Technical and legal considerations for regulating the digital marketing of breast-milk substitutes

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1.0 Introduction

The aggressive marketing of breast-milk substitutes (BMS) undermines breastfeeding initiation, exclusivity and duration. In 1981, the World Health Assembly (WHA) adopted the International Code of Marketing of Breast-milk Substitutes, which provides guidance to Member States for using legal measures to protect breast feeding through regulating BMS marketing (1). The Code has been strengthened over time through a series of WHA resolutions and technical guidance (collectively referred to herein as 'the Code').

BMS marketing practices have dramatically changed in recent times, with a shift away from the use of traditional media towards digital media, where marketing content is delivered in a highly targeted, personalised and engaging manner. A recent report published by the WHO found that digital media is now the primary channel through which BMS products are marketed, with widespread reach and engagement (2).

Despite this, no country around the world has measures in place that restrict the digital marketing of BMS in a comprehensive and nuanced manner, which is reflective of the complex digital ecosystem. The latest WHO Status report on the National implementation of the Code (September 2022) found that of the 144 countries with legal measures related to the Code, only 37 explicitly mentioned digital media and these were almost always limited to the definition of advertising or within the general text for the provisions related to BMS promotion to the general public (3). The Code is broad enough that many of the provisions can be interpreted to apply to digital media, however clarity is needed for *how* this can be done and *where* additional regulatory guidance may be needed to ensure that the Code is fit-for-purpose in the digital age.

The aim of this report is to identify the key issues in regulating the digital marketing of BMS and to propose potential legal and technical solutions to the issues.

2.0 Methods

Findings from this report are informed by a desk-top review of the literature (2, 4-13), 11 expert interviews with representatives from across the marketing supply chain and our own expertise as academics working extensively in the area of digital marketing from a public health policy (KB) and public health law (FS) perspective. Interview participants represented employees, owners or former employees of commodity companies (from the marketing and legal teams), digital media agencies, digital regulators, international non-government organisations, and civil society organisations that monitor digital marketing practices. These interviews are part of a broader program of work that the

consultants are undertaking to understand the legal and technical parameters for regulating inappropriate digital marketing. In section 3.0 we present the key legal and technical challenges with regulating the digital marketing of BMS and propose possible regulatory design and implementation solutions to these issues.

3.0 Findings

This section outlines the key issues related to regulating the digital marketing of BMS, where regulatory clarity is required regarding how the Code can be interpreted in the digital environment, or where additional regulatory provisions are required to adequately restrict BMS marketing specifically through digital media (as opposed to traditional media). For each of the identified challenges we outline potential solutions that governments can consider when designing and implementing legal measures to restrict the inappropriate digital marketing of BMS.

3.1 Regulatory design

3.1.1 Interpretation of the Code to digital media

The challenge

The Code was written and adopted prior to widespread use of the internet, social media and other digital platforms that infiltrate lives across the world today. This means that although many of the provisions within the Code can, and should, be interpreted to apply to digital media, this is not explicit in the existing guidance documents. Clarity is required as to how the Code should be applied to the digital media.

Potential solutions

Governments should give effect to the Code in respect to digital marketing. The provisions within the Code are general enough to cover the marketing of BMS through all media, including digital media. For example, provisions that address traditional marketing practices, such as point-of sale promotions, should reasonably be extended to online retailers; sponsorship of health professional meetings should logically be applied to health professional webinars; direct contact with mothers should include direct contact through social media or baby or parent clubs. To add further clarity, in **Table 1** we provide examples of how the Code can be applied to digital media.

Table 1: Marketing strategies prohibited in the Code and their digital equivalents. *BMS products are inclusive of all products within scope of the Code

Digital equivalent aligned with the Code *(note, this list is illustrative, not exhaustive)*
Education and Information
• Accurate and legible information on the benefits of breast-feeding and hazards of infant formula should be provided on all digital informational material, no matter where it is distributed online (e.g. social media, e-learning platforms, websites). • Digital media should not be used to distribute, or initiate distribution, of donations of informational or educational equipment or materials related to BMS products.
Promotion to the General Public and Mothers *Samples and Supplies*

• Digital media cannot be used for direct or indirect advertising or other forms of promotion of BMS products. This includes (but is not limited to) use of:
  ○ Search engine optimization and advertising: to improve organic search engine rankings and visibility of BMS products and companies within internet search engines.
  ○ Social media advertising or advertising on other peer-to-peer platforms: advertising of BMS products, which is often targeted and shared rapidly through social networks.
  ○ Influencer marketing: collaborating with influential individuals ('influencers') for the purpose of endorsing BMS products.
  ○ Affiliate marketing: partnering with affiliates to promote BMS products.
  ○ Display advertising: banner ads, images or videos on websites promoting BMS products.
  ○ Native advertising: seamless integration of BMS marketing messages into the content of a digital platform.
  ○ Geotargeting: delivering targeted promotional material related to BMS products, based on where a user is located.
  ○ User-Generated Content Campaigns: encouraging or enabling users to create and share content for the promotion of BMS products.
  ○ Online Contests and Giveaways: Running promotions, contests, or giveaways to promote BMS products or to engage customers or attract new ones.
  ○ Social Proof and Reviews: Displaying customer reviews and testimonials related to BMS products on websites or social media platforms to build trust and credibility with customers.
  ○ Product placement: in online pictures, videos, games
  ○ Use of online games and other entertainment to promote BMS products or brands.
• Digital media cannot be used to distribute, or initiate distribution, of BMS sample products.
• Online retail or e-commerce platforms (including online retail outlets, manufacturer e-commerce and peer-to-peer e-commerce) cannot:
  ○ Advertise BMS products at prominent online or app point-of sale locations, including online check outs or through online catalogues.
  ○ Provide free samples of BMS products with an online order.

- Provide coupons, codes or links for discounted online orders of BMS products.
- Provide personalised recommendations for BMS products based on customer preferences and behavior.
- Integrate virtual reality or augmented reality technology to promote BMS products through immersive shopping experiences.
- Collaborate with influencers to create exclusive BMS sales or discounts.
- Promote BMS products through chatbots or AI-powered customer support.
- Use search engine optimization to boost BMS products to the top of a search within an e-commerce platform.
- Promote and provide discounted or time limited BMS products through online retail catalogues, on 'specials/discount' pages or through regular online shopping pages.
- Use online loyalty programs to incentivize BMS sales.
- Use cross-selling and upselling tie-ins by recommending related or upgraded BMS products during an online shop.
- Use any other promotion to induce online sales of BMS products.

- Digital media cannot be used to distribute gifts which may promote use of BMS of bottle-feeding.
- No direct contact with pregnant women or mothers of infants and young children through any digital media, including (but not limited to):
  - Baby or parent clubs
  - Social media platforms
  - Email
  - Text messages
  - Online apps
  - Push notifications on mobile devices
  - Chatbots or other AI-powered contact
  - Engaging and commenting on social media feeds (including invitations to 'Direct Message')

Health Systems and Facilities

- Health systems include the online presence of all health care facilities, including websites, social media pages, apps and other digital presence. There should be no promotion, display or distribution of BMS products or demonstration of feeding with infant formula on any of these online health system sites or platforms.

Product Labels

- Display of online labels must reflect provisions in the Code.
- If a label complies with the Code, any display of that label online, including text and images, should be clear, conspicuous, and easily readable.

Health worker sponsorship and incentives

- BMS manufacturers and distributors cannot sponsor, and advertise brands or BMS products at online health professional or scientific meetings or events or within online material, including (but not limited to):
    - e-learning courses and platforms
    - webinars
    - blogs
    - webpages
    - online meetings, conferences and events, including online conference materials and virtual speaker backgrounds
    - online research publications or journals
- No dissemination of online event registration details to BMS companies
- Health workers cannot be accessed online for the promotion of BMS products.
- No financial or material inducements can be given to health workers for any kind on digital promotion of BMS products.
- All information provided to health workers through any online platform must be accurate.

3.1.2 Legislative co-ordination: mapping existing digital protections

The challenge

The online environment is increasingly becoming subject to online regulation. There is a perception that regulating digital actors, or the digital environment, is outside of the jurisdiction of the Ministry of Health. Ministries of Health may consider that many government agencies and various pieces of legislation already regulate the digital ecosystem in some way. This can cause confusion about whether any law they introduce would contradict existing laws or whether they have the expertise and knowledge to regulate the digital ecosystem without oversight by a government agency with more involvement in online regulation.

Governments need to decide whether to introduce or amend a BMS law to include digital marketing provisions or whether to extend the provisions in other laws regulating the online environment such as data protection laws, privacy law or consumer laws.

Potential solution

There is a need for coordinated laws and government agencies at the national level. However, the Ministry of Health can have confidence in leading the development of regulation for the digital marketing of BMS. While a country may have laws that already protect the public online, that may be important to connect to, such as data protection and consumer protection laws, the appropriate legislative vehicle for increasing protections on the digital marketing of BMS is the existing BMS legal framework (for countries that have one in place) or the introduction of a BMS law that gives effect to the Code (for countries without existing BMS laws in place). Because BMS marketing restrictions are

under the mandate of the Ministry of Health, this provides the jurisdiction for the Ministry of Health to lead the legislative approach.

Other digital protection laws can aid in restricting the digital marketing of BMS, so it is important for the Ministry of Health to understand the existing digital protection system in place (4). To do this, a legal mapping exercise can be undertaken, which can be carried out by a government official (4). These areas of law to map could include:

- **Media laws**: For example, broadcast law and communications law that regulate the content of traditional forms of media, such as television.
- **Data protection law/Privacy law**: For example, laws that restrict entities collecting and using personal data online.
- **Intellectual property/Copyright law**: For example, laws that protect commercial rights to intellectual property and copyright laws.
- **Digital services law:** Laws that regulate companies that provide digital services.
- **Consumer law:** For example, consumer safety, consumer rights, anti-spam laws.
- **Online safety law**: For example, including harmful digital communications law, censorship laws, and laws that restrict hate speech or child pornography.

Government officials can ask the following questions about the existing laws in place in their country to understand the scope of existing powers relating to online regulation, which may be useful when designing legal measures to prohibit the digital marketing of BMS (4):

1. Scope of law - What do the laws regulate?
2. Jurisdiction - Which government department is responsible for the law
3. Jurisdiction - Do the laws' scope of application cover activities taking place outside of your jurisdiction?
4. Monitoring - How is compliance monitored? Which authority monitors it?
5. Enforcement powers - Which authorities enforce the law? What are the penalties?
6. Liability - Against whom can these measures be enforced? Can measures be enforced even where the addressee is not in the jurisdiction?

This regulatory mapping exercise can help governments understand where other existing laws can be leveraged to strengthen a BMS specific law that prohibits the digital marketing of BMS. For instance, the powers of other government agencies or any monitoring and enforcement mechanisms that exist in the online regulation space can be utilised to monitor and enforce prohibitions on the digital marketing of BMS (This is discussed further in *Section 3.2.3 Enforcement*). Understanding the scope

of each law can also help the Ministry of Health understand what legal parameters they can adopt when designing legal measures to prohibit the digital marketing of BMS (i.e. that there is legal precedent in the country). It can also aid in understanding how an inter-agency governance mechanism could be used to help enforce the provisions related to digital marketing within a BMS law if different agencies and powers can be utilised by the Ministry in collaboration with other agencies (for more on this see Section 3.2.5 Governance).

3.1.3 Liability along marketing chain

The challenge

There are many actors along the digital marketing supply chain from the advertiser to media agencies, supply side and demand side platforms, internet service providers and publishers (such as social media platforms) (see Figure 1) (4). Knowing who to hold to account for the marketing within this digital marketing supply chain can be difficult as some governments may consider that certain actors are out of the jurisdictional reach of the government or that it might not be technically feasible to regulate some actors (e.g social media platforms).

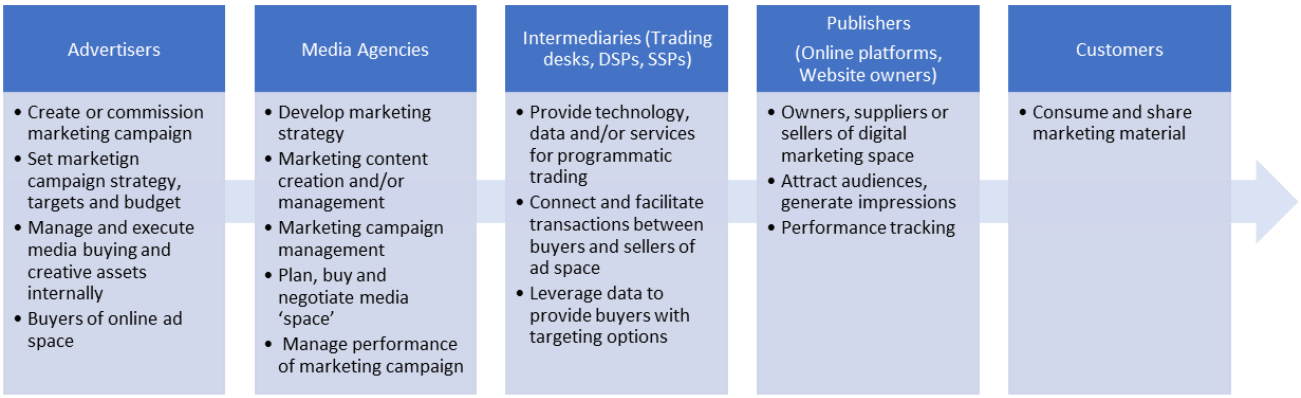

Figure 1: Digital marketing supply chain

Potential solutions

Under the Code, all 'manufacturers' and 'distributors' are considered 'duty-bearers' which means they are liable to comply with the provisions in the Code (Table 2).

Table 2: Definition of manufacturers and distributors as duty bearers with the Code and their place along the digital marketing supply chain

Actor	Description	Actor along digital marketing supply chain
Manufacturer	A corporation of other entity in the public or private sector engaged in the business or function (whether directly or indirectly through an agent or through an entity controlled by or under contract with it) of manufacturing a product within the scope of the Code (1)	- Advertiser
Distributors	Persons, corporations or any other entities in the public or private sector engaged in the business of marketing, at the wholesale or retail level, a product within the scope of the Code, in accordance with Article 3 of the Code (1).	- Publishers - Influencers - Potential to also include media agencies, and intermediaries in the digital marketing supply chain

At a minimum, the advertiser should be held liable, particularly as they are the actor that has instigated the commercial transaction of designing and disseminating the marketing campaign. At the other end of the marketing supply chain is the publisher, such as online platforms (e.g social media companies), who have control over what marketing is seen online and how. Influencers are also content creators and should be considered as distributors as they are engaged in the marketing process (see section 3.1.4 for more detail). Increasingly online platforms are being held to account in other areas of online regulation (see Box 1), which shows precedence for holding that actor liable under the law. This would increase the effectiveness of the law because publishers have a large amount of control and power in the digital marketing supply chain and therefore have the ability to block, remove or moderate online marketing that is in breach of the law. It is, however, important to distinguish between holding the publisher liable for any commercial marketing content compared to holding them liable for organic 'user-generated' content (4). It would be up the government to decide whether to hold publishers liable for moderation of user generated content that is in breach of any digital BMS marketing law, such as what can occur for other online content, such as hate crimes, child pornography or disinformation, for example (4).

It is less common to see media agencies, demand and supply side platforms and internet service providers (companies that provide access to the internet) held liable under the law for their role in disseminating online marketing content, however they still do have an important role to play and would need to be cognisant of any national law. This may be an area of internet regulation that emerges, particularly the internet service providers responsibilities to take down website that publish terrorist or hate crime material, for example. The UK Government's proposed Online Advertising Programme proposes to hold 'ad tech intermediaries that facilitate the placement and distribution of online adverts' to account (14). This is intended to include social media firms, search engines and other websites.

Box 1: How online platforms are being regulated internationally

Digital services: Governments could adopt provisions in their BMS law or other online protection laws that are modelled on the European Union's Digital Services Act that requires greater transparency from advertisers and other actors in the digital marketing value chain in their use of data driven marketing and profiling. The Digital Services Act requires disclosure by online platforms about who has placed the advertisement and how the consumer was chosen to see that advertisement. It will also require large online platforms (45 million recipients) to create a public searchable database of all digital marketing content, who initiated and paid for the advertisement, how many people saw it, and how the end-user consumers were chosen to see the content.

Online harm: Many governments including Australia, Canada, New Zealand and the UK have introduced or are proposing to introduce national level laws that would hold online platforms to account for 'harmful' or 'unsafe' content. The liability to identify and remove harmful content from the internet is being placed on the online platforms who are the only actor in the digital ecosystem able to monitor and 'turn off' or remove content from their platforms.

3.1.4 Influencer marketing

The challenge

Influencer marketing is where a marketer or brand identifies and engages an individual with a large online follower base (an 'influencer') to endorse or promote a product or brand in exchange for a monetary or non-monetary payment. Influencer marketing may involve an influencer sharing brand-created content or influencer generated content specifically for a brand. The commercial transaction between the influencer and brand, through a paid endorsement or sponsorship (monetary or non-monetary), is what distinguishes 'influencer marketing' from 'user generated content' (see section

3.1.5 for more on user generated content). Influencers have a large reach due to the size of their follower base (micro-influencers can be defined as having <500K followers and macro-influencers as having >500K followers) (15), meaning influencer marketing messages can spread to large numbers of users in a very short time. Influencer marketing is also considered to be highly influential as influencers present as authentic, approachable and relatable individuals, shaping what users trust, purchase and consume. Not surprisingly, influencer marketing is one of the most common digital marketing techniques used by brands today, with promise to deliver substantially greater return on investment compared to other digital marketing techniques (16). It is therefore essential that influencer marketing is included in any legal response to restrict the digital marketing of BMS products. This can be problematic when the disclosure of commercial relationships between brands and influencers is not clear making it difficult to determine whether the content falls into the scope of the law.

Potential solution

Use of influencers to promote BMS products should be prohibited under existing provisions within the Code. An influencer should be considered a 'distributor' and therefore a duty-bearer under the provisions of the Code. This means that influencers should be prohibited from promoting BMS products in response to a commercial incentive. Similarly, in accordance with the Code, a BMS manufacturer or any entity acting on their behalf, cannot engage, directly or indirectly, an influencer to promote any product within the scope of the Code. Monitoring and enforcement of this requires disclosure of the commercial relationship between the brand or manufacturer and the influencer, which in turn, will require strengthening of disclosure requirements for influencer marketing. The mechanism for this will depend on the jurisdictional context of each country but may be addressed in BMS specific laws or in other laws to strengthen the general disclosures of commercial relationships between influencers and brands.

3.1.5 User-generated content

The challenge

User-generated content is any content, including text, images, videos, posts, that is created by users. While it is users who create the content, not the brands, brands can have a key role in encouraging or eliciting the creation and dissemination of user-generated content for marketing purposes (17). User-generated content promoting a brand or product may be incentivised through enticements of popularity or fame, by encouraging brand loyalty or through engagement techniques, such as ad creation competitions and contents. User-generated content has been found to be highly effective at

increasing purchase behaviors when users actively engage with a brand as opposed to being exposed to passive marketing messages (17). Challenges with the creation and dissemination of user-generated content that promotes BMS are primarily related to i) the inability to hold BMS manufacturers to account for users generating content that may promote a BMS product that would be in breach of a law and ii) the inability to hold private citizens liable under the law for operating within the online space thereby restricting their freedom of expression (4).

Potential solutions

While BMS manufacturers and distributors cannot be held liable for user-generated content that has been created or disseminated under circumstances outside of their control, governments can consider a regulatory response that prohibits a BMS manufacturer or distributor from engaging with users for any commercial purposes, including through the use of incentives to encourage user-generated content (e.g through competitions, games or promotion of fun, fame or brand loyalty), or by propagating organic user generated content (e.g through sharing, liking or commenting on user generated content or re-posting or publishing user testimonials on brand web-pages or social media accounts). Governments could also consider requiring content moderation by online platforms (publisher) where user-generated content that is in breach of a law is removed or modified, as is commonly done with some forms of misinformation or disinformation under online safety laws or through online platform codes of practice (4).

3.1.6 Transactional content

The challenge

There are two potential challenges related to online transactional content. The first relates to the freedom of BMS companies to conduct business and provide information without government interference and to trade without restrictions or prohibitions. This relates to transactional content on a BMS manufacturers own website or social media page or the sale of BMS products through a third-party platform (e.g amazon or online retailer). The second relates to the increasingly blurred distinction between marketing and e-commerce, with widespread use of shoppable marketing content (e.g posts with ‘buy-now’ or ‘shop-now’ buttons) placed within social media advertisements, on websites, or within emails. These are used to initiate a seamless and convenient purchase by taking users directly to a product page, a shopping cart, or a checkout page and have shown to influencing purchasing behaviors, impulse buying and can increase overall sales (18).

Potential solutions

BMS manufacturers should be able to operate their own webpages, social media platforms and applications, but these should be limited to the functionalities required to complete a sale and to provide factual information. All provisions within the Code should have effect for online point of sale content, including legible and compliant product labels (see Table 1). These point-of-sale provisions should extend to all third-party e-commerce platforms that sell BMS products. BMS manufacturers and distributors should not be allowed to use e-commerce shoppable buttons on any online content other that their own websites and platforms. Use of these on third party websites, apps, platforms, through email or other direct means constitutes a form of promotion and is prohibited under the provisions of the Code.

3.1.7 Cross border marketing

The challenge

Governments may consider that they cannot regulate the actions of a manufacturer or distributor that is not domiciled within its borders. For example, social media platforms are concentrated in specific countries (e.g the USA, China and Ireland) and therefore appear out of the jurisdictional reach of many governments. Likewise, some BMS brands are multi-national brands that may not have a legal presence in every country and are headquartered in a different country.

Potential solutions

Governments can regulate the actions of BMS manufacturers or distributors that do not live or operate inside its borders if the company is providing services or products inside its border (4). For example, the EU is taking an approach with its Digital Services Act that it can regulate a company that is carrying out business with any country within the EU, even if they are not headquartered there (19).

If the government can find a 'connecting factor' between the BMS manufacturer or distributor actions and a national law then this can provide the government with the jurisdictional power to find that actor liable under that law (4). There are three common ways that can 'connect' the conduct of an actor outside of a government's national borders with national laws to hold them liable (4). The first is nationality, for example if the actor has the nationality of a particular country, then the laws of that government can apply to that person (or 'legal person' like a company), regardless of where that person is based and where they conduct their activities. The second is territory, where if the conduct or activity happens in a certain country, the laws of that country apply to that person. The third is

targeting, so in the case of advertising, where advertising is targeted at the people of a country, that government has the jurisdiction to hold the BMS manufacturer or distributor liable under their laws (4).

Therefore, the jurisdictional reach of a law regulating digital marketing practices in a country can be broad, however, the major challenge is not the jurisdictional powers, it is the ability to enforce the law outside of the country (4). For more information around enforcement of the law with actors based overseas see section *3.2.3 Enforcement.*

3.2 Implementation

3.2.1 Monitoring implementation of the law

The challenge

Successful implementation of legal measures prohibiting the digital marketing of BMS products, requires an effective monitoring system to detect breaches of the law and to ensure the law is having its intended effect and without the exploitation of regulatory loopholes. Monitoring BMS marketing is much more difficult in the digital ecosystem, compared to marketing through traditional media. Digital marketing is often delivered in 'dark' formats, using segmented data (based on the characteristics and behaviors of individuals) to created highly personalised and ultra-targeted marketing messages that reach a very specific target audience, and no one else. This makes monitoring of digital marketing very challenging as much of it is not observable and data collection is highly resource intensive as there may be large volumes of data to collect and filter for monitoring purposes.

Potential solutions

Responsibility for monitoring digital marketing of BMS can be delegated to different government agencies using multiple methods of data collection and review. Governments can use mechanisms such as the purchasing of third-party marketing reports or use of AI-enabled monitoring systems (or virtual violation detectors) to detect breaches of the law on public websites (20).

Governments could also consider including powers in the legislation that requires greater transparency in digital marketing practices through discloser obligations on BMS manufacturers through reporting of all digital marketing practices. Governments could also require greater transparency of BMS distributors, including digital platforms, by requiring digital marketing to be observable within a public database (see example in Box 2) or through regular reporting on actions that online platforms have taken to moderate content that is in breach of a law. Monitoring could

also include civil society using a public complaint system to complement, not replace, government monitoring systems.

Box 2: Use of Internet regulation to enable monitoring of digital marketing of BMS

Laws modelled on the European Union's Digital Services Act that requires greater transparency from advertisers and other ad tech actors in their use of data driven marketing and profiling would also benefit governments in relation to monitoring the digital marketing ecosystem. If more governments were to introduce infrastructure that required online platforms to disclose the content of their digital advertisements and who paid for the advertisement, this would radically reduce the amount of monitoring that governments would have to undertake to ensure breaches of the law are detected. This would provide governments with a database for regular monitoring, but more importantly, would deter advertisers and online platforms from publishing prohibited content with such transparency measures in place.

3.2.2 Enforcing the law

The challenge

Enforcing a law that prohibits the promotion of BMS is one of the most difficult elements of incorporating the BMS Code at a national level that governments have faced, which is perceived to be even more challenging in the digital environment.

Enforcing online BMS marketing restrictions can add an extra layer of complication because of the ephemeral nature of digital marketing (see Section 3.2.1) and the variety of actors involved in the digital marketing supply chain (Figure 1), making it difficult to identify the actor responsible for the content that is in breach of the law. Enforcement relies on a strong monitoring system to capture breaches of the law (see Section 3.2.1), but also relies on ensuring that the enforcement powers and penalties are appropriate and act as a deterrent, and that they are comprehensively applied to all offending marketing content.

Potential solutions

It is important to consider the enforcement powers required and which actors will be given the powers to enforce the law so that the most appropriate enforcement powers and jurisdiction to issue remedies and enforcement mechanisms are granted. Depending on which actors are held liable the appropriate penalties required will vary. A range of remedies and enforcement mechanisms can be included in the law that vary in seriousness depending on the actor (e.g the advertiser compared to

the online publisher). The remedies or enforcement mechanisms should be proportional to the nature and seriousness of the breach of the law but also be a sufficient enough deterrent to ensure compliance with the law.

A list of the potential remedies and enforcement mechanisms relevant to digital marketing, are listed in Table 3.

Table 3: A list of remedies and enforcement mechanisms to regulate digital marketing

Remedies or enforcement mechanisms	Description
Content moderation	Monitoring and moderating content from an online platform.
Filtering	Removing content from an online platform.
Warning letters	Letter sent by public authorities to undertakings, requiring them to submit answers, documents or other evidence following an alleged unlawful practice.
Name and shame	Public lists of persons and/or undertakings that are not complying with the law.
Amendment of advertisement	Request to modify the content of an advertisement.
Withdrawal of advertisement	Measure aimed at the website operator (or host) to remove a non-compliant advertisement from the platform where it is posted.
Restrictions on future advertisements	Ban of a certain category of advertisement in the future
Account suspension	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.
Blocking and filtering measures	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 Internet Service Providers.
Take down of the brand's account or website	Shutting down a website where a product has been unlawfully advertised
Prosecution	Criminal or civil charges for company officers or company directors.
Fines	Impose monetary fines for infringement, with different levels of severity graded for seriousness of breach or repetition of non-compliance, so that they are effective and dissuasive. The size of the fine could be proportionate to the global turnover of the entity or corporate group that has violated the restrictions, or as above could be applied to individuals for corporate offences.

Source: Modified from World Health Organization. Restricting digital marketing in the context of tobacco, alcohol, food and beverages, and breast-milk substitutes: existing approaches and policy options. Geneva: World Health Organization; 2023 (4)

3.2.3 Cross-border enforcement

The challenge

While a BMS law can apply extraterritorially (see section 3.1.7), enforcing that law may be more difficult in digital media, particularly for countries with lower resources or global power to hold large multi-national companies to account. For example, holding social media companies liable, when the parent company is not based within the government's jurisdiction (e.g countries outside of the USA, for example, where large online platforms are headquartered), could make it more difficult to apply the penalties outlined in the legislation.

Potential solutions

Cross-border enforcement is more likely to be a concern where the distributors (publisher, i.e. social media platforms or websites) are held liable, as opposed to the manufacturers (advertiser) where there will potentially be a national presence and a legal entity in the country even when the manufacturer is headquartered elsewhere.

When a government makes decisions on the jurisdictional reach of the law, it is important to factor in the enforcement capacity of the country and what it is feasible to enforce (4). Broad jurisdictional powers are permitted under international law (see section 3.1.7), but it is important that each government allocates sufficient resources to enforcing their laws. There are other ways governments can enforce their BMS laws extraterritorially through enforcement cooperation, where governments work together, either regionally or globally, to help each other enforce the marketing laws. This mechanism could take the form of international agreements, regional agreements, informal exchanges of information, memoranda of understanding or extradition treaties (4). Another mechanism is to require any multi-national company, such as a social media platform, that wants to undertake business or provide services in a country, to have a legal entity present that can be held liable for any breaches of national laws.

3.2.4 Governance of implementation

The challenge

Given there are a diverse range of actors involved in the digital marketing of BMS and complexities in the monitoring and enforcement of any digital regulation, governments, especially Ministries of Health, can grapple with the issue of who is responsible for implementing the law.

Potential solutions

It is important to consider the overarching governance system of who is responsible and has the appropriate authority or jurisdiction to implement the different facets of the digital law. A BMS law regulating digital marketing can link to other laws and depend on other agencies other than health agencies to carry out key monitoring and enforcement roles.

Ministries of Health, in collaboration with other government agencies, should lead the mapping of every element of implementing the digital marketing aspect of the BMS law when designing the law. A multi-sectoral governance approach, led by the Ministry of Health, who has the mandate to legislate digital marketing of BMS, is the appropriate governance mechanism to adequately design the implementation of the BMS laws. Table 4 provides some guiding considerations for this mapping exercise.

Table 4: Governance considerations when designing legal measures to prohibit the digital marketing of BMS

Area of implementation	Overarching governance considerations
Liability	- Are actors along the marketing supply chain held liable for digital content (creation or publication etc) under any other laws – particularly online platforms?
Monitoring	- Who has overall responsibility/mandate for monitoring the law? - Are there any government agencies that are already monitoring the digital ecosystem (such as online harm regulators or data protection regulators) that are best placed to monitor this law? - Do they have the right powers to monitor the law? Do they need powers delegated to them to extend their jurisdiction to also monitor the BMS law? - Do they have enough resources (financial and human) to monitor the law?
Enforcement	- Is there a government agency that already has powers to enforce penalties against OR compel action by advertisers?

	- Is there a government agency that already has powers to enforce penalties against OR compel action by online platforms such as social media companies? - Can that agency be given delegated authority in the enabling BMS legislation to compel the actor to comply with the law and issue penalties and enforcement actions? - If not, what agency could be developed to carry out this task? - Does either the existing agencies or any newly established agency have enough resources (financial and human) to enforce the law?

The enabling legislation (either new BMS legislation implementing the BMS Code, if none currently exists OR extending existing national BMS legislation to include provisions for digital BMS marketing) should be the legislative vehicle that sets out the agreed governance relationship between different actors. The legislation or the regulations should clearly stipulate which government agencies are responsible for implementation, monitoring and enforcement – including where there is a need for inter-agency collaboration. In addition, the law should stipulate the powers given to all agencies to carry out their roles and responsibilities. Finally, the law should include provisions to ensure that the necessary resources to carry out the roles and responsibilities will be provided.

3.3 Future Proofing

The challenge

Our online and digital environments are rapidly evolving. The seemingly impossible may be just around the corner. The metaverse, a three-dimensional virtual world that merges physical and digital experiences, is opening up opportunities for new ways of marketing using virtual and augmented reality. For example, Coca-Cola has already purchased advertising real-estate in the metaverse and has released a special edition virtual Coca-Cola product available for purchase only in the metaverse. Use of augmented and virtual reality may become common tools in a marketer's toolbox to enable consumers to engage with marketing messages and products in an increasingly immersive and interactive manner. Use of voice search functions, chatbots, podcast marketing, generative AI for marketing content and seamless integration of offline and online marketing, are all becoming more sophisticated and may change the digital marketing environment as we currently know it. The future of digital marketing is ultimately uncertain.

Potential solutions

To ensure legal measures for the digital marketing of BMS stand the test of time, it is important that laws give effect to the provisions outlined within the Code. The Code includes broad provisions, which are likely to be applicable to future digital marketing developments, just as many of the provisions from the initial 1981 WHA endorsed guidance are applicable to the marketing of BMS through digital media today (see Section 3.1.1). This is because many of the provisions within the Code are broad and non-exhaustive, a principle that should be applied to any national laws that prohibit the digital marketing of BMS. The pace of development for digital marketing also emphasizes the importance of regular monitoring to ensure the law is meeting the intended legislative objectives (of prohibiting the marketing of BMS across all media) and to close any loopholes in the law as they arise if it is not.

4.0 Conclusion

Regulating digital marketing is not as technically difficult as it might appear. With good regulatory design and governance mechanisms in place, the implementation of a comprehensive measures to prohibit the digital marketing of BMS is feasible.

Contact

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