NAB WRITTEN SUBMISSION TO THE DEPARTMENT OF HEALTH ON THE REGULATIONS AND DRAFT GUIDELINES RELATING TO THE LABELLING AND ADVERTISING OF FOODS 29 AUGUST 2014

INTRODUCTION

1. The National Association of Broadcasters ("the NAB") is the leading representative of South Africa's broadcasting industry, established over 20 years ago. It aims to further the interests of the broadcasting industry in South Africa, by contributing to its development. The NAB's current members are –

    1.1. the three television services and 18 radio services of the SABC;[1]

    1.2. licensed commercial radio broadcasters, including Primedia, Kagiso Media, Tsiya Group, AME, MSG Afrika, Classic FM, Kaya FM and YFM;

    1.3. all licensed commercial television broadcasters (e.tv, MultiChoice, M-Net, and StarSat);

    1.4. a host of community radio broadcasters and one community television broadcaster; and

    1.5. both the licensed broadcast signal distributor and the selective and preferential broadcast signal distributors (Sentech and Orbicom).

[1] The SABC is not party to this joint submission. Instead, the NAB understands that the SABC intends to make its own independent submission.

2. The NAB welcomes the opportunity to make this written submission on the draft Regulations Relating to the Labelling and Advertising of Foods ("the draft regulations").[2] It respectfully submits that in view of the nature of the proposed regulatory framework, its potential effect on the public, and the complexity of the legal and substantive issues raised, it would be appropriate for oral hearings to be held. In that event, the NAB requests permission to make such oral submissions.

3. In terms of substance, much of what is contained in the draft regulations is not of concern to the NAB. Indeed, the NAB supports a regulatory framework that – amongst other things – seeks to ensure that foodstuffs are appropriately labelled, and only permits the making of justifiable nutrition and health claims. In the result, this submission only considers the substance of draft regulation 65 (dealing with restrictions on the advertising of certain foods and non-alcoholic beverages to children) and draft regulation 68 (dealing with commencement dates):

3.1. Under the heading *"Commercial Marketing of Foods and Non-alcoholic Beverages to Children"*, draft regulation 65 provides as follows:

> *"No food or non-alcoholic beverage shall be marketed to children unless it complies with all the criteria in Guideline 14."*

[2] Government Notice No. R. 429, *Government Gazette* No. 37695 (29 May 2014)

3.2. Insofar as it deals with draft regulation 65, draft regulation 68 – entitled *"Commencement"* – provides:

> *"(1) These regulations except the regulations identified in regulation 68(2) to 68(11) below, shall come into operation 36 months after the date of final publication ….*
>
> *…*
>
> *(7) Regulations 16(1)(b), 46, 52(12), 53(1), 53(2) and 65 shall come into effect on the date of final publication."*

4. As the voice of South Africa's broadcasting industry, the NAB's aim is to maintain an environment in which South African radio and television broadcasters are able to thrive – both serving audiences, and contributing to development and diversity. For the majority of our members, the carriage of advertisements is central to their ability to broadcast. For example, public free-to-air broadcasters derive the majority of their income from advertising revenue, and commercial free-to-air broadcasters derive their sole income from advertising revenue.

5. At the outset, it is important to note that the NAB is not opposed – in principle – to the introduction of a regulatory framework that places appropriate restrictions on the radio and television advertising of unhealthy foods and non-alcoholic beverages to children. In particular, the NAB has no principled opposition to the regulation of the content of advertisements that are likely to be seen and/or heard by children.

6. But to be lawful, such regulations must be –

6.1. contemplated by the appropriate statute;

6.2. sufficiently clear to enable broadcasters to understand what is expected of them;

6.3. in line with the Constitution;

6.4. based on scientific evidence; and

6.5. implemented, as far as is reasonably possible, in a manner that addresses the legitimate concerns of broadcasters.

7. For the reasons that follow, the NAB submits that insofar as regulation 65 and Guideline 14 are concerned, none of these requirements have been met. In particular, this submission shows that –

7.1. the Foodstuffs, Cosmetics and Disinfectants Act 54 of 1972 ("the Foodstuffs Act") does not empower the Minister of Health ("the Minister") to make regulations that ban the radio and television advertising of unhealthy foods and non-alcoholic beverages to children between 06h00 and 21h00;

7.2. draft regulation 65, if adopted in its current or any similar form,

would be the result of an unlawful delegation of authority, as the Department of Health ("the DoH") would effectively have determined an integral part of the regulatory framework;

7.3. the substantive prohibitions in the proposed regulatory framework are so vague as to violate the rule of law;

7.4. the proposed regulatory framework does not comply with the requirements of section 192 of the Constitution regarding the regulation of broadcasting;

7.5. the proposed regulatory framework would limit the right to freedom of expression, as entrenched in section 16(1) of the Constitution, in a manner that is not permitted by section 36(1) of the Constitution;

7.6. the proposed regulatory framework does not appear to appreciate the complexity of the scientific issues in question, seemingly also relying on the flawed assumption that the evidence is clear on what constitutes unhealthy food; and

7.7. by requiring draft regulation 65 to come into effect on the date of publication of the final regulations, the proposed regulatory framework fails to recognise and address the concerns of broadcasters regarding the need for phased implementation.

8. We deal below with each of these issues in turn. In addition, we consider recommendations of the World Health Organization ("WHO") aimed at limiting children's exposure to the marketing of unhealthy foods and non-alcoholic beverages. Those recommendations, in respect of which the draft regulations purport to provide a framework to implement, were adopted by the World Health Assembly ("WHA") in May 2010.

REGULATION 65 IS UNLAWFUL

9. The Minister's regulation-making powers are set out in section 15(1) of the Foodstuffs Act. Yet despite covering a vast array of topics, section 15(1) does not mention advertisements or advertising. The closest it comes to doing so is in subsection (1)(g), which empowers the Minister to make regulations *"prohibiting the sale of any particular foodstuff, cosmetic or disinfectant, or of any foodstuff, cosmetic or disinfectant of a particular nature or class"*. This provision may have implications for advertising in certain circumstances, because the word *"sell"* is defined in section 1 of the Foodstuffs Act to include *"advertise … for sale"*.

10. The NAB has been advised, however, that to the extent that this provision confers a power on the Minister to prohibit advertisements dealing with foodstuffs, it can only be used to do so in the event that a determination has been made that the advertised foodstuff itself shall not be made available to the public. This is because the purpose of a

provision such as section 15(1)(g) is to provide the legislative basis for the product to be pulled from the market.

11. Should sales of foodstuffs be prohibited in terms of regulations made under section 15(1)(g), what would be prohibited in such circumstances would be the *"offer[ing], advertis[ing], keep[ing], display[ing], transmit[ting], consign[ing], convey[ing] [and/]or deliver[ing] for sale, [and/]or … [the] exchang[ing], [and/]or … dispos[ing] of [such foodstuffs] to any person in any manner whether for a consideration or otherwise"*. In the result, section 15(1)(g) does not provide a basis for the regulation of advertising in respect of foodstuffs which remain on the market.

12. In addition to the express regulation-making powers set out in section 15(1), the Minister also has a general regulation-making power. Whilst broad, this power does not assist in providing any legislative basis for the making of the proposed regulatory framework, because it empowers the Minister to make regulations *"with regard to <u>any matter</u> which [he or she] considers necessary or expedient to prescribe or regulate <u>in order to attain or further the objects of [the Foodstuffs] Act</u>"*.[3]

13. The Foodstuffs Act does not expressly set out its objects. In addition, its long title only speaks broadly – about *"control[ling] the sale, manufacture, importation and exportation of foodstuffs, cosmetics and disinfectants, and to provide for matters connected therewith."* In the result, its objects

[3] Emphasis added

must be established by considering its subject matter.

14. Insofar as advertising is concerned, the reach of the Foodstuffs Act appears largely limited to protecting the public from false or misleading claims. Thus section 5(1), under the heading *"False description of articles"*, provides as follows:

> *"Subject to the provisions of subsection (2) and section 6,*[4] *any person shall be guilty of an offence if he –*
>
> *(a) publishes a false or misleading advertisement of any foodstuff, cosmetic or disinfectant; or*
>
> *(b) for purposes of sale, describes any foodstuff, cosmetic or disinfectant in a manner which is false or misleading as regards its origin, nature, substance, composition, quality, strength, nutritive value or other properties or the time, mode or place of its manufacture; or*
>
> *(c) sells, or imports for sale, any foodstuff, cosmetic or disinfectant described in the manner aforesaid."*

15. Section 5(1) is to be read together with sections 15(1)(e), (g) and (k), which empower the Minister to make regulations –

15.1. *"prescribing any foodstuff, cosmetic or substance as a foodstuff, cosmetic or substance which shall for the purposes of this Act be deemed to be harmful or injurious to human health"*;[5]

15.2. *"prohibiting the sale of any particular foodstuff, cosmetic or*

[4] These provisions are not relevant for present purposes.
[5] Section 15(1)(e)

disinfectant, or of any foodstuff, cosmetic or disinfectant of a particular nature or class";[6] and

15.3. *"prescribing the manner in which any foodstuff, cosmetic or disinfectant or its package, or the bulk stock from which it is taken for sale, shall be labelled, the nature of the information to be reflected on any label, the manner or form in which such information shall be so reflected or shall be arranged on the label, or the nature of information which may not be reflected on any label"*.[7]

16. Should a foodstuff be declared to be *"harmful or injurious to human health"*, or its sale prohibited, there would be a lawful basis for restricting such advertising. This is because –

16.1. any advertisement which seeks to promote that which has been declared to be *"harmful or injurious to human health"* would – by definition – be false or misleading; and

16.2. the broad definition of *"sell"*, which includes *"advertise … for sale"*, means that there can be no advertising in respect of foodstuffs that may not be sold.

[6] Section 15(1)(g)
[7] Section 15(1)(k)

17. But in all other circumstances, all that can be required – in addition to what is set out in section 5(1) – is for strict adherence to prescribed labelling requirements.[8] In other words, whilst the Foodstuffs Act places restrictions on the nature of advertisements and food labels (so as to ensure that consumers are provided with accurate information on the basis of which they are able to exercise free choice), it does not contemplate the effective ban of advertising in respect of foodstuffs that may lawfully be sold.

18. This is in stark contrast to two other statutes that expressly regulate advertising in respect of potentially harmful products that may lawfully be sold (to adults): the Tobacco Products Control Act 83 of 1993 ("the Tobacco Act"); and the Liquor Act 59 of 2003 ("the Liquor Act"):

    18.1. Under the heading *"Advertising, sponsorship, promotion, distribution, display and information required in respect of packaging and labelling of tobacco products"*, section 3(1)(a) of the Tobacco Act places an absolute ban on the advertising of tobacco products by stating that *"[n]o person shall advertise or promote, or cause any other person to advertise or promote, a tobacco product through any direct or indirect means"*.

    18.2. In addition to prohibiting false or misleading advertisements, section 9(1)(a) of the Liquor Act prohibits any person from

[8] The definitions of *"label"* and *"describe"* make it plain that a label is not an advertisement.

advertising *"in a manner intended to target or attract minors"*. It does so in the context of legislation that recognises that one of its objects is to *"reduce the socio-economic and other costs of alcohol abuse by ... setting essential national norms and standards in the liquor industry"*.[9]

19. The doctrine of legality, an essential element of the rule of law,[10] requires the exercise of public power to be sourced in law:[11]

> *"The doctrine of legality, which requires that power should have a source in law, is applicable whenever public power is exercised. … Public power … can only be validly exercised if it is clearly sourced in law."*

20. Given that the Foodstuffs Act does not provide legislative authority for the making of draft regulation 65, the proposed regulatory framework – insofar as it places restrictions on the radio and television advertising of unhealthy foods and non-alcoholic beverages to children – is unlawful.

UNLAWFUL DELEGATION OF AUTHORITY

21. The substantive prohibitions in Guideline 14, including those in clause 6(3), have been introduced by the DoH. Yet the regulation-making power in section 15(1) of the Foodstuffs Act is to be exercised by the

[9] Section 2(a)(i)
[10] *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) at paragraph 20
[11] *AAA Investments (Proprietary) Limited v Micro Finance Regulatory Council and Another* 2007 (1) SA 343 (CC) at paragraph 68

Minister. Section 25 of the Foodstuffs Act, which is the only provision dealing with delegation of authority, is limited in its application to the powers and duties vested in the Director-General. In the result, the section 15(1) powers may not be delegated.

22. In *New Clicks*,[12] the Constitutional Court declared a regulation invalid because it gave to the Director-General of Health the power to determine the content of an integral part of the transparent pricing system that section 22G(2) of the Medicines and Related Substances Act 101 of 1965 ("the Medicines Act") empowers the Minister to make.[13] Chaskalson CJ explained:[14]

> *"[278] The [single exit price (SEP)] set initially is later required to be brought into line with international benchmarks. This is dealt with in reg 5(2)(e) …. Objection is taken to this provision on the ground that the regulation delegates to the Director-General a discretion not permitted by s 22G(2)(a) of the Medicines Act.*
>
> *[279] The methodology is an essential part of the pricing system, and is the basis for the determination of the maximum SEP. No objective criteria are set for establishing the methodology. In effect, the regulations vest a broad subjective discretion in the Director-General to determine a crucial part of the pricing system.*
>
> *[280] It may well be legitimate for the Minister and the Pricing Committee to make provision for a system which will require the prices of medicines in South Africa to be brought into line with international*

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[12] *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as amici curiae)* 2006 (2) SA 311 (CC) at paragraph 13 (read together with the judgment of Chaskalson CJ)
[13] The power to make such regulations is *"on the recommendation of the pricing committee"*.
[14] At paragraphs 278 – 281

> *benchmarks, and to delegate to the Director-General the responsibility for making the calculations necessary to give effect to that methodology. But the regulations go much further than that. They delegate to the Director-General the power to determine the methodology itself. ...*
>
> *[281] The methodology will ultimately determine the SEP of every medicine or scheduled substances. That was pre-eminently a task for the Minister and the Pricing Committee. The Pricing Committee was appointed because of its special expertise. Policy considerations require the Minister's involvement as well. They must determine the pricing system themselves, and not delegate this function to the Director-General. I would therefore hold that reg 5(2)(e) constitutes an unauthorised delegation of power and for that reason is invalid."*

23. To remedy this defect,[15] draft regulation 65 ought to be amended so that it (and not Guideline 14) introduces any substantive prohibitions on advertising that the Minister may be authorised to introduce by way of regulations. That said, the NAB stands by its submission that the Foodstuffs Act – as it currently reads – does not authorise the Minister to make such regulations.

NON-COMPLIANCE WITH SECTION 192 OF THE CONSTITUTION

24. Section 192 of the Constitution provides as follows:

> *"National legislation must establish an independent authority to regulate broadcasting in the public interest, and to ensure fairness and a diversity of views broadly representing South African society."*

[15] This would not address the concerns raised at paragraphs 24 to 38 below.

25. To give effect to this provision, Parliament enacted the Independent Communications Authority of South Africa Act 13 of 2000 ("the ICASA Act"). One of the ICASA Act's objects is *"to establish an independent authority which is to … regulate broadcasting in the public interest and to ensure fairness and a diversity of views broadly representing South African society, as required by section 192 of the Constitution"*.[16] The independent authority in question is the Independent Communications Authority of South Africa ("ICASA").

26. To the extent that the proposed regulatory framework seeks to *"regulate broadcasting"*, or is to have this effect if implemented in its current or any similar form, it must comply with section 192. As this submission has already made clear, the Minister intends to make regulations that will ban the radio and television advertising of unhealthy foods and non-alcoholic beverages to children between 06h00 and 21h00. The question that arises is whether this limitation on what may be advertised on radio and television amounts to the regulation of broadcasting.

27. The Merriam-Webster Dictionary defines regulate as including *"to bring (something) under the control of authority"* and *"to make rules or laws that control (something)"*. Similarly, the Oxford English Dictionary defines regulate to include *"[t]o control, govern, or direct, esp. by means of regulations or restrictions"*. In determining which advertisements may

[16] Section 2(a)

not be broadcast on radio and television between 06h00 and 21h00, we are of the view that the proposed framework regulates broadcasting.[17]

28. In so doing, the proposed regulatory framework violates section 192 of the Constitution in two ways.

28.1. First, it encroaches on the constitutionally-mandated role of ICASA to regulate broadcasting; and

28.2. Second, to the extent that the framework is to be enforced by the DoH and/or inspectors (as contemplated by section 10 of the Foodstuffs Act),[18] it fails to meet the constitutional requirement that an authority regulating broadcasting must be *"independent"*.

29. This submission elaborates on each of these issues in turn.

Encroachment on ICASA

30. Section 192 of the Constitution does not envisage multiple institutions being given the power to regulate broadcasting. On the contrary, it envisages a single institution to regulate broadcasting. As already mentioned, ICASA is that independent authority. In terms of the

[17] This is so even if it is only the effect of the regulatory framework rather than its purpose. If a statute has an unconstitutional effect, that is sufficient for it to be declared invalid, as the Constitutional Court made clear in *Zondi v MEC for Traditional and Local Government Affairs and Others* 2005 (3) SA 589 (CC) at paragraph 90.

[18] Inspectors have the powers, duties and functions set out in section 11 of the Foodstuffs Act.

Electronic Communications Act 36 of 2005 ("the ECA"), it has control over the regulation of broadcasters in respect of issues relating to –

30.1. the licensing and ownership of broadcasters;[19] and

30.2. broadcasting content.[20]

31. In particular, section 55 of the ECA expressly addresses *"[c]ontrol over advertisements"* and ICASA's primary role in this regard:

> *"(1) All broadcasting service licensees must adhere to the Code of Advertising Practice (in this section referred to as the Code) as from time to time determined and administered by the Advertising Standards Authority of South Africa.*
> *(2) The Complaints and Compliance Committee must adjudicate complaints concerning alleged breaches of the Code by broadcasting service licensees who are not members of the Advertising Standards Authority of South Africa, in accordance with section 17C of the ICASA Act.*
> *(3) Where a broadcasting licensee, irrespective of whether or not he or she is a member of the said Advertising Standards Authority, is found to have breached the Code, such broadcasting licensee must be dealt with in accordance with applicable provisions of the ICASA Act."*

32. Unlike most other independent regulators, ICASA's powers include the making of regulations:

[19] See sections 48 – 52 and 64 – 66 of the ECA
[20] See sections 53 – 61 of the ECA

32.1. Section 4 of the ECA empowers ICASA to *"make regulations with regard to any matter which in terms of [the ECA] or the related legislation must or may be prescribed, governed or determined by regulation."*[21]

32.2. Section 4(3)(j) of the ICASA Act empowers ICASA to *"make regulations on any matter consistent with the objects of [the ICASA] Act and the underlying statutes or that are incidental or necessary for the performance of the functions of [ICASA]"*.[22]

33. Control over radio and television advertisements is currently exercised in accordance with the regulatory framework provided by section 55 of the ECA, section 17C of the ICASA Act, and the Regulations Governing Aspects of the Procedures of the Complaints and Compliance Committee of the Independent Communications Authority of South Africa.[23] At the heart of this framework is the *"Code of Advertising Practice … as from time to time determined and administered by the Advertising Standards Authority of South Africa"*.

34. Should it be adopted, the effect of the proposed regulatory framework would be to discard this framework. It would take away jurisdiction conferred by the Constitution and Parliament on ICASA, handing over an

[21] The related legislation is defined to include the Broadcasting Act 4 of 1999 ("the Broadcasting Act") and the ICASA Act.
[22] The underlying statutes are defined to include the Broadcasting Act, the ECA and the Postal Services Act 124 of 1998.
[23] Government Notice No. R. 886, *Government Gazette* No. 33609 (6 October 2010)

integral part of the regulation of broadcasting to the DoH, its inspectors, and potentially others. In the NAB's view, this is in conflict with section 192 of the Constitution and accordingly unlawful.

The DoH and its inspectors lack the required degree of independence

35. In any event, even if the Constitution did contemplate more than one authority being empowered to regulate broadcasting, section 192 of the Constitution makes clear that a body regulating broadcasting must be independent. The Constitutional Court has pronounced on numerous occasions on the meaning of a requirement of independence contained in the Constitution, and what safeguards are necessary to achieve it.[24]

36. In *Glenister*, for example, the majority of the Constitutional Court considered the nature of an independent anti-corruption agency which it held the Constitution required the state to put in place:[25]

> *"The main judgment notes that independence requires that the anti-corruption agency must be able to function effectively without undue influence. It finds that legal mechanisms must be established that limit the possibility of abuse of the chain of command and that will protect the agency against interference in operational decisions about starting,*

[24] See, for example, *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC) at paragraphs 163 and 165; *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of the Republic of South Africa* 1997 (2) SA 97 (CC) at paragraph 134; *De Lange v Smuts NO and Others* 1998 (3) SA 785 (CC) at paragraphs 69 – 73; *Van Rooyen and Others v The State and Others* 2002 (5) SA 246 (CC) at paragraphs 29 – 34; and *South African National Defence Union v Minister of Defence and Others* 2007 (5) SA 400 at paragraphs 99 – 103.

[25] *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC) at paragraphs 206 and 207 (emphasis added; footnotes omitted)

continuing and ending criminal investigations and prosecutions involving corruption. It then asks whether the [Directorate of Priority Crime Investigation (DPCI)] has sufficient structural and operational autonomy to protect it from political influence. Here the question is not whether the DPCI has full independence, but whether it has an adequate level of structural and operational autonomy, secured through institutional and legal mechanisms, to prevent undue political interference.

… To these formulations we add a further consideration. This Court has indicated that 'the appearance or perception of independence plays an important role' in evaluating whether independence in fact exists. ... Whether a reasonably informed and reasonable member of the public will have confidence in an entity's autonomy-protecting features is important to determining whether it has the requisite degree of independence."

37. The following is now clear from the Constitutional Court's jurisprudence:

37.1. An institution will only be considered sufficiently *"independent"* if it enjoys a sufficient degree of structural protection from governmental control.

37.2. The correct test for assessing independence is an objective one, involving an inquiry into how the reasonable observer would perceive the structural independence of the institution in question and government's capacity to exercise control over it.

37.3. While there is no closed list of factors to be considered in determining independence, particularly important issues are –

37.3.1. the appointment mechanisms of the members of the institution;

37.3.2. security of tenure (including protection against unwarranted removal of the members of staff); and

37.3.3. financial security for members of staff.

38. The DoH and its inspectors fail at the very first hurdle. They do not enjoy any degree of structural protection from governmental control. On the contrary, they are an integral part of government, subject to its direct control. In the result, they do not meet the requirement of independence in section 192 of the Constitution for the regulation of broadcasting.

LIMITING THE RIGHT TO FREEDOM OF EXPRESSION

39. The NAB submits that the proposed regulatory framework would unreasonably and unjustifiably limit the right to freedom of expression as contained in section 16(1) of the Constitution:[26]

> *"Everyone has the right to freedom of expression, which includes –*
> *(a) freedom of the press and other media;*
> *(b) freedom to receive or impart information or ideas;*
> *(c) freedom of artistic creativity; and*
> *(d) academic freedom and freedom of scientific research."*

40. Not only does the proposed regulatory framework place severe

[26] Emphasis added

restrictions on the right of advertisers to market certain foods and non-alcoholic beverages to children, but it also limits the right to freedom of expression of all consumers – including adults – who are denied the right to receive information relating to such products.

41. It is clear both that the expression concerned falls within section 16(1) of the Constitution, and not section 16(2), and that the proposed "regulation" of this expression certainly involves a limitation of the section 16(1) right. As the Constitutional Court has explained:[27]

> *"Because freedom of expression, unlike some other rights, does not require regulation to give it effect, regulating the right amounts to limiting it. The upper limit of regulation may be set at an absolute ban, which extinguishes the right totally. Regulation to a lesser degree constitutes infringement to a smaller extent, but infringement nonetheless."*

42. Such limitations are only permitted if they satisfy the provisions of section 36(1) of the Constitution. We return to this section in some detail below.

43. Freedom of expression is of fundamental importance in an open and democratic society. As the Constitutional Court recognised in *South African National Defence Union v Minister of Defence and Another*:[28]

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[27] *Print Media South Africa and Another v Minister of Home Affairs and Another* 2012 (6) SA 443 (CC) at paragraph 51 (emphasis added)
[28] 1999 (4) SA 469 (CC) at paragraph 7 (footnotes omitted)

> *"Freedom of expression lies at the heart of a democracy. It is valuable for many reasons, including its instrumental function as a guarantor of democracy, its implicit recognition and protection of the moral agency of individuals in our society and its facilitation of the search for truth by individuals and society generally. The Constitution recognises that individuals in our society need to be able to hear, form and express opinions and views freely on a wide range of matters."*

44. Our courts have accepted that commercial expression, such as advertising, also enjoys constitutional protection. In *City of Cape Town v Ad Outpost (Pty) Ltd and Others*,[29] for example, Davis J held that *"advertising falls within the nature of expression and hence stands to be protected in terms of s 16(1) of the Constitution."* This was later confirmed by the Supreme Court of Appeal ("the SCA") in *British American Tobacco South Africa (Pty) Ltd) v Minister of Health*.[30]

45. Our courts are not alone. The position that freedom of speech includes commercial expression has been adopted in Canada and the United States, and by the European Court of Human Rights.[31] So, for example, the Canadian Supreme Court in *RJR-MacDonald Inc. v Canada (Attorney General)* accepted that a ban on tobacco advertising amounted to a limitation on the right to freedom of expression.[32] This position has also been adopted by the Supreme Court of the United States, which held as follows *Lorillard Tobacco Co. v Reilly*:[33]

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[29] 2000 (2) SA 733 (C) at 749E – F
[30] [2012] 3 All SA 593 (SCA) at paragraph 9
[31] See, for example, *Müller v. Switzerland* [1988] 13 EHRR 212 at paragraph 27
[32] [1994] 1 SCR 311 at paragraphs 58 and 124
[33] 533 US 525 (2001) at 564

> *"The State's interest in preventing underage tobacco use is substantial, and even compelling, but it is no less true that the sale and use of tobacco products by adults is a legal activity. We must consider that tobacco retailers and manufacturers have an interest in conveying truthful information about their products to adults, and adults have a corresponding interest in receiving truthful information about tobacco products."*

46. While limitations on commercial expression may be easier to justify than other forms of speech, it is important to recognise that the relevant balancing act is only to be performed when section 36(1) of the Constitution comes into play:[34]

> *"The tendency to conclude uncritically that commercial expression bears less constitutional recognition than political or artistic speech needs to be evaluated carefully. So much speech is by its very nature directed towards persuading the listener to act in a particular manner that artificially created divisions between the value of different forms of speech requires critical scrutiny. Whatever the role of such speech within a deliberative democracy envisaged by our Constitution, it is clear that advertising falls within the nature of expression and hence stands to be protected in terms of s 16(1) of the Constitution. <u>To the extent that its value may count for less than other forms of expressions, account of this exercise in valuation can only be taken at the limitation enquiry as envisaged in s 36 of the Constitution</u>."*

47. Thus the central question which needs to be asked is whether the proposed restrictions on advertising, which limit the right to freedom of expression in section 16(1) of the Constitution, are *"reasonable and*

[34] *City of Cape Town* at 749D – F (emphasis added), endorsed by the SCA in *British American Tobacco* at paragraph 9

justifiable in an open and democratic society based on human dignity, equality and freedom".

48. It is trite that the primary burden to establish that any limitation of a constitutional right is justified is placed on the state.[35] In determining whether any limitation can be justified in terms of section 36(1), *"all relevant factors"* are to be taken into account, including –

> *"(a) the nature of the right;*
> *(b) the importance of the purpose of the limitation;*
> *(c) the nature and extent of the limitation;*
> *(d) the relation between the limitation and its purpose; and*
> *(e) less restrictive means to achieve the purpose."*

49. In essence, this involves a proportionality analysis. As the Constitutional Court explained in *Phillips*:[36]

> *"The justification exercise involves an assessment of proportionality. As O'Regan J and Cameron AJ wrote:*
>
> > *'The approach to limitation is, therefore, to determine the proportionality between the extent of the limitation of the right considering the nature and importance of the infringed right, on the one hand, and the purpose, importance and effect of the infringing provision, taking into account the availability of less restrictive means available to achieve that purpose.'"*

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[35] *Phillips and Another v Director of Public Prosecutions, Witwatersrand Local Division, and Others* 2003 (3) SA 345 (CC) at paragraph 20

[36] Ibid at paragraph 22 (footnote omitted). See also *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA (6) CC at paragraph 35 (footnote omitted)

> "On the one hand there is the right infringed; its nature; its importance of an open and democratic society based on human dignity, equality and freedom; and the nature and extent of the limitation. On the other hand there is the importance of the purpose of the limitation. In the balancing process and in the evaluation of proportionality one is enjoined to consider the relation between the limitation and its purpose as well as the existence of less restrictive means to achieve this purpose."

50. The stated purpose of the proposed regulatory framework (to protect children) is not proportional to the extent of the limitation (a ban on all radio and television advertising from 06h00 to 21h00). Such a regulatory framework fails to consider viewership, effectively imposing intrusive regulation on adult viewing. This is because the prohibition on advertising is to apply to all stations and channels, including those that have little or no child viewership.[37]

51. In *City of Cape Town v Ad Outpost*, it was held that a blanket prohibition is contrary to the constitutional requirement that a desired result should be achieved by means which are least damaging to the constitutional right in question.[38] And in *North Central Local Council and Another v Roundabout Outdoor (Pty) Ltd and Others*,[39] a limitation of section 16(1) was found to be reasonable and justifiable – in large part – because the impugned regulations constituted *"the least restrictive measures that could have been employed by applicant to accomplish its purpose."*

52. Alternative forms of regulation are indeed available. This case is thus quite unlike *British American Tobacco*, where a core part of the SCA's reasoning related to the absence of any less restrictive means to achieve the purposes concerned.[40] In the present context, we draw the DoH's attention to the manner in which the issue has been addressed by

[37] Such as CNN or Business Day TV
[38] At 750I – J
[39] 2002 (2) SA 625 (D) at 635A – B
[40] At paragraph 26

Ofcom, the *"[i]ndependent regulator and competition authority for the UK communications industries"*.[41] In particular, it is important to note that –

52.1. the issue was addressed by the regulatory authority responsible for broadcasting in the United Kingdom, and not by the relevant health authorities;

52.2. before regulating, Ofcom undertook a detailed impact assessment, which included a modelling and revenue analysis to understand the potential impact on broadcasters' advertising revenue and how this could be mitigated; and

52.3. Ofcom sought to balance competing interests by reducing the exposure of children to the advertising of unhealthy food while at the same time avoiding intrusive regulation of adult viewing.

53. The detail in this regard is provided in an Ofcom report entitled *"Television Advertising of Food and Drink Products to Children: Final statement"*,[42] which was published on 22 February 2007. Interestingly, the report makes express provision for staggered implementation. None of the new rules were to come into effect immediately upon publication. In other words, broadcasters were given time to ensure that they were

[41] See http://www.ofcom.org.uk/about/
[42] The report is available at http://stakeholders.ofcom.org.uk/binaries/consultations/foodads_new/statement/statement.pdf

able to comply with the new regulatory framework.

54. The effectiveness of these advertising restrictions was considered in an Ofcom report entitled "HFSS[43] advertising restrictions: Final Review",[44] which was published on 26 July 2010. It noted that the restrictions on advertising – which were targeted at children – had *"reduced children's exposure to HFSS advertising significantly …, particularly in the case of younger children … who may be more susceptible to the influence of advertising"*.[45] In the result, the targeted restrictions were retained, but not extended.

55. Moreover, it is critical to bear in mind that our courts are generally (and correctly) highly sceptical of the need for a "prior restraint" on expression – that is preventing expression taking place or constraining how this occurs before it reaches the public.

55.1. Thus in *Print Media*, the Constitutional Court emphasised that a prior restraint "*though occasionally necessary in serious cases, is a drastic interference with freedom of speech*".[46]

55.2. Similarly, in *Midi Television*, the SCA made clear that the bar to be set to justify the curtailment of expression via a prior restraint

[43] *"HFSS"* refers to foods that are *"high in fat, salt or sugar"*.
[44] The report is available at http://stakeholders.ofcom.org.uk/binaries/research/tv-research/hfss-review-final.pdf
[45] Paragraph 1.23, page 5
[46] At paragraph 44

was a very high one. It held that –

> "*a publication will be unlawful, and thus susceptible to being prohibited, only if the prejudice that the publication might cause to the administration of justice is demonstrable and substantial and there is a real risk that the prejudice will occur if publication takes place. Mere conjecture or speculation that prejudice might occur will not be enough. Even then publication will not be unlawful unless a court is satisfied that the disadvantage of curtailing the free flow of information outweighs its advantage.*"[47]

55.3. While this statement was made in the context of prior restraints purporting to protect the administration of justice, the SCA went on to emphasise that these principles "*would also seem … to apply, with appropriate adaptation, whenever the exercise of press freedom is sought to be restricted in protection of another right.*"[48]

56. Significantly, in all the circumstances, and taking into account the relevant principles, it simply cannot be concluded that the proposed regulatory framework limits the right to freedom of expression in a manner permitted by section 36 of the Constitution. It may well be possible to craft regulations that achieve the aims of the DoH and do not fall foul of the Constitution. The NAB remains committed to assisting in this process. However, the draft regulations simply go too far, without

[47] *Midi Television (Pty) Ltd v Director of Public Prosecutions (Western Cape)* 2007 (5) SA 540 (SCA) at paragraph 19 (emphasis added)
[48] At paragraph 20

appropriate justification, and on this basis alone they are unconstitutional.

VAGUENESS CONCERNS

57. As already indicated above, regulation 65 provides that *"[n]o food or non-alcoholic beverage shall be marketed to children unless it complies with all the criteria in Guideline 14."*[49] Amongst other things, these criteria are set out in clause 6 of Guideline 14. Of particular concern to the NAB are the contents of sub-clauses (2) and (3):

> *"(2) No energy dense, nutrient poor food and non-alcoholic beverage, which are too high in any one of the following; fat, saturated fats, trans-fatty acids, total sugar, or total Sodium (hereafter called unhealthy food), shall be marketed commercially to children in any manner, whether prepacked, non-prepacked or ready-to-eat, if the foodstuff –*
>
> *a) firstly, does not pass the screening criteria of the Nutrient Profiling Model, using the electronic calculator, by clicking on Nutrient Profiling Model Calculator at the bottom of the web page of the Directorate: Food Control on the website of the Department of Health;* ***http://www.doh.gov.za*** *or* ***http://www.health.gov.za***
>
> *b) secondly, contains added fructose, added non-nutritive sweeteners, added fluoride or added aluminium through an additive or ingredient; and*
>
> *c) thirdly, exceeds the nutrient levels in the food or beverage per 100 g/ml as indicated in the table below, based on the UK Food Standards Agency Criteria (per 100g/100ml) (Published January 2007):*

[49] Emphasis added

Undesirable Nutrient	*Nutrient levels in food (per 100 g)*	*Nutrient levels in non-alcoholic beverages (per 100 ml)*
Total sugars	*5 g*	*2.5 g*
Fat	*3 g*	*1.5 g*
Saturated fat	*1.5 g*	*0.75 g*
Sodium/salt	*20 mg Sodium/0.3 g salt*	*20 mg Sodium/0.3 g salt*

(3) a) Commercial marketing or promotion of unhealthy food shall not be advertised on radio or television, between 6.00 to 21.00.

b) No commercial marketing activities to children shall be permitted between 6.00 to 21.00, especially using new media (such as, but not limited to websites, social networking sites and text messaging).

c) Principles described in this Guideline shall also apply to commercial communications for those products directed at children outside of children's programmes."

58. Read together with and in light of draft regulation 65, clauses 6(2) and (3) raise at least the following two concerns:

58.1. First, the nature of the relationship between draft regulation 65 and Guideline 14; and

58.2. Second, the definition of *"unhealthy food"*.

Relationship between draft regulation 65 and Guideline 14

59. As already indicated, regulation 65 only allows for the marketing of food and non-alcoholic beverages to children that *"complies with all the criteria in Guideline 14."* But it is not at all clear whether this reference to criteria means the effective incorporation of clause 6 of Guideline 14 in its entirety, inclusive of all its substantive prohibitions, or whether it only incorporates the actual criteria as set out in sub-clause (2). The wording of draft regulation 65 suggests the latter, whereas the manner in which Guideline 14 has been drafted suggests the former.

60. In *Dawood*, O'Regan J – writing for a unanimous Constitutional Court – held that *"[i]t is an important principle of the rule of law that rules be stated in a clear and accessible manner."*[50] Similarly, in *Hyundai*,[51] Langa DP noted that *"the Legislature is under a duty to pass legislation that is reasonably clear and precise, enabling citizens and officials to understand what is expected of them."* This applies with equal effect to the promulgation of subordinate legislation.

61. In considering the validity of certain regulations made under the

[50] *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC) at paragraph 47

[51] *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2001 (1) SA 545 (CC) at paragraph 24

Medicines Act, Ngcobo J held as follows in *Affordable Medicines Trust*:[52]

> *"The doctrine of vagueness is one of the principles of common law that was developed by courts to regulate the exercise of public power. As pointed out previously, the exercise of public power is now regulated by the Constitution which is the supreme law. The doctrine of vagueness is founded on the rule of law, which, as pointed out earlier, is a foundational value of our constitutional democracy. It requires that laws must be written in a clear and accessible manner. What is required is reasonable certainty and not perfect lucidity. The doctrine of vagueness does not require absolute certainty of laws. The law must indicate with reasonable certainty to those who are bound by it what is required of them so that they may regulate their conduct accordingly."*

62. An unclear relationship between draft regulation 65 and Guideline 14 means that it is unclear what is proposed as law and what is proposed as mere guideline. Should this vagueness not be addressed in the final regulatory framework, the purported prohibition against radio and television advertising of unhealthy foods and non-alcoholic beverages between 09h00 and 21h00 would be unlawful on this ground.

Definition of unhealthy food

63. Given the manner in which the various parts of clause 6 have been drafted, and the lack of clarity regarding the relationships between these parts, it appears possible to define *"unhealthy food"* – for the purposes of

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[52] *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC) at paragraph 108 (footnotes omitted)

sub-clause 6(3) – in at least the following four different ways:

63.1. First, any foodstuff that is *"too high in any of the following: fat, saturated fat, trans-fatty acids, total sugar, or total [s]odium"*;

63.2. Second, any *"energy dense, nutrient poor food [or] non-alcoholic beverage"* that is too high in any of the substances listed in paragraph 63.1 above;

63.3. Third, any foodstuff that, in addition to satisfying the contents of paragraph 63.2 above, also satisfies sub-clause (2)(a), (2)(b) or (2)(c); or

63.4. Fourth, any foodstuff that, in addition to satisfying the contents of paragraph 63.2 above, also satisfies sub-clauses (2)(a), (2)(b) and (2)(c).

64. This makes it virtually impossible to understand clearly what is actually prohibited by sub-clause 6(3). This difficulty is exacerbated by it being unclear whether the way to determine whether a foodstuff is too high in any of the substances listed in paragraph 63.1 above is by reference to the table in sub-clause (2)(c),[53] or by some other way. It is also exacerbated by the fact that the phrases *"energy dense"* and *"nutrient poor"* are not defined – in the Foodstuffs Act, the draft regulations or

[53] Even if the table is the appropriate reference point, it does not address trans-fatty acids.

Guideline 14.

COMPLEXITY OF THE SCIENTIFIC ISSUES AT STAKE

65. Other stakeholders will, no doubt, make detailed submissions on these issues. In the result, we only focus on certain aspects which underscore our primary submission that the proposed regulatory framework does not appear to appreciate the complexity of the scientific issues in question, seemingly also relying on the flawed assumption that the evidence is clear on what constitutes unhealthy food.

66. In this part of the submission, reliance is placed on the advice provided to the NAB by Ms. Sarita Banitz ("Banitz"), a registered dietician. Banitz graduated from the University of Pretoria in 1998 with a bachelors degree in dietetics. She also has a bachelors degree from UNISA (in which she majored in psychology), and a diploma from the same institution in 2001.

67. Banitz's starting point is that there is a clear link between obesity on the one hand, and non-communicable diseases (NCDs) – such as diabetes, cardiovascular diseases, respiratory conditions, and certain cancers – on the other. Put most simply, an overweight or obese adult is at much greater risk of developing a range of NCDs. And an overweight child is more likely to become an obese adult.

68. Recognising that poor nutritional habits give rise to an overweight and obese population, the NAB accepts that the state has a legitimate interest in taking reasonable legislative measures designed to improve nutritional habits – with a particular focus on children. But in so doing, lawmakers should seek to base the regulatory measures they introduce on the best available science.

69. In this regard, the NAB submits – based on Banitz's advice – that the DoH's focus is misplaced. In contrast to what has been proposed, the NAB is of the view that the scientific consensus suggests an alternative approach – one based on a recommended daily kilojoule intake ("daily energy intake") which may vary according to age, gender and level of physical activity.

70. According to the Dietary Guidelines for Americans, published jointly by the Department of Agriculture and the Department of Health and Human Services in 2010,[54] the estimated daily energy intake for children is broken down as follows:[55]

70.1. Boys and girls aged 2-3 years:

70.1.1. Sedentary: 1,000 – 1,200 calories

70.1.2. Moderately active: 1,000 – 1,400 calories

[54] The guidelines are available at www.dietaryguidelines.gov
[55] Table 2-3, page 14 (using calories instead of kilojoules)

70.1.3. Active: 1,000 – 1,400 calories

70.2. Girls aged 4-8 years:

70.2.1. Sedentary: 1,200 – 1,400 calories

70.2.2. Moderately active: 1,400 – 1,600 calories

70.2.3. Active: 1,400 – 1,800 calories

70.3. Boys aged 4-8 years:

70.3.1. Sedentary: 1,200 – 1,400 calories

70.3.2. Moderately active: 1,400 – 1,600 calories

70.3.3. Active: 1,600 – 2,000 calories

70.4. Girls aged 9-13 years:

70.4.1. Sedentary: 1,400 – 1,600 calories

70.4.2. Moderately active: 1,600 – 2,000 calories

70.4.3. Active: 1,800 – 2,200 calories

70.5. Boys aged 9-13 years:

70.5.1. Sedentary: 1,600 – 2,000 calories

70.5.2. Moderately active: 1,800 – 2,200 calories

70.5.3. Active: 2,000 – 2,600 calories

70.6. Girls aged 14-18 years:

70.6.1. Sedentary: 1,800 calories

70.6.2. Moderately active: 2,000 calories

70.6.3. Active: 2,400 calories

70.7. Boys aged 14-18 years:

70.7.1. Sedentary: 2,000 – 2,400 calories

70.7.2. Moderately active: 2,400 – 2,800 calories

70.7.3. Active: 2,800 – 3,200 calories

71. This approach includes recommendations on how much of the daily energy intake should be made up of fat, protein and carbohydrate. According to the Dietary Guidelines for Americans, the recommended breakdown is as follows:[56]

71.1. Young children (1-3 years): 45-65% carbohydrate; 5-20% protein; and 30-40% fat; and

71.2. Older children and adolescents (4-18 years): 45-65% carbohydrate; 10-30% protein; and 25-35% fat.

[56] Table 2-4, page 15

72. On the relationship between individual foods and beverages on the one hand, and body weight on the other, the Dietary Guidelines for Americans note the following:[57]

> *"For calorie balance, the focus should be on total calorie intake, but intake of some foods and beverages that are widely over- or under consumed has been associated with effects on body weight. In studies that have held total calorie intake constant, there is little evidence that any individual food groups or beverages have a unique impact on body weight. Although total calorie intake is ultimately what affects calorie balance, some foods and beverages can be easily over consumed, which results in a higher total calorie intake. As individuals vary a great deal in their dietary intake, the best advice is to monitor dietary intake and replace foods higher in calories with nutrient-dense foods and beverages relatively low in calories."*

73. Banitz has endorsed the validity of this approach.[58] In particular, she has advised that nutritional requirements vary greatly due to several factors which may increase or reduce the needs for certain types of foods, such as sex, age (which influences growth patterns), the particular growth phase of a child (which differs between boys and girls), heredity health concerns (such as a family history of heart disease), existing health status, activity profile, and appetite. Other factors also need to be considered, such as living conditions, financial ability, level of food security, food availability, and level of education.

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[57] Pages 15-16 (emphasis added)

[58] She advises that instead of focusing on the amount of fat or added sugar per food item, fats and added sugars should be limited by daily intake. Fats, for example, should always be expressed as a percentage of the total energy requirement per day. Fruits are ordinarily indicated in units (like 2-3 fruits per day), and added sugar in the number of teaspoons per day (like 3-5 teaspoons of added sugar daily). The only foodstuff that Banitz recommends be limited per serving of food is trans-fatty acids (at 0.5g per serving).

74. In addition, Banitz is of the view that the most appropriate approach to improving children's nutritional habits is not to exclude energy dense, nutrient poor ("EDNP") foods and non-alcoholic beverages completely, but rather to include them as part of a comprehensive approach that seeks to control overall daily consumption of fat, protein and carbohydrate. That said, she recognises that other dieticians adopt a different approach, seeing low fat, low sugar and low salt foods for children as the solution.

75. Thus, the approach of simply engaging in a daytime and early evening ban on the broadcasting of advertisements for unhealthy foods is not consistent with the fact that the utility of such an approach is still seriously contested. Put differently, the approach to childhood nutrition reflected in the US guidelines, and endorsed by Banitz, suggests – at minimum – that the proposed ban may have little positive impact on children's eating patterns.

76. There are two final issues to consider: an alternative view on whether a high fat content, on its own, renders a food unhealthy; and the draft regulations' reliance on certain UK information. On these issues, Banitz has advised the NAB as follows:

76.1. A food that is high in fat but low in sugar could indeed be

considered as healthy.[59] Such foods are usually more protein-based, which reduces the sugar content naturally. But because they are high in fat, they are automatically regarded by the draft regulations as unhealthy. In Banitz's view, the focus should be on foods that are high in fat, sugar and sodium.[60]

76.2. The table under clause 6(2)(c) of Guideline 14 is based on criteria adopted by the UK Food Standards Agency. But those criteria are used for a different purpose: the labelling of food. Thus for a food to be considered as low fat, it must not contain more than 3g of fat per 100g, and no more than 1.5g of saturated fat per 100g.[61] Containing anything more than that does not, on its own, mean that the food is unhealthy.

MANNER OF IMPLEMENTATION

77. As already mentioned above, draft regulation 68(1) states that the bulk of the regulatory framework is to *"come into operation 36 months after the date of final publication".* But there are departures from this general rule. In particular, draft regulation 68(7) states that *"[r]egulations 16(1)(b), 46, 52(12), 53(1), 53(2) and 65 shall come into effect on the date of final publication."* Yet no explanation is provided for this

[59] Banitz also advises that a snack for a child such as a cracker with butter, cheese and/or cold meat is likely to exceed both the fat and salt allowance contained in Guideline 14. But in her view, such a snack ought to be considered as healthy for children.
[60] Such foods include a wide range of fast foods, such as pizzas and pies.
[61] Banitz advises that the UK National Health Service considers a high fat product to contain more than 17.5g of fat per 100g, and more than 5g of saturated fat per 100g of food.

differential treatment. In the NAB's view, there does not appear to be any good reason why all the provisions identified in draft regulation 68(7) ought to come into operation with immediate effect.

78. Elsewhere in draft regulation 68, provision has been made for phased implementation over periods shorter than 36 months. Consider the following examples:

78.1. Draft regulation 68(3) contemplates a period of three months for changes to be made to labels that contain a nutrition or health claim that is in conflict with the requirements contained in draft regulation 53.

78.2. Draft regulation 68(9) provides for draft regulation 66, which deals with the labelling of enteral foods for the dietary management of persons with specific medical conditions, to *"come into effect 12 months after the date of final publication."*

79. There is no good reason why similar provision cannot be made for the phased implementation of draft regulation 65. On the contrary, to ensure that broadcasters are able to manage the transition to a new regulatory framework in a manner that does not unreasonably prejudice their operations, a period of at least 12 months is required. This is because advertisers and broadcasters will only become aware of the content of the final regulations once they have been published, and only

thereafter will they be in a position to take steps to ensure compliance.

80. If draft regulation 65 is to come into operation with immediate effect, broadcasters may be compelled to pull a wide range of advertisements at a moment's notice. This would have a devastating impact on their advertising revenue, which would be felt disproportionately by those who operate on a free-to-air model.

81. Alternatively, advertisers may – out of extreme caution – choose instead not to place any advertisements dealing with children's food and non-alcoholic beverages, even those that the final regulatory framework ultimately permits. This too could cause significant financial prejudice to broadcasters, for no corresponding public benefit.

82. By requiring draft regulation 65 to come into effect on the date of publication of the final regulations, the proposed regulatory framework fails to recognise and address the concerns of broadcasters regarding the need for phased implementation. As such, it is unreasonable and accordingly unlawful.

THE WHA RESOLUTION

83. In a resolution dated 21 May 2010,[62] the WHA endorsed a *"set of recommendations on the marketing of foods and non-alcoholic*

[62] Resolution WHA63.14

beverages to children",[63] made certain requests of the WHO's Director-General,[64] and urged member states to do the following five things:[65]

83.1. First, *"to take necessary measures to implement the recommendations on the marketing of foods and non-alcoholic beverages to children, while taking into account existing legislation and policies, as appropriate"*;

83.2. Second, *"to identify the most suitable policy approach given national circumstances and develop new and/or strengthen existing policies that aim to reduce the impact on children of marketing of foods high in saturated fats, trans-fatty acids, free sugars, or salt"*;

83.3. Third, *"to establish a system for monitoring and evaluating the implementation of the recommendations on the marketing of foods and non-alcoholic beverages to children"*;

83.4. Fourth, *"to take active steps to establish intergovernmental collaboration in order to reduce the impact of cross-border marketing"*; and

83.5. Fifth, *"to cooperate with civil society and with public and private*

[63] Attached to the resolution as the annex to document A63/12 (a copy of which is attached)
[64] See paragraph 3 of the resolution
[65] Emphasis added

<u>stakeholders in implementing the set of recommendations</u> on the marketing of foods and non-alcoholic beverages to children in order to reduce the impact of that marketing, while ensuring avoidance of potential conflicts of interest"

84. What is clear from the resolution is that the needs of all stakeholders, as well as local context, are to be taken into account. In addition, the aim of the regulatory intervention is to reduce – and not eliminate – the impact on children of the marketing of certain foods. Importantly, an integral part of the proposal is the establishment of a monitoring and evaluation system, something which is completely absent from the draft regulations.

85. The WHA endorsed a total of 12 recommendations,[66] inclusive of the following which underpin many of the concerns raised in this submission:

85.1. Recommendation 3 states that member states *"should consider different approaches, i.e. stepwise or comprehensive, to reduce marketing of foods high in saturated fats, trans-fatty acids, free sugars, or salt, to children."* The explanation provided for this flexible approach recognises the need to take into account *"national circumstances and available resources"*.[67]

85.2. Recommendation 4 speaks to the need for governments to *"set*

[66] See above note 63
[67] Paragraph 16, page 11

clear definitions for the key components of the policy". Importantly, this includes defining *"what foods are to be covered by marketing restrictions"*.[68] In this regard, governments are afforded flexibility *"to distinguish food types in several ways, for example by using national dietary guidelines, definitions set by scientific bodies or nutrient profiling models or they can base the marketing restrictions on specific categories of foods."*[69]

85.3. Recommendation 7 provides that member states *"should consider the most effective approach to reduce marketing to children of foods high in saturated fats, trans-fatty acids, free sugars, or salt"* taking into account the available resources and *"the benefits and burdens of all stakeholders involved"*. *"Statutory regulation … through which implementation and compliance are a legal requirement"* is but one recommended approach amongst a *"variety of approaches"* suggested.[70]

85.4. Recommendation 10 speaks about the need to *"include a monitoring system to ensure compliance with the objectives set out in national policy, using clearly defined indicators."* Linked to this is recommendation 11's reference to *"a system to evaluate the impact and effectiveness of the policy on the overall aim, using clearly defined indicators."* The draft regulations fail to

[68] Paragraph 19, page 12
[69] Footnote 1, page 12
[70] Paragraph 22, page 13

address both of these recommendations.

86. The NAB is well-aware that the WHA resolution is not directly binding on member states. That said, Guideline 14 makes it clear that its objective is *"to provide a framework for implementing a set of recommendations and regulations to limit children's exposure to the marketing of foods and non-alcoholic beverages (resolution WHA63.14), endorsed by the 63rd World Health Assembly (WHA) in May 2010."* What our analysis shows is that there is a significant disconnect between the draft regulatory framework and the recommendations endorsed by the WHA.

CONCLUSION

87. In this written submission, the NAB has highlighted a number of ways in which the draft regulatory framework, if adopted in its current or any similar form, would be unlawful and invalid. With this in mind, the NAB strongly recommends that draft regulation 65 and Guideline 14 (as well as all references to them) be removed from the draft regulations, and that the industry be consulted afresh on a new approach.

88. In the NAB's view, it is essential that such consultation should fall under the auspices of ICASA, as the independent authority to which section 192 of the Constitution refers. That said, the DoH would be entitled – and indeed ought – to play a central role in the consultation and regulation-making process. The Ofcom experience in regulating the

same issue provides an example of how the relevant health authorities in the United Kingdom played such a role. As Ofcom explained in its February 2007 reported entitled *"Television Advertising of Food and Drink Products to Children: Final statement"*:[71]

> *"The Communications Act 2003 ("the 2003 Act") gives Ofcom the responsibility for regulating communications within the UK, including the use of radio spectrum, the provision of a wide variety of telecommunications services and the licensing and regulation of broadcasters. Ofcom does not possess expert knowledge relating to health and dietary matters and therefore is reliant upon the expertise of those with that knowledge (such as the [Department of Health] and [the Food Standards Agency]) when considering regulation in this social policy area."*

89. The NAB looks forward to further public engagement and consultation on the proposed regulatory framework, mindful of the need to give effect to the WHA-endorsed recommendations in a manner that both recognises and responds appropriately to the South African context.

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[71] See above note 42 at paragraph 2.1, page 6