced by the courts of another. This is particularly an issue in areas that have a transborder character, such as regulating digital marketing. Jurisdictions have recently made efforts to harmonize this field.

At the global level, the most relevant instrument is the Hague Convention on Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters of 2019 (220). The convention has been signed by six parties so far (Costa Rica, Israel, Russian Federation, Ukraine, United States and Uruguay) (221) and only the EU has ratified it, although it has not deposited the instrument of accession yet (222) It will come into force after two States deposit their instruments of ratification, acceptance, approval or accession (223).

Several international agreements have been concluded with the same purpose at the regional level (224). In addition to global and regional efforts, jurisdictions can also conclude bilateral agreements on the recognition and enforcement of foreign judgments. Some jurisdictions use all these mechanisms. For example, Argentina has entered into regional agreements for enforcement of foreign judgments, while also maintaining bilateral agreements with other countries. Even so, large geographical gaps remain, meaning that the agreements in place do not cover all countries.

Where no global, regional or bilateral agreement has been concluded, the recognition and enforcement of foreign judgments is subject to

domestic law. For example, the recognition and enforcement of foreign judgments in Australia is governed by the Foreign Judgments Act 1991 and by common law principles (225).

Either way, whether through an agreement or by ad hoc means, foreign enforcement is a relatively burdensome process for a government so it is often less certain that the desired outcome will be achieved.

## Box 10. Policy options



### Type of policy: Strengthen the enforcement of digital marketing rules:

Allocate appropriate enforcement functions to the Ministry of Health or responsible health-related agencies.

Delegate enforcement functions to other government entities (data protection, consumer protection, finance authorities...) where appropriate, with a clear separation of functions and coordination with responsible health agencies

Develop and implement an effective enforcement procedure.

- Allow a variety of information sources (individual, consumer organizations, computers, media, internal authorities, foreign authorities) that can constitute a basis for enforcement action.
- Grant authorities broad investigative powers to gather information, request documents, ask for testimonies, etc.
- Grant legal standing to consumers, civil society organizations and economic

operators to bring actions for violation of digital marketing rules.

- Consider establishing an administrative dispute settlement mechanism, where appropriate.
- Cooperate with other countries through bilateral, regional and global mechanisms to facilitate the enforcement of laws and judgements across your country's borders

Develop and implement enforcement measures that can be applied to all actors in the supply chain of the *products* concerned, including, where appropriate, brands, manufacturers, distributors and retailers

Consider introducing strict liability provisions applicable to brands, manufacturers and distributors to make them responsible for unlawful digital marketing of their products carried out by related entities

Cooperate with advertising associations and online platforms to ensure that enforcement measures are implemented by all actors involved (such as where online platforms themselves are not liable for the content but must implement enforcement action).

# 9. Legal considerations in restricting digital marketing

Restrictions on digital marketing protect public health and children's rights, amongst others.<sup>26</sup> However, depending on domestic law and international commitments, other interests and legal rights may need to be considered by governments when restricting digital marketing. This can include both domestic and international legal obligations, particularly those arising under international and national human rights (or constitutional) laws (9.1) and international trade and investment obligations (9.2).

The relevance of these legal issues will differ from Member State to Member State,

depending on national law and the international commitments undertaken. Additionally, although legal issues may be common to some Member States, the application of relevant laws may differ from one jurisdiction to another. Moreover, how Member States choose to restrict digital marketing is likely to differ from one to another. For these and other reasons, this section is not a definitive statement or opinion on the likelihood of legal issues arising, or how they will be resolved. Rather, the intention is to highlight the issues and prominent arguments and authorities for consideration by government.

## 9.1 Human rights

Even though marketing restrictions further the right to the highest attainable standard of health and protect rights of the child, economic operators have historically challenged marketing restrictions. These challenges have come on human rights grounds, including that marketing restrictions limit free expression, the right to conduct a business or property rights. For most countries, these arguments are not specific to digital marketing and may be levied against marketing restrictions more generally. Where this is the case, the approach of courts to these broader issues will likely also be relevant to restrictions on digital marketing.

Nonetheless, it is worth mentioning the arguments and how they have been dealt with in such broader context.

Enforcing restrictions in the digital context may also raise specific issues, such as to ensure that enforcement actions are proportionate to the objective pursued. Where a right is affected by restrictions on marketing, the success of the defence will often revolve around the proportionality of the measure, its necessity, rationality or reasonableness. All these terms, although not identical, describe a measure that pursues a legitimate objective which is

26 The WHO-UNICEF-Lancet Commission has called for an optional protocol to the Convention on the Rights of the Child to protect children from the marketing of a range of products, including tobacco, alcohol, formula milk, sugar-sweetened beverages and gambling, and from potentially damaging social media and the inappropriate use of their personal data; see Clark H, Coll-Seck AM, Banerjee A, Peterson S, Dalgligh SA, Ameratunga S et al. A future for the world's children? A WHO-UNICEF-Lancet Commission. *Lancet*. 2020; 395(10224): 605-658. [https://doi.org/10.1016/S0140-6736\(19\)32540-1](https://doi.org/10.1016/S0140-6736(19)32540-1), p. 607.



Overview



Restrict



Monitor



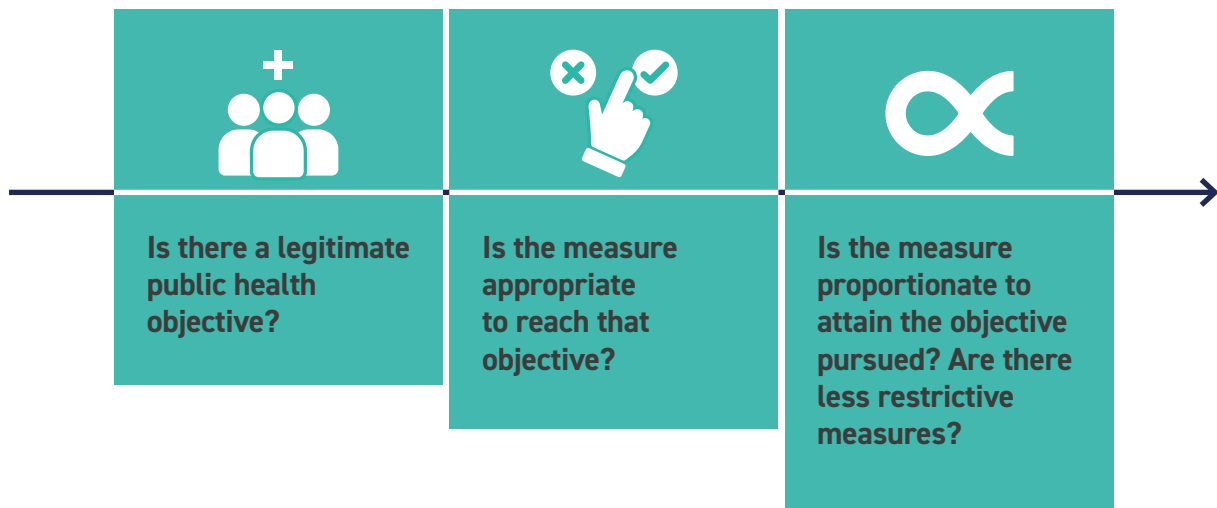
Enforce

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necessary to reach that objective and does not go beyond what is necessary (that is, that there are no less restrictive measures achieving the same objective). Public health protection is often

considered a strong interest that grants a broad margin of discretion to governments. Figure 19 provides an example of a proportionality test.

**Figure 19. Example of a proportionality test**



In practice, governments can strengthen their legal positions by defining their policy objectives in a clear and precise manner that reflects a theory of change (a theory of how the intended interventions will achieve their policy objectives). Doing so can help ensure that the legitimate interest and its proportionality are later upheld by courts in case of a legal challenge.

### 9.1.1 Freedom of expression or commercial speech

Freedom of expression and opinion is recognized in several international human rights instruments and often protected in national constitutions (226).

In the context of digital marketing, freedom of expression and opinion might be relevant considerations in two specific circumstances.

- Brands may claim that restrictions on digital marketing interfere with their exercise of the right.
- Endorsers, such as influencers, may claim that restrictions on digital marketing interfere with their right.

In such situations, the first question for governments to consider will often be whether

the conduct restricted falls within the scope of the right.

In some countries, marketing practices conducted by brands are considered to fall within the scope of freedom of commercial speech,<sup>27</sup> which is often protected by the freedom of expression. This approach is followed, for example, in the European region (227),<sup>28</sup> Colombia (228), the United States (229), and Canada (230). However, two caveats need to be underlined.

- The level of protection granted to this right is subject to limits.
- Any restriction to the freedom of commercial speech by a national regulation needs to be balanced with other human rights that may be pursued by the said regulation, notably the right to health.<sup>29</sup>

The freedom of commercial speech is not an absolute right, as it can be limited to protect the reputation or honour of persons, social safety, or public order (231). Hence, it is the least protected form of expression under the freedom of expression (232).<sup>30</sup>

The freedom of expression can be restricted under certain conditions, which typically require assessing whether the limitation is imposed by law, pursues a legitimate interest and is proportionate. For example, in *Philip Morris*, the CJEU examined a rule prohibiting the labelling of any element to promote tobacco products or encourage their consumption on their packaging (233). The CJEU admitted that this rule was an interference with the freedom of expression. However, it also considered the following elements.

- The prohibition was established in the EU Tobacco Products Directive.
- The essence of tobacco manufacturers' freedom of expression was not affected by the rule.

27 For a counter-example, see the Supreme Court of Sri Lanka, which held that advertising does not fall within the scope of the freedom of speech because it is not intended to safeguard the natural right of an organized freedom loving society to impart and acquire information about a matter of common interest; Supreme Court of the Democratic Socialist Republic of Sri Lanka, *The Lion Brewery Ceylon Ltd., et al. v. Hon. Attorney General, et al.*, S.C. (S.D) Nos. 13-22/05, 16 January 2006.

28 Both in the EU and in the Council of Europe.

29 But also the right to life, the right to privacy, or the rights of the child, amongst others. See, for example, on the links between alcohol marketing and human rights: Realising our rights: How to protect people from alcohol marketing. Alcohol Focus Scotland. 2022 ([https://www.alcohol-focus-scotland.org.uk/media/440171/realising-our-rights-how-to-protect-people-from-alcohol-marketing.pdf?utm\\_source=Report&utm\\_medium=PDF&utm\\_campaign=Alcohol+Marketing](https://www.alcohol-focus-scotland.org.uk/media/440171/realising-our-rights-how-to-protect-people-from-alcohol-marketing.pdf?utm_source=Report&utm_medium=PDF&utm_campaign=Alcohol+Marketing), accessed 17 May 2023).[30].

30 Supreme Court of Justice of Argentina, *Nobleza Piccardo S.A.I.C. y F. c/ Provincia de Santa Fe*, CSJ N 188/2006 (42-N)/CSI, 27 October 2015, p. 43: "the speech that the plaintiff considers impaired has the sole purpose of fomenting the consumptions of goods and services (...) [but] does not bear a close relationship with the functioning of the republic and democratic system. This entails that there is no constitutional foundation for granting it a protection as intense as other manifestations of ideas that comprise part of the necessary participation and deliberation in any democratic society (...)"; Supreme Court of Appeal of South Africa, *BATSA v. Minister of Health*, No. 463/2011, 2012, paras 25-26: "when commercial expression is used, as alleged here, for the purposes of inducing people to engage in harmful and addictive behaviour, its value becomes tenuous"; Provincial Court of Nova Scotia (Canada), *R v Mader's Tobacco Store Ltd*, NSPC 29 (2013), para. 25: "the sale of addictive and harmful products is not closely linked to the core values of s. 2(b) and clearly does no merit the stringent scrutiny accorded to political speech for example, but it does merit scrutiny".

- The interference with the freedom of expression met an objective of general interest, namely the protection of public health (234).

The CJEU then balanced human health protection and the right to health, on the one hand, and the freedom of expression, on the

## Online platforms can adopt safeguards to ensure the lawfulness of filtering mechanisms, such as appropriate targeting of the measures, as well as effective complaint and redress mechanisms

other hand (235). Following this analysis, the CJEU in *Philip Morris* concluded that the interference of the EU Tobacco Products Directive with the freedom of expression was proportionate.

The proportionality assessment can be pivotal to this analysis. For example, a complete ban on the advertising of tobacco products was found to be disproportionate by the Supreme Court of Canada, as it was not established that pure information or brand-preference advertising was connected to an increase in consumption. Following this finding, the Canadian Parliament adopted a new instrument permitting information and brand-preference advertising in certain media and certain locations and prohibiting other forms of advertising. This new law was considered constitutional (236).

As this discussion suggests, where marketing restrictions of some type are already in place it is possible that courts have already considered issues regarding freedom of expression. In the digital context, there are two additional issues that might arise. The first concerns to what

extent user-generated content is protected and the second concerns whether enforcement mechanisms or actions are disproportionate to the goal.

*To what extent is user-generated content protected by the freedom of expression?*

The question may arise whether limitations imposed upon the content that can be uploaded on social media violate freedom of expression. Here, this question is focused on content uploaded by users other than brands where those users are not in a commercial relationship with brands, for example in the context of an online contest or other viral campaigns. It can for example be argued that filtering mechanisms developed by online platforms to avoid unlawful content limit the freedom of expression. However, online platforms can adopt safeguards to ensure the lawfulness of such mechanisms, such as appropriate targeting of their measures, as well as effective complaint and redress mechanisms (237).

*The proportionality of restrictions to the freedom of expression imposed by enforcement measures*

Enforcement measures imposed upon online platforms to moderate content, amend or remove unlawful advertising can also be challenged for restricting the platform's freedom of expression. Several factors may be relevant to whether restrictions are proportionate, including the time available for platforms to moderate the content. For example, some laws on content moderation require online platforms to remove unlawful content within a few hours from the moment they are notified of the violation, increasing the risk that freedom of expression will be inadvertently impeded. The proportionality of such measures will often depend on the balance between the interest being protected and the freedom being restricted. In this regard, while measures that restrict political speech will often be closely scrutinized by



courts, measures restricting commercial speech may be more likely to be upheld.

### 9.1.2 Freedom to conduct a business

The freedom to conduct a business, or freedom of enterprise,<sup>31</sup> is not recognized as a human right in all systems.<sup>32</sup> This freedom is not recognized in international human rights instruments, which protect the right to pursue a chosen occupation (238).

Where the freedom to conduct a business is recognized, restrictions on marketing may also be considered to restrict this right. Consequently, brands might invoke the freedom to conduct a business to contest the validity of such legislation. However, the freedom to conduct a business is generally not considered to be absolute (239). Hence, restrictions are ordinarily lawful if they respect the essence of the freedom, if they are appropriate and necessary to achieve a legitimate objective, and if they are reasonable and proportionate (240). Moreover, the freedom to conduct a business has to be balanced with other protected interests, such as the right to health (241).

### 9.1.3 Right to property

The right to property is recognized in many national constitutions as well as several global and regional human rights instruments (242). Investment treaties also protect the property rights of foreign investors under certain conditions. The right to property, and other legal protections of property rights, are often considered to include intellectual property rights

(243), such as trademarks, which are frequently displayed in marketing.

In the tobacco-control context, legal challenges asserting the right to property have been made with respect to restrictions on use of descriptive trademarks in names (244), restrictions on use of trademarks on packaging (plain / standardized packaging) (245) and restrictions on use of promotional brands (246). Along similar lines, governments may need to consider how restrictions on digital marketing affect intellectual property rights. Restrictions on digital marketing might limit use of trademarks in a number of contexts. Limitations may arise where a manufacturer or advertiser's website is taken down or a digital marketing campaign is filtered, if only descriptive information is permitted on the regulated product with no further commercial elements, and/or if the use of characters or celebrities, as well as the use of certain innovative marketing techniques (participatory online campaigns or contests, for example) is restricted.

In considering these types of claims, courts might:

- Define the nature and extent of the property rights in question (particularly whether rights holders have a positive right to use a trademark in the course of trade, or whether the right is limited to the right to exclude use by third parties under certain conditions) (247).
- Determine the impact of the regulation in question on the property rights invoked (in the examples given above, trademark rights could be used or licensed other than

31 This expression is used in Spanish ("libertad de empresa") and French ("liberté d'entreprise").

32 For example, in the European region, the freedom to conduct a business is guaranteed in the EU but not in the Council of Europe. See Charter of Fundamental Rights of the European Union, OJEU C 202, 7 June 2016, p. 389 ([http://data.europa.eu/eli/treaty/char\\_2016/oj](http://data.europa.eu/eli/treaty/char_2016/oj), accessed 17 March 2023), Art. 16; in the Council of Europe, this freedom is essentially protected through the right to property; Usai A. The freedom to conduct a business in the EU, its limitations and its role in the European legal order: A new engine for deeper and stronger economic, social and political integration. *German Law Journal*. 2013; 14(9):1867-1888, p. 1868.

on the regulated products and trademark rights could still be asserted to prevent unauthorized use by third parties).

- Evaluate whether that impact violates the right to property, for example whether the rights holder is deprived of their property, as compared to that right being regulated or limited in some way (248).

- Consider whether the essence of the right remains intact and/or whether the right should be weighed against the right to health (249).

The case law reveals that the right to property is limited. Courts tend not to find a violation of this right when States regulate the use of property in the public interest to prevent harm to third parties.

## 9.2 International trade

International trade agreements govern the ways in which States Parties may restrict or regulate trade in goods and services, including through the use of tariffs (customs duties) and non-tariff barriers to trade, such as regulatory measures. Trade agreements can also impose positive obligations, such as obligations to ensure minimum standards of protection for intellectual property rights. Accordingly, governments

may need to consider trade obligations when restricting digital marketing.

The World Trade Organization (WTO) Agreement is the central multilateral agreement governing international trade. Through several WTO 'covered agreements', WTO law establishes principles and rules relevant to non-tariff measures, such as regulations. Core principles of WTO law include:

- non-discrimination (for example, that imported goods are not treated less favourably than like domestic goods, either on the face of a measure or through its effect);
- a prohibition on quantitative restrictions, such as quantitative limits on the import of goods; and
- necessity (for example, that regulations should not be more trade restrictive than necessary to achieve a legitimate objective such as protection of human health).

WTO law also obliges Members to ensure minimum standards of protection for intellectual property rights, including trademarks, and trade secrets. These and other obligations are enforced through a system of dispute settlement, permitting one Member (government) to bring a claim against another, seeking an order that any measure violating WTO law be brought into compliance.

In general, marketing restrictions have not been the subject of WTO disputes. The exception to this concerned tobacco plain packaging in Australia, which prohibited marks on tobacco packaging and products other than word marks in a standardized font, style and size. In *Australia – Tobacco Plain Packaging* several Members challenged those restrictions, including on grounds that they unjustifiably encumbered use of trademarks in the course of trade under Article 20 of the Agreement on

Trade Related Aspects of Intellectual Property Rights (TRIPS). In adjudicating the claim, the WTO panel stated that

[A] determination of whether the use of a trademark in the course of trade is being 'unjustifiably' encumbered by special requirements should involve a consideration of the following factors: (a) the nature and extent of the encumbrance resulting from the special requirements ... (b) the reasons for which the special requirements are applied, including any societal interests they are intended to safeguard; and (c) whether these reasons provide sufficient support for the resulting encumbrance (250).

This approach, which is similar to a proportionality test, applies generally to restrictions on use of trademarks and not only to restrictions on product packaging (251). Accordingly, WTO Members may wish to consider whether this test is satisfied when implementing restrictions on marketing that impede use of trademarks, in addition to ensuring that restrictions are non-discriminatory and not more trade restrictive than necessary to protect health.

In addition to obligations under WTO law, many countries are also parties to free trade agreements (FTAs), or members of customs unions. These agreements involve commitments above and beyond those of WTO law, with some agreements including specific obligations on issues such as broadcasting and e-commerce. It is not possible to generalize about the legal obligations in these agreements, but the EU

provides an example of a customs union with relevant commitments. The EU Tobacco Advertising Directive prohibits all marketing of tobacco products across all media, including digital marketing. The AVMS Directive restricts marketing of alcoholic beverages as well as food and non-alcoholic beverages in traditional and non-traditional media, including on-demand services and video-sharing platforms. Other instruments apply to digital marketing and regulate how certain practices are to be conducted, including whether consent is required, whether the practice is restricted for children or whether disclosures need to be made.<sup>33</sup> Where the EU has not legislated, its Member States remain free to regulate digital marketing, but they must do so while ensuring EU free movement rules. The CJEU has sometimes considered that advertising legislation constitutes a restriction to the free movement of goods. In such situations, the Member State needs to demonstrate that the restrictive legislation is justified on public health grounds and that it is proportionate.<sup>34</sup>

**Governments can strengthen their legal positions by defining their policy objectives in a clear and precise manner that reflects a theory of change**



33 Such provisions can be found in the Unfair Commercial Practices Directive, the General Data Protection Regulation, the e-Commerce Directive or the Digital Services Act, for example.

34 See, for example, CJEU, C-262/02 *Commission v France*, C-429/02 *Bacardi France*, C-405/98 *Gourmet*, or C-1/90 and C-176/90 *Aragonesa de Publicidad Exterior*, where the restrictions to the free movement of goods were justified. Compare with CJEU, Case 152/78 *Commission v France*, where the restriction constituted a mean of arbitrary discrimination.

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Overview



Restrict



Monitor



Enforce

Annex



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# Annex 1 - Policy options outlined in this report

Topic	Policy options
<b>Legislative coordination to restrict marketing and allocate authority for effective monitoring and enforcement</b>	<p>1.1) Restrict digital marketing of specific product categories in a sector specific law specifying:</p> <ul style="list-style-type: none"> <li>• prohibited and restricted practices</li> <li>• jurisdictional reach</li> <li>• liability provisions</li> <li>• enforcement powers, procedures and measures (including those linked to other provisions of sector specific laws, such as licensing measures)</li> </ul> <p>1.2) Include cross-references in sector specific laws to other relevant laws governing marketing, coordinating the substantive restrictions, monitoring and enforcement.</p> <p>Or,</p> <p>2.1) Strengthen existing laws applicable to marketing (including consumer protection, data protection, media, digital markets / regulation of the Internet) to create sector-specific restrictions where they do not otherwise exist and enable their monitoring and enforcement.</p> <p>2.2) Include cross-references in laws applicable to marketing to sector specific laws establishing marketing restrictions to ensure coordination and bring sector specific restrictions within the scope of laws applicable to marketing and their enforcement regimes.</p> <p>3) Adopt a broad and (non-exhaustive) definition of marketing covering digital marketing and future innovation to the greatest extent possible.</p> <p>4) Include enabling provisions in legislation granting regulatory powers to government agencies that enable them to adapt to future innovations in digital marketing, including by prohibiting and restricting practices and using monitoring mechanisms.</p> <p>5) Where industry codes are in place, link them to formal laws to make them enforceable.</p>
<b>Jurisdiction</b>	<p>1) Define a broad jurisdictional scope encompassing all restricted digital, or at least that targeted at nationals or reaching nationals.</p> <p>2) Where appropriate and enforceable under a sector-specific law, go beyond the jurisdictional reach of other marketing laws in so far as they apply to that specific sector.</p> <p>3) In the absence of a broad jurisdictional scope, establish a more limited jurisdictional scope that is effectively enforceable.</p>

<b>Bans or restrictions on digital marketing</b>	<ol style="list-style-type: none"> <li>1) Establish comprehensive restrictions on digital marketing of specific product categories to ensure a high standard of protection for public health.</li> <li>2) Use broad prohibitions and avoid providing lists of prohibited activities that could be interpreted as exhaustive.</li> </ol>
<b>In the absence of comprehensive restrictions to digital marketing of specific product categories:</b>	
<b>Targeted advertising and protection of children and other vulnerable populations</b>	<ol style="list-style-type: none"> <li>1) Require effective age-verification mechanisms by law to protect children from accessing age-restricted online content and to limit their exposure to marketing.</li> <li>2) Ban targeted advertising of specific product categories through restrictions on data collection, processing and use, sector specific laws or a combination of the two.</li> <li>3) In the absence of a comprehensive ban on targeting of marketing applicable to specific product categories: <ul style="list-style-type: none"> <li>• Restrict data collection by brands/advertisers of specific product categories.</li> <li>• Define vulnerable populations in need of strengthened protection from targeted advertising.</li> <li>• Ban targeting of vulnerable populations with marketing for specific product categories.</li> <li>• Require that advertisers proactively target advertising of specific product categories away from vulnerable populations.</li> </ul> </li> </ol>
<b>User-generated and influencer content</b>	<ol style="list-style-type: none"> <li>1) Regulate influencers directly, such as where those influencers are a national or present in the jurisdiction.</li> <li>2) Prohibit or restrict advertisers from using influencers for prohibited forms of marketing i.e., ensure marketing restrictions applicable to advertisers extend to use of influencer marketing.</li> <li>3) Regulate online platforms, placing obligations on them with respect to influencer marketing, including an obligation to disclose marketing and prevent or remove prohibited influencer marketing.</li> <li>4) Draw a distinction between marketing and user-generated content that is not marketing, by reference to whether the content is commercial in character.</li> <li>5) Prohibit or restrict advertisers in specific sectors from using user-generated content, such as by restricting the possibility of using user-generated content for any commercial purposes, by restricting online competitions, sharing or otherwise publishing users' comments relating to a product, permitting users to share an advertiser's content, or from engaging actively with consumers in social media.</li> <li>6) Consider regulating online platforms to prevent prioritization or personalization of content where sector specific restrictions apply e.g., prohibit prioritization or personalization of content on tobacco or nicotine products.</li> </ol>



## Monitoring

- 1) Require disclosure obligations to enable more effective monitoring:
  - Require advertisers to disclose all their advertisements in digital media.
  - Require online platforms to disclose all relevant advertisements on their platforms.
  - Disclosure should include the content of the advertisement, where, when and for how long the advertisement was available, and the patterns used to target the advertisement to consumers.
  - Require advertisers and online platforms to submit this information to public authorities and/or to make this information publicly available through ad repositories.
- 2) Allocate appropriate monitoring functions to the Ministry of Health or responsible health-related agencies.
- 3) Delegate monitoring functions to other government entities (data protection, consumer protection, finance authorities...) where appropriate, with a clear separation of functions and coordination with responsible health agencies.
- 4) Designate a group of inspectors exclusively tasked with monitoring digital marketing. Grant them explicit powers to have anonymous accounts to inspect social media and broad investigative powers more generally.
- 5) Develop AI-based monitoring tools to facilitate monitoring. Explore the possibility of working with non-State actors in this area.
- 6) Encourage civil society to monitor ad repositories where these are publicly available and grant them legal standing to bring complaints (see Enforcement).



<p><b>Enforcement</b></p>	<ol style="list-style-type: none"> <li>1) Allocate appropriate enforcement functions to the Ministry of Health or responsible health-related agencies.</li> <li>2) Delegate enforcement functions to other government entities (data protection, consumer protection, finance authorities...) where appropriate, with a clear separation of functions and coordination with responsible health agencies.</li> <li>3) Define an effective enforcement procedure. <ul style="list-style-type: none"> <li>• Allow a variety of information sources (individual, consumer organizations, computers, media, internal authorities, foreign authorities) that can constitute a basis for enforcement action.</li> <li>• Grant authorities broad investigative powers to gather information, request documents, ask for testimonies, etc.</li> <li>• Grant legal standing to consumers, civil society organizations and economic operators to bring actions for violation of digital marketing rules.</li> <li>• Consider establishing an administrative dispute settlement mechanism, where appropriate.</li> <li>• Cooperate with other countries through bilateral, regional and global mechanisms to facilitate the enforcement of laws and judgements across your country's borders.</li> </ul> </li> <li>4) Develop and implement enforcement measures that can be applied to all actors in the supply chain of the products concerned, including, where appropriate, brands, manufacturers, distributors and retailers.</li> <li>5) Consider introducing strict liability provisions applicable to brands, manufacturers and distributors to make them responsible for unlawful digital marketing of their products carried out by related entities.</li> <li>6) Cooperate with advertising associations and online platforms to ensure that enforcement measures are implemented by all actors involved (such as where online platforms themselves are not liable for the content but must implement enforcement action).</li> </ol>
<p><b>Legal considerations</b></p>	<ol style="list-style-type: none"> <li>1) Assess which constitutional and international human rights are applicable in your country and can justify restrictions (right to health, rights of the child, right to food).</li> <li>2) Assess which constitutional rights and freedoms, international human rights, and trade obligations may be relevant to your ability to restrict digital marketing (freedom of expression, right to property, trade obligations).</li> <li>3) Base policy objectives and digital marketing restrictions on a theory of change</li> <li>4) Collect and consider evidence of the risks associated with digital marketing (exposure, power, consumer perceptions and behavior) and the impact of restrictions.</li> <li>5) Define proportionate rules and provide procedural safeguards to restrictions.</li> </ol>

# Annex 2 – Assessing a country’s legal environment

The following table is designed to be used to support desk research and/or semi-structured key informant interviews to map the existing legal environment relevant to digital marketing.

## Applicable legislation to digital marketing:

Is digital marketing regulated in your country?		If yes, please explain:	
No	Yes	Applicable laws	Competent authorities
		Sector-specific laws:	
		Advertising laws:	
		Data protection laws:	
		Digital markets laws:	
		Audiovisual/Broadcasting laws:	
		Other laws:	
What do these laws regulate?		Product-specific restrictions:	
		Prohibited or restricted marketing practices:	
		Disclosure obligations:	
		Regulation of targeted marketing and profiling techniques:	
		Data protection for marketing purposes:	
		Protection of vulnerable groups:	
Are there any coordination mechanisms across laws?		Other:	
		If yes, please explain:	

<b>Is there an advertising association in your country?</b>	If yes, please explain:
	Does the advertising association regulate digital marketing?
	What is the relationship between the advertising association and the State?
	What are the regulatory, monitoring and enforcement powers of the advertising association?

## Current challenges in digital marketing:

<b>Does the laws’ scope of application cover marketing practices taking place outside of your jurisdiction?</b> <b>No            Yes</b>	If yes, please explain:
	How is jurisdiction established in your legislation?
	Do authorities effectively enforce marketing practices taking place abroad?
<b>Are children protected against digital marketing?</b> <b>No            Yes</b>	If yes, please explain:
	What additional safeguards are provided to children?
	Does legislation provide mechanisms to verify the age of viewers of websites, search engines and online platforms?
<b>Does your legislation provide additional safeguards against digital marketing for other vulnerable groups?</b> <b>No            Yes</b>	If yes, please provide details:
<b>Is user-generated content regulated in your legislation?</b> <b>No            Yes</b>	If yes, please provide details:
<b>Are there any tools available in your legislation to easily update rules on digital marketing?</b> <b>No            Yes</b>	If yes, please provide details:

## Monitoring and enforcing digital marketing restrictions:

<b>Which authorities monitor and enforce digital marketing practices?</b>	Advertising associations: No      Yes If yes, please provide details:
	Public authorities: No      Yes If yes, please provide details:
	Private undertakings (i.e. online platforms, search engines, etc.): No      Yes If yes, please provide details:
<b>How does your country monitor digital marketing practices?</b>	Individual inspectors (if so, please provide details – how many inspectors, to which authority are they attached...):
	Artificial intelligence:
	Disclosure obligations:
	Other:
<b>Which enforcement measures does your country's legislation provide against unlawful marketing practices?</b>	
<b>Against whom can these measures be enforced?</b>	Product manufacturer: No      Yes Advertiser: No      Yes Online platform/search engine/website: No      Yes Influencer: No      Yes Retailer: No      Yes
<b>Can measures be enforced even where the addressee is not in the jurisdiction?</b>  No      Yes	If yes, please explain:
	Does your country have any enforcement cooperation mechanisms with other countries?
	Does your legislation have a broad jurisdictional reach allowing to enforce provisions abroad?
	In practice, how is enforcement across borders undertaken?



## Legal considerations in digital marketing regulation:

<p><b>Is your country a party to any global/regional human rights instruments?</b></p> <p>No      Yes</p>	<p>If yes, please provide details:</p>
<p><b>Is your country a member of the WTO?</b></p> <p>No      Yes</p>	<p>If yes, please provide details:</p>
<p><b>Is your country a member of any regional economic integration organisation (REIO), or free trade agreement?</b></p> <p>No      Yes</p>	<p>If yes, please provide details:</p> <p>Which REIO does your country belong to?</p> <p>Does this REIO have any obligations of relevance to digital marketing, such as commitments on broadcasting, e-commerce or others?</p> <p>Does any of the FTAs your country has concluded have obligations of relevance to digital marketing, such as commitments on broadcasting, e-commerce or others?</p>
<p><b>Has there been any case law in your country on the interaction between marketing and human rights?</b></p> <p>No      Yes</p>	<p>If yes, please provide details:</p> <p>Is there any case law challenging restrictions on marketing on human rights grounds?</p> <p>Is there any case law challenging restrictions on digital marketing or other digital communications on human rights grounds?</p>
<p><b>Has there been any case law in your country on the interaction between digital marketing and international trade rules?</b></p> <p>No      Yes</p>	<p>If yes, please provide details:</p>







