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REPORT: The Marketing of Unhealthy Foods and Beverages to Children

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Executive summary

Studies have shown that the marketing of unhealthy foods and beverages to children causes adverse effects on their health.¹ From a strictly scientific perspective such commercial practices raise an issue due to the fact that the brains of children are not entirely developed, thereby making them incapable of recognizing the difference between fact and fiction in advertisements. This makes children more susceptible to the marketing of unhealthy foods and beverages than the average adult. This kind of marketing is therefore highly likely to influence children's choices in consumption and their overall diet.²

Yet, from a legal perspective the mitigation of these negative effects is complex, especially with the current regulations in place. The Netherlands largely relies on a self-regulation model to regulate food marketing to children. This implies that the food industry regulates its own marketing behaviours regarding unhealthy foods and beverages.³

However, it has been argued that this model of self-regulation is inadequate.⁴ Combined with the health considerations at stake, this report therefore researches the possibility of introducing a ban on all marketing of unhealthy foods and beverages to children under the age of 18, as proposed by professor Seidell.⁵

The aim of this report is to provide an insight of the legal tools which can be used to reach this proposed goal. After thoroughly discussing the most relevant legal provisions, this report concludes with stating that although no specific provision at international, European or domestic level contains a specific obligation for the Dutch State to ban the marketing of unhealthy food and beverages to children, an obligation to adopt stricter regulations than are currently in place can reasonably be derived from the general duties the State has to protect children. In this report it is advised to lobby the Dutch State with a new rights-based approach. Nevertheless, if the Dutch State does not wish to change their current regulations or the proposed changes are inconsequential, it is advised to start court proceedings against the Dutch

¹ Jaap Seidell and others, 'Marketing of unhealthy foods and drinks to children and adolescents: The behavioural and biomedical consequences' (VU Honours class, 2021) 28.

² Ibid 5.

³ D. Mollet, 'Do States have obligations to regulate unhealthy food advertising under IHRL?', (University of Groningen, 2020). <https://www.rug.nl/rechten/onderzoek/expertisecentra/ghlg/blog/part-i-hfss-food-advertising-regulation-in-the-netherlands-12-10-2020#_ftn13>.

⁴ OECD, 'Obesity Report 2017' (OECD Publishing 2017) <<http://www.oecd.org/health/obesity-update.htm>> 13. Schuttelaar & Partners, 'Eindverslag Expertsessie: Mogelijkheden voor het beperken van aanbiedingen en marketing voor ongezonde producten' (in opdracht van het Ministerie van Volksgezondheid, Welzijn & Sport', 2020). <<https://open.overheid.nl/repository/ronl-ea3bb770-b6e7-4104-9444-ac53788bb435/1/pdf/eindverslag-expertsessie.pdf>>.

⁵ Jaap Seidell and others, 'Marketing of unhealthy foods and drinks to children and adolescents: The behavioural and biomedical consequences' (VU Honours class, 2021). Mimi Tatlow-Golden & Amandine Garde, 'Digital food marketing to children: Exploitation, surveillance and rights violations' (2020) 27 Global food security 1, 2.



State based on their failed obligation to sufficiently protect children. Additionally, in order to highlight the unlawfulness of individual advertisements, individual food and beverage companies can also be taken to court based on Dutch consumer law. While any legal claim based on this legal ground will not result in a ban on the marketing or advertising of unhealthy foods to children in general, it could still be relevant for the broader goal of ultimately banning that type of advertisement of marketing all together.

Keywords: unhealthy food, unhealthy beverages, HFSS foods, HPF (highly processed foods), children, adolescents, marketing, advertisement, health effects, legal framework, State obligations.



Preface

This report was written as part of the *Recht en Beleid Clinic* [Law and Policy Clinic] of the Amsterdam Law School (UvA). The research was carried out between February and July 2022 at the request of Prof. Dr. J.C. Seidell. His report on the behavioural and biomedical consequences of the marketing of unhealthy foods and drinks to children and adolescents,⁶ co-written by his students of the Vrije Universiteit Amsterdam, formed the starting point of this report. Our addressees are anyone interested in the health and rights of the child.

The main question this report tries to answer is: *‘Which legal rules can be utilised in order to support stricter regulations (preferably a ban) on the marketing of unhealthy foods and beverages to children and adolescents under the age of 18 and how can these rules be applied to realise this?’*. In order to answer this question, we engaged in legal doctrinal research, which provided us with a picture of how the current rules around child-marketing are legally structured. This legal doctrinal research mainly consisted of literature and case law review. Additionally, we engaged in comparative research in order to visualise the approaches other countries were taking concerning child-marketing. Furthermore, we utilised existing empirical research to report on what effects these approaches had in different countries. On the basis of this abovementioned research, we presented our legal arguments in Section 3 of this paper.

Working on this project has increased our awareness of the sheer amount of marketing of unhealthy foods and beverages to children, whether it is on television, radio, online or through product-packaging. Additionally, this project made us more conscious of the risks associated with overweight and obesity. With 1 in 7 Dutch children between the ages of 2 to 19 years old being declared either overweight or obese in 2020,⁷ the relevance of this report is clear. This relevance is even more stressed by the (still current) Covid-19 pandemic. With research showing that people who are overweight or obese are more likely to develop a severe Covid-19 infection,⁸ the pandemic has re-emphasized the current need to tackle overweight and obesity. Starting with factors that influence unhealthy eating patterns, such as food marketing, is a reasonable step.

⁶ Jaap Seidell and others, ‘Marketing of unhealthy foods and drinks to children and adolescents: The behavioural and biomedical consequences’ (VU Honours class, 2021).

⁷ J.C. Seidell, J. Halberstadt, ‘National and local strategies in the Netherlands for obesity prevention and management in children and adolescents, (S. Karger AG, Basel, 2020), 418.

⁸ Pauline Dekhuijzen, ‘Patients who are obese or overweight are at risk for a more severe course of Covid-19’, *Radboudum* (2021) <<https://www.radboudumc.nl/en/news-items/2021/patients-who-are-obese-or-overweight-are-at-risk-for-a-more-severe-course-of-covid-19>>.



During the process of writing, we were assisted by numerous people. We express our gratitude to our supervisors Bastiaan Wallage and Roland Bertens for their constant guidance, encouragement, and insightful feedback. We would also like to thank Linde Bryk for her support. Finally, many thanks to Prof. Dr. Seidell for trusting us with the legal research around this topic, but also for inviting us to a think-tank session on child-marketing. This meeting allowed us to take part in interesting discussions which were particularly inspiring for the writing of this report.



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SECTION 1: AN INTRODUCTION TO THE TOPIC



1.1. Introduction

Professor J.C. Seidell et al. have produced a paper on the behavioural and biomedical consequences of the marketing of unhealthy foods to children and adolescents.⁹ This report uses this paper to clarify the negative effects of the marketing of unhealthy foods and beverages to children,¹⁰ while highlighting the need for stricter regulation. Our client presented our team with a set of conditions a new regulation in the Netherlands should ideally meet (hereafter referred to as ‘the ban’ or ‘the regulation’ interchangeably), which this section will set forward. Simultaneously, this section will highlight the adverse health effects of food product advertising to minors, which will be obtained from the aforementioned report. Furthermore, we will provide an overview of the current regulatory framework in the Netherlands concerning the marketing of food products. Lastly, the Dutch regulatory system will be compared to the regulatory systems in other countries, from which we will draw lessons on how stricter regulations on the marketing of unhealthy food and beverages to children are generally implemented.

1.2. The factual background

1.2.1. Summary of findings from the report: The adverse health effects of HPF

A child’s mental and physical health can be drastically affected by the consumption of hyper palatable foods (HPF) and other foods often contain high amounts of fats, sugars and salts (HFSS).¹¹ Brain development can be drastically affected by the consumption of HPF, as these foods are designed to dysregulate normal appetite regulation (induces appetite) and dysregulate the brain’s reward and satiety mechanisms.¹² This can cause food addiction and overeating under children due to biochemical alterations in the sensory-specific satiety mechanisms. These kinds of foods have shown to dysregulate the brains food reward system by increasing dopamine production, making them addictive and highly popular under children.¹³

Early life high sugar and fat intake correlates with a wide range of epigenetic phenomena and diseases, diseases such as obesity, type 2 diabetes mellitus, inflammation, and neurocognitive disorders.¹⁴ These early life exposures can in turn can cause more severe later

⁹ Jaap Seidell and others, ‘Marketing of unhealthy foods and drinks to children and adolescents: The behavioural and biomedical consequences’ (VU Honours class, 2021) 1.

¹⁰ This paper uses ‘the marketing of’ and ‘the advertising of’ interchangeably or even in combination. We assign the same meaning to each of these varieties. It consists of marketing, advertisement and product packaging. The same goes for ‘unhealthy food and beverages’ or ‘unhealthy food products’. We assign the same meaning to each of these varieties.

¹¹ Jaap Seidell and others, ‘Marketing of unhealthy foods and drinks to children and adolescents: The behavioural and biomedical consequences’ (VU Honours class, 2021) 8.

¹² Ibid 7.

¹³ Ibid 7.

¹⁴ Ibid 15.

life health risks.¹⁵ Diets containing high amounts of fat, sugar and salt are also associated with inflammatory markers.¹⁶ Particularly processed foods, such as HPF's, contain a lot of pro-inflammatory properties, while whole grains, fruits and vegetables contain anti-inflammatory properties. These foods with pro-inflammatory properties are then associated with several chronic diseases, such as chronic low-grade inflammation.¹⁷

Importantly, the regular consumption of HPF's can have a drastic impact on the microbiome at the early stages of life, the composition of which predisposes the succeeding wellbeing of the microbiome¹⁸. A stable microbiome in early life is a buffer to prevent various non-communicable diseases, like obesity or IBD, but a dysbiotic microbiome can also further accelerate these conditions in later stages of life.¹⁹

Lastly, the report shows that a diet of HPF and HFSS processed foods does not only impact children's and adolescent's physical health, but furthermore has a drastic impact on their mental health. There is a cross-sectional association between an unhealthy diet and poor mental health in children and adolescents. Children with poor dietary patterns are at higher risk for developing a multitude of mental health issues such as depression, anxiety, psychiatric distress as well as decreased cognitive performance.²⁰ HFSS foods also negatively affect the synaptic plasticity of young brains by distorting the insulin and glucagon mechanism, which in turn negatively influences learning and memory.²¹ These effects are caused by both the toxic effects of unhealthy foods and the lack of nutrition due to these foods replacing healthier alternatives, as shown in the *Schijf van Vijf* [Wheel of Five].²²

1.2.2. Unhealthy food marketing expenditures

What are the justifications for targeting to marketing to reduce the consumption of HPF? Unhealthy foods are fiercely and extensively marketed to children below the age of 18. Food and beverage companies spend large amounts, reportedly around \$1.79 billion in 2009 by the Federal Trade Commission (FTC), to market their products to children.²³ The large majority (72%) specifically marketing three types of (unhealthy) products – breakfast cereals, fast foods,

¹⁵ Ibid 16.

¹⁶ Ibid 18.

¹⁷ Ibid 18.

¹⁸ Ibid 24.

¹⁹ Ibid 24.

²⁰ Ibid 29.

²¹ Ibid 31.

²² Ibid 30.

²³ Jaap Seidell and others, 'Marketing of unhealthy foods and drinks to children and adolescents: The behavioural and biomedical consequences' (VU Honours class, 2021) 2.

and carbonated drinks.²⁴ More recent numbers show that food marketing promoting these product categories to children varied from 60% to 90%,²⁵ the most common categories targeted towards children being pre-sugared breakfast cereals, soft drinks, savoury snacks, confectionery and fast foods. Particularly, HPF are targeted towards these age groups, which contain combinations of fat, sugar, carbohydrates and/or sodium at levels that make it more likely that consumers will continue to eat these kinds of foods over healthier alternatives.²⁶

1.2.3. Scope of regulation: Forms of advertisement

Strategies used to advertise unhealthy foods towards children rarely appeal to their health and nutrition, and often use specific deceptive techniques meant to appeal to children's "taste, humour, action-adventure, fantasy and fun"²⁷. This is often done using animated and other fictional characters, as well as endorsements by famous figures and product placement. These techniques are used in TV advertisements, through online media platform advertisement and prominently on product packaging. This report wishes to address these explicit and aggressive marketing techniques, through digital and in-store methods, that are explicitly directed to children below the age of 18.

Based on these findings, our client wants to pursue a ban in the Netherlands on all forms of marketing of unhealthy foods and drinks directed towards children and adolescents. Our client wants to expand the scope of regulation beyond the system we currently have in three key ways. Firstly, our client wants to base the current Dutch regulation on a stricter set of nutritional standards, specifically the Wheel of Five. Secondly, they want to extend the age of the child to which restrictions apply from the current 7-12 age range, to 18 and under. Thirdly, to expand the framework of enforcement from a self-regulating system to a statutory basis of enforcement. These three points will be expanded upon in the following subsections.

1.2.4. Scope of regulation: The Wheel of Five

HPF typically do not fit in the recommended daily food intake determined by the *Voedingscentrum* [Nutrition centre]. In the Netherlands we have nutritional standard called the 'Wheel of Five', which is the recommended nutritional standard used by the Nutrition centre,

²⁴ Ibid 2.

²⁵ Georgina Cairns and others, 'Systematic Reviews Of The Evidence On The Nature, Extent And Effects Of Food Marketing To Children. A Retrospective Summary' (2013) 62 *Appetite* 209–215.

²⁶ Ibid 2.

²⁷ Jaap Seidell and others, 'Marketing of unhealthy foods and drinks to children and adolescents: The behavioural and biomedical consequences' (VU Honours class, 2021) 3.

Gezondheidsraad [health council], and the RIVM [National Institute for Public Health and the Environment], among others.²⁸ However, this standard is currently not used in the Dutch regulatory system for food product advertisement, instead companies utilise their own nutritional criteria, which in some cases still allows HPF to be advertised. Therefore, diverse organisations and groups of experts with an expertise in nutrition have insisted for the Wheel of five to be used as the Dutch regulatory standard of nutrition for food advertisements, particularly those targeted at children. This standard consists of five classes of food, if consumed accordingly to the daily required caloric needs within the right proportions, it contains a healthy combination of minerals, vitamins, proteins, carbohydrates, fats and fibers.²⁹ It is therefore essential that foods that fall outside the Wheel of Five are not advertised towards children as this will induce an unhealthy lifestyle with an unbalanced nutritious value. In sum, this report seeks a stricter regulation to be implemented based on the Wheel of Five standard.

1.2.5. Scope of regulation: extending the age limit

Our client seeks to extend the Dutch regulation in the Netherlands to all minors, thus ages 18 and under. Currently, the Dutch regulatory system only applies food advertisement regulations directed to children till the age of 13. However, the report shows that HPF advertising can have a drastic impact not only on children, but also on adolescents under the age of 18, and particularly on their mental health.³⁰ Both children and adolescents are vulnerable to advertisement directed towards them because they do not have the ability to make conscious and informed decisions on their eating patterns.³¹ Adolescents are particularly vulnerable, as around this age they receive pocket money or start working, making them more susceptible to buying and consuming these food products than children. It is likely for this reason that unhealthy food patterns often start in middle school, and statistical data shows that overweight children between the ages of 12 to 18 has doubled in the Netherlands since the 1990's (while it has decreased slightly for children under 12)³². For these reasons, our client seeks a new regulation to extend the age of regulation to the age of 18 and under.

²⁸ Jaap Seidell and others, 'Marketing of unhealthy foods and drinks to children and adolescents: The behavioural and biomedical consequences' (VU Honours class, 2021) 8.

²⁹ Brink L and others, 'The Wheel Of Five Fact Sheet' (*Mobiel.voedingscentrum.nl*, 2017) <<https://mobiel.voedingscentrum.nl/Assets/Uploads/voedingscentrum/Documents/Professionals/Pers/Factsheets/English/Fact%20sheet%20The%20Wheel%20of%20Five.pdf>> accessed 17 July 2022.

³⁰ Jaap Seidell and others, 'Marketing of unhealthy foods and drinks to children and adolescents: The behavioural and biomedical consequences' (VU Honours class, 2021) 29.

³¹ *Ibid* 38.

³² Vzinfo 'Overgewicht | Volksgezondheid En Zorg' (*Vzinfo.nl*, 2022) <<https://www.vzinfo.nl/overgewicht>>.

1.3. Regulating food and beverages: The current framework

Currently, the Netherlands does not have any particular binding regulations on food and beverage advertisements, or product packaging aimed at children. Instead, it regulates this marketing through general legislation in areas such as media and consumer protection,³³ complemented by self-regulation.³⁴ Self-regulation entails that the industry regulates their own adherence to certain standards, without an authoritative governmental regulator to enforce those standards, as would be the case with legal measures.³⁵ The main source of self-regulation concerning marketing to children is the *Nederlandse Reclame Code* [Dutch Advertising Code]. This Advertising Code was first introduced in the 1960s and aims to ensure that companies advertise in a responsible manner.³⁶ It consists of a General Code and Special Advertising Codes. The General Code gives the definition of a ‘commercial’ (art. 1 Dutch Advertising Code) and stipulates general norms, such as that advertising cannot be misleading or contradict the truth (art. 7 Dutch Advertising Code). In addition to the rules from the General Code, there are multiple Special Advertising Codes that apply to the advertising or marketing of specific products. With regards to the marketing of food and beverages to children and product packaging aimed at children, the following Codes are of importance: ‘*Reclamecode voor Voedingsmiddelen*’ [Food Advertising Code], ‘*Kinder- en Jeugd reclamecode*’ [Child and Youth Advertising Code] and the ‘*Reclamecode Social Media & Influencer Marketing*’ [Advertising Code Social Media & Influencer Marketing]. The following paragraphs will discuss each of these Codes.

1.3.1. The Food Advertising Code (2019)

The Food Advertising Code applies to all advertisements for food products³⁷ intended for the Dutch market, irrespective of the medium used to advertise these products.³⁸ Article 8 paragraph 1 sub a of the Food Advertising Code states that companies cannot advertise food products to children younger than 13, unless the advertising concerns a collaboration with, or is supported by, the government and/or another recognized authority in the field of nutrition,

³³ See section 2 of this report: the Dutch Media Act and articles 6:193a-6:193j DCC.

³⁴ Panteia, ‘Regulering van Voedingsreclame Gericht op Kinderen: Een Verkenning van Beleid in elf Europese Landen’ (19 February 2015) 6.

³⁵ Panteia, ‘Regulering van Voedingsreclame Gericht op Kinderen: Een Verkenning van Beleid in elf Europese Landen’ (19 February 2015) 6-8.

³⁶ Panteia, ‘Regulering van Voedingsreclame Gericht op Kinderen: Een Verkenning van Beleid in elf Europese Landen’ (19 February 2015) 6.

³⁷ The term ‘food products’ includes all industrially prepared, often packaged, food and beverages intended for consumer use.

³⁸ Food Advertising Code, I General Provisions.

health or exercise. Sub c specifies that the food products which are advertised to children between the age of 7 to 12 needs to meet certain nutritional criteria.³⁹ Interestingly enough, an exception is made for marketing aimed at children below 13 when it concerns product packaging or point-of-sale material.⁴⁰

But when is marketing or an advertisement ‘aimed at children’? Article 8 paragraph 4 of the Food Advertising Code clarifies that an advertisement is considered to be aimed at children when: (a) it is shown on media-channels, which according to generally market-accepted reach-surveys, specifically target children below the age of 13 or (b) it is not shown on media-channels which specifically target children, but according to generally accepted reach-surveys more than 25% of the audience consists of children below the age of 13.

However, while this definition works well for print advertisements or TV commercials, it is difficult to apply these parameters to advertisements on websites, social media channels or other online platforms, since there are no generally accepted reach-surveys for those platforms yet. Therefore, the Food Advertising Code gives a non-exhaustive list of factors that can be taken into account in deciding whether an advertisement was aimed at children. These factors include the tone or choice of words, the design or animation utilized, the use of games and playful activities and the role of child idols.⁴¹ However, even with these factors the ‘*Reclame Code Commissie*’ [Advertisement Code Committee] (ACC) deems it difficult to determine whether a food company is targeting children via online platforms, as can be seen from their recent decision in *Foodwatch v. McDonald’s (2021)*. For instance, the sole fact that certain influencers are popular among young children was not enough to state that certain contested expressions were also specifically ‘aimed’ at children.⁴²

Additionally, the Food Advertising Code has introduced specific restrictions regarding the use of ‘child idols’ in commercials or packaging. Within the meaning of the Food Advertising Code, child idols are licensed media characters that are popular with children, such as cartoons or game characters. ‘Brand characters’, characters that have a relation with the brand and have no separate use outside the design made for the food product, fall outside of this definition and can be used freely.⁴³ Paragraph 2 sub a of article 8 states that child idols cannot be

³⁹ ‘Voedingskundige Criteria Reclame voor Voedingsmiddelen Gericht op Kinderen’ (February 2019) <<https://www.reclamecode.nl/wp-content/uploads/2019/02/Voedingskundige-criteria-Reclame-gericht-op-kinderen-7-tot-en-met-12-jaar-d.d.februari-2019.pdf>>.

⁴⁰ Article 8 paragraph 1 Food Advertising Code.

⁴¹ Food Advertising Code, II Advertisements, Explanation article 8 paragraph 4.

⁴² *Foodwatch v. McDonald’s*, case number 2021/00312 (10 February 2022) <<https://www.reclamecode.nl/uitspraken/foodwatch/voeding-en-drank-2021-00312/314776/>>.

⁴³ Food Advertising Code, I General Provisions.



used in advertisements, on packaging or point-of-sale materials⁴⁴ for children younger than 7 years old. When it concerns children between the age of 7 to 12, paragraph 2 sub b of article 8 states that child idols can only be used in advertising, packaging or point-of-sale materials if the food meets certain nutritional criteria.⁴⁵

1.3.2. Child and Youth Advertising Code (2013)

According to article 1 of the Child and Youth Advertising Code, advertisements directed at children below 18 years of age cannot contain words, sounds or images which can in any way mislead children about the possibilities or properties of the product which is offered. The explanation behind this article clarifies that in judging whether children could be misled by certain advertising, their comprehension and expectations should be taken into account.⁴⁶

Furthermore, article 2 paragraph 1 sub b of the Child and Youth Advertising Code states that advertising aimed at children must also not directly incite their parents or others to buy advertised products. Additionally, article 3 of the Child and Youth Advertising Code expresses that advertising directed at children cannot suggest that having or using that particular product gives them a physical or social advantage over other children, nor that not having that product would produce the opposite effect. The Child and Youth Advertising Code also contains articles on the use of hyperlinks in commercials and the use of social media and games.

1.3.3. Advertising Code Social Media & Influencer Marketing (2019)

This Advertising Code was realized in order to take into account the drastic change in marketing in recent years. With the rise of smartphones and social media, there were new forms of marketing that required more defining. The Advertising Code Social Media & Influencer Marketing therefore focuses on bloggers, vloggers and other online content creators who work with advertisers to promote a product via YouTube, Instagram, TikTok, Facebook, Twitter, Snapchat or podcasts. The main objective is to ensure that it is always clear when a brand or product is being advertised, to ensure transparency about the relationship between the influencer and the provider of the product.⁴⁷ It must be clear for a consumer whether an influencer is offered reimbursement in money or is receiving free products in order to display a brand or product in their content.

⁴⁴ Referring to advertisements present at a point of sale, such as a supermarket.

⁴⁵ 'Voedingskundige Criteria Reclame voor Voedingsmiddelen Gericht op Kinderen' (February 2019) <<https://www.reclamecode.nl/wp-content/uploads/2019/02/Voedingskundige-criteria-Reclame-gericht-op-kinderen-7-tot-en-met-12-jaar-d.d.februari-2019.pdf>>.

⁴⁶ Child and Youth Advertising Code, II General Provisions, Explanation article 1.

⁴⁷ Appendix to the Advertising Code Social Media & Influencer Marketing, Explanation.

1.3.4. *The shortcomings of self-regulation*

While this self-regulation seems quite encompassing, it has been argued that food and beverage companies still have too much leeway. For instance, it is still possible for these companies to advertise products which contain too much sugar, fat and/or salt, as these companies utilize their own nutritional criteria in their self-regulation instead of utilizing the WHO nutritional criteria or ‘the Wheel of five’-criteria.⁴⁸

Additionally, while the Food Advertising Code formulates restrictions on licensed characters, food and beverage companies can still use many other marketing tricks, such as contests, promotions and giveaways, to market to children.⁴⁹

Moreover, it has been argued that food and beverage companies can easily avoid the Advertising Codes when it concerns online platforms, because of the minimum age limit that these platforms generally set. The most popular online platforms, such as Facebook, Instagram and TikTok have all set a minimum age requirement of 13.⁵⁰ Therefore, formally speaking, there is no advertising or marketing aimed at children below 13 on these platforms. However, in practice, children below 13 can still access these online platforms and see the advertisements.⁵¹ Not only because large parts of these platforms are accessible without an account, but also because children can make an account by simply entering a different birthdate.⁵² This argument is of specific relevance considering the fact that the number of directly sponsored posts via Instagram and TikTok has increased over the last couple of years.⁵³

Furthermore, as advertising to children below the age of 13 via point-of-sale material or product packaging is still allowed under the current self-regulation, children are still regularly exposed to the advertisements of unhealthy foods and beverages.⁵⁴

Lastly, it is generally argued that the rules concerning the marketing of unhealthy food and beverages should apply to children up to an age of 18 as opposed to the age limit of 13

⁴⁸ Consumentenbond, ‘Nieuwe Reclamecode voor Voedingsmiddelen’ (2019)

<<https://www.consumentenbond.nl/acties/kindermarketing/nieuwe-reclamecode-voor-voedingsmiddelen>>.

⁴⁹ Consumentenbond, ‘Nieuwe Reclamecode voor Voedingsmiddelen’ (2019)

<<https://www.consumentenbond.nl/acties/kindermarketing/nieuwe-reclamecode-voor-voedingsmiddelen>>.

⁵⁰ YouTube is not mentioned here, as they have recently changed their advertising policies. YouTube now only shows advertisements of unhealthy food products to users who are logged in with an account showing that they are 18 years of age or older. See: Panteia, ‘Kindermarketing voor voedingsproducten: Monitor 2021’ (18 March 2022) 96.

⁵¹ Currently there is no specific data to indicate what portion of the visitors of these online platforms are under 13 years of age.

⁵² Panteia, ‘Kindermarketing voor Voedingsproducten: Monitor 2021’ (18 March 2022) 29.

⁵³ Ibid 5.

⁵⁴ Ibid.

years set by many self-regulatory initiatives.⁵⁵ The group between 12 and 18 years old is just as susceptible to the marketing of unhealthy food products as children younger than 12, because they are also not yet fully equipped with the cognitive knowledge to be aware of, and not succumb to, marketing strategies that target them.⁵⁶

These arguments already highlight some concerns with relying on self-regulation. However, besides the problems with the *content* of the self-regulation, there also seem to be shortcomings in the *enforceability and effectiveness* of self-regulation. Food companies do not seem to adhere to self-regulation.⁵⁷ This has also been stressed by the Organisation for Economic Co-operation and Development (OECD). In 2017 they stated that “[...] voluntary pledges, rather than regulation by law, may not be as effective in reducing children’s exposure to such advertisements”, due to a lack of participation by large food companies, the lack of enforceability and the weakness of the penalties for noncompliance.⁵⁸

This lack of enforceability can also be detected in the Dutch self-regulation system. The ACC assesses whether an advertisement complies with the applicable Advertising Code when a complaint is filed, but they do not have the power to impose any sanctions.⁵⁹ In certain cases the (threat of a) complaint procedure is enough to nudge food and beverage companies to adapt or remove their packaging or advertising. For instance, in a case of *Foodwatch v. Dairy4Fun* about their pudding desserts with Peppa Pig and Paw Patrol on the packaging, the manufacturer chose to adapt their packaging before the complaint procedure was finished.⁶⁰ Additionally, in a case of *Foodwatch v. 4Retail*, the manufacturer took certain products out of production after getting reprimanded by the ACC for violating article 8 paragraph 2 sub b of the Food Advertising Code on five different products.⁶¹ Lastly, more recently McDonald’s removed several Instagram-posts after the ACC declared that the posts were breaching the Food

⁵⁵ Emma Calvert, ‘Food marketing to children needs rules with teeth: A snapshot report about how self-regulation fails to prevent unhealthy foods to be marketed to children’ (2021) BEUC 7, 18.

⁵⁶ Jaap Seidell and others, ‘Marketing of unhealthy foods and drinks to children and adolescents: The behavioural and biomedical consequences’ (VU Honours class, 2021) 5.

⁵⁷ Bridget Kelly and others, ‘Global benchmarking of children’s exposure to television advertising of unhealthy food and beverages across 22 countries’ (2019) 20 Wiley 123-126 ; Consumentenbond, ‘Kinderen moeten wettelijk beschermd worden tegen reclame voor ongezond eten’ (2021)

<<https://www.consumentenbond.nl/gezond-eten/kinderen-moeten-wettelijk-beschermd-worden-tegen-reclame-voor-ongezond-eten>> accessed 17 July 2022 ; Panteia, ‘Kindermarketing voor voedingsproducten: Monitor 2021’ (18 March 2022) 5, 6.

⁵⁸ OECD, ‘Obesity Report 2017’ (OECD Publishing 2017) <<http://www.oecd.org/health/obesity-update.htm>> 13.

⁵⁹ Panteia, ‘Regulering van Voedingsreclame Gericht op Kinderen: Een Verkenning van Beleid in elf Europese Landen’ (19 February 2015) 34.

⁶⁰ *Foodwatch v. Dairy4Fun*, case number 2020/00365 (3 November 2020) <<https://www.reclamecode.nl/uitspraken/foodwatch/voeding-en-drank-2020-00365/283391/>>.

⁶¹ *Foodwatch v. 4Retail*, case number 2020/00363 (3 November 2020) <<https://www.reclamecode.nl/uitspraken/foodwatch/voeding-en-drank-2020-00363/281845/>>.

Advertising Code, because they showed SpongeBob and DC-characters with McDonald's food.⁶² However, in general these complaint procedures are not always sufficient to compel change from food and beverage companies, and while it is possible for a complainant to initiate civil or criminal proceedings, this can be relatively complex.

This system of self-regulation has led some authors to argue that the Netherlands is noticeably dependent on the willingness of companies to change their practices surrounding the child-marketing of unhealthy foods and beverages, as “there is no [legal] ban on unhealthy food for young people, there is no [legal] ban on food marketing (for unhealthy products) aimed at children, and there is no obligation to encourage a healthy diet”.⁶³ However, this reliance on self-regulation might not be beneficial for the goal the Dutch government is trying to reach, namely giving children extra protection against inappropriate ‘online’ advertising and child-marketing,⁶⁴ while also reducing obesity in general.⁶⁵ For instance, research by the Dutch National Institute for Health and Environment on the ban of commercials on sugary drinks has shown that “legal regulations [have] a greater effect on (the consequences of) the exposure of marketing and advertising via television to children than prohibition or restriction through self-regulation”.⁶⁶ A simulated legal introduction of an advertising ban on television advertising of unhealthy foods also showed a decrease in BMI and a decrease in the intake of unhealthy foods.⁶⁷ An expert group researching the options for limiting the marketing of unhealthy products on behalf of the Dutch Ministry of Health, Welfare and Sports has also recommended

⁶² Foodwatch v. McDonald's, case number 2021/00312 (10 February 2022)

<<https://www.reclamecode.nl/uitspraken/foodwatch/voeding-en-drank-2021-00312/314776/>>.

⁶³ Carja Mastenbroek, ‘Reclame Gericht op Kinderen: Amerikaanse Overheid beveelt nieuwe Richtlijnen aan voor Kindermarketing van junk food’ (*Reclameboek.nl*, 17 mei 2011)

<https://www.reclameboek.nl/www.delexbackoffice.nl/uploads/file/reclameboek/RB%20C_S_%20Mastenbroek,%20%E2%80%98Reclame%20gericht%20op%20kinderen_%20Amerikaanse%20overheid%20beveelt%20nieuwe%20richtlijnen%20aan%20voor%20kindermarketing%20van%20junk%20food%E2%80%99%20RB%20909.pdf>.

⁶⁴ ‘Omzien naar elkaar, vooruitkijken naar de toekomst: Coalitieakkoord 2021-2025 VVD, D66, CDA en ChristenUnie, (15 December 2021) 31.

⁶⁵ ‘Maatregelen Nationaal Preventieakkoord’ (*Rijksoverheid.nl*, 2018)

<<https://www.rijksoverheid.nl/onderwerpen/gezondheid-en-preventie/nationaal-preventieakkoord>>; ‘Omzien naar elkaar, vooruitkijken naar de toekomst: Coalitieakkoord 2021-2025 VVD, D66, CDA en ChristenUnie, (15 December 2021) 33.

⁶⁶ E. Steenbergen, E. Nawijn & M. Hendriksen, ‘Effectiviteit van een verbod op prijsaanbiedingen op suikerhoudende dranken: een literatuuronderzoek naar de effectiviteit van een verbod op prijsaanbiedingen en marketing- en reclame-uitingen in de supermarkt’ (RIVM, 2020) 15.

⁶⁷ *Ibid.*

a legally-regulated, broad package of measures in order to achieve the objectives of the National Prevention Agreement.⁶⁸

1.4. Overview of international policies regarding marketing of unhealthy foods to children

Marketing of unhealthy foods and beverages to children has been a concern among the international community. Since Québec in 1980, multiple countries across the world have introduced bans on marketing of unhealthy food and drinks to children.⁶⁹ Statistics show that 10 countries in the European Union (EU) have adopted statutory regulation in that field. Very recently in 2022, Spain introduced its plan to ban advertising of unhealthy foods to children.⁷⁰ Although no action at European Union level can be identified at this stage, organizations such as Foodwatch, Eurochild and European Public Health Alliance have called on the EU to adopt legislation and even drafted a “blueprint Food Marketing Directive”.⁷¹

1.4.1. *The rationales*

Countries that have introduced bans on unhealthy food products to children have done so according to two main rationales: the rights-based approach and the risks-based approach.⁷²

The rights-based approach is built on the United Nation Convention on the Rights of the Child (UNCRC) which was ratified by the Netherlands in 1995.⁷³ According to this approach, there is a duty for governments to protect children as they are particularly vulnerable to the influence of marketing strategies.⁷⁴ In that sense, the supporting articles for the rights-based approach are article 24(2) UNCRC on the right to the provision of adequate nutritious food and article 27

⁶⁸ Schuttelaar & Partners, ‘Eindverslag Expertsessie: Mogelijkheden voor het beperken van aanbiedingen en marketing voor ongezonde producten’ (in opdracht van het Ministerie van Volksgezondheid, Welzijn & Sport’, 2020) <<https://open.overheid.nl/repository/ronl-ea3bb770-b6e7-4104-9444-ac53788bb435/1/pdf/eindverslag-expertsessie.pdf>>.

⁶⁹ Obesity Policy Coalition, ‘Policy brief: Restrictions on marketing unhealthy food to children, - international comparison’, (Obesity Policy Coalition, January 2018), 1-2.

⁷⁰ Miguel Angel Medina, ‘Spanish government to ban advertising aimed at children of unhealthy foods such as chocolate, juices and ice creams’, *El pais*, (Madrid/Barcelona, 2021).

⁷¹ Kate Askew, ‘EU ‘must legislate’ on unhealthy marketing for kids: ‘Industry self-regulation is not working’’, *Food Navigator* (10 November 2021); European Public Health Alliance, ‘Blueprint Directive on the approximation of the laws of Member States on the protection of children from the marketing of nutritionally poor food’, (EPHA, November 2021) <<https://epha.org/wp-content/uploads/2021/11/blueprint-eu-directive-protect-children-against-the-marketing-of-nutritionally-poor-food-final-november2021.pdf>>.

⁷² World Health Organization, ‘Marketing of foods high in fat, salt and sugar to children: update 2012-2013’, (WHO, 2013), 9 <https://www.euro.who.int/_data/assets/pdf_file/0019/191125/e96859.pdf>.

⁷³ Government of the Netherlands, ‘Human rights in the Netherlands’ <<https://www.government.nl/topics/human-rights/human-rights-in-the-netherlands>>; Gabriella Ramdhan, Vyerna Kwakkel and Stina Ihle Amankwah, ‘Children’s Right to Water in the Netherlands’, (PILP NJCM, 2016), 25.

⁷⁴ World Health Organization, ‘Marketing of foods high in fat, salt and sugar to children: update 2012-2013’, (WHO, 2013), 9 <https://www.euro.who.int/_data/assets/pdf_file/0019/191125/e96859.pdf>.



UNCRC on the right to an adequate standard of living.⁷⁵ Among the countries that have followed this rationale when introducing their restrictions are Québec, Norway and Sweden.⁷⁶

In particular instances, the rights-based approach uses a State's national constitution as its foundation. This was the case for the food product regulations that were implemented in Spain, France and multiple Scandinavian countries. However, in the Netherlands, courts may not assess whether laws and treaties in place are contrary to the Constitution, known as *het toetsingsverbod* [the testing ban] under Article 120 of the Constitution⁷⁷. Thus, in Netherlands we cannot base the duty of the State to pass a stricter ban on child marketing upon the Constitution as other countries have. However, the Dutch constitution can still be used as an authoritative source to support other sources of law.

The risks-based approach is much rather linked to economic considerations. It consists in “weigh(ing) up the multiple likelihoods of harm and benefit in terms of outcomes, to minimize the risk of harm and maximize the benefit”.⁷⁸ Among the countries that have introduced risk-based policies are the United Kingdom, Ireland, Chile, France and several others.⁷⁹ In 2021, the government of the United Kingdom announced its intention to ban on TV before 9pm as well as online, all food advertising targeting children under the age of 16. These measures would take effect in 2023.⁸⁰ When it comes to the rationales behind this policy, it appears that it was not supported by law. Instead, the policy papers mention that market failure considerations are at the origin of the proposed ban. Those considerations are negative externalities and information failure.⁸¹ Negative externalities refer to the health costs associated with excess calorie consumption that are passed on to society and therefore, not just experienced by the individual.⁸² As for information failure, it is linked to the lack of transparency of manufacturers and consequently the lack of awareness of consumers about the implications of consumption of HFSS products for their future health.⁸³

⁷⁵ Ibid; Michael. I. Goran, *Childhood obesity. Causes, consequences and intervention approaches*, (CRC Press, 2017).

⁷⁶ World Health Organization, ‘Marketing of foods high in fat, salt and sugar to children: update 2012-2013’, (WHO, 2013), 9 <https://www.euro.who.int/_data/assets/pdf_file/0019/191125/e96859.pdf>.

⁷⁷ Parlement.com, ‘Constitutionele Toetsing’ (Parlement, 2022).

⁷⁸ World Health Organization, ‘Marketing of foods high in fat, salt and sugar to children: update 2012-2013’, (WHO, 2013), 9 <https://www.euro.who.int/_data/assets/pdf_file/0019/191125/e96859.pdf>.

⁷⁹ Ibid.

⁸⁰ Mark Sweney, ‘UK to ban junk food advertising online and before 9pm on TV from 2023’, *The Guardian*, (23 June 2021).

⁸¹ UK Government, ‘Introducing a 2100-0530 watershed on TV and online restriction for paid advertising of food and drink that are High in Fat, Salt and Sugar (HFSS products)’, (*Gov.uk*, 25 May 2021), 18.

⁸² Ibid.

⁸³ Ibid.



1.4.2. The Quebecois example

In 1980, Québec introduced through section 248 of its Consumer Protection Act a prohibition to “make use of commercial advertising directed at persons under thirteen years of age”.⁸⁴ The very general wording of the article makes multiple advertising techniques fall under its scope, such as “web, radio, television, mobile, signage, promotional items or printed materials such as newspaper, magazines and flyers”.⁸⁵ Moreover, the legislation provides guidance as to how to determine whether commercial advertising is directed at persons under 13. When it comes to that analysis, criteria such as the timing and placement of the advertisement or the extent to which the promoted product appeals to children are relevant to consider.⁸⁶

As highlighted in the previous section, Québec adopted the rights-based approach to ban food advertising to children in 1980. This legislation was implemented in response to growing concerns about childhood obesity in the province.⁸⁷ At the time, Québec’s statutory legislation was “the first of its kind”.⁸⁸ It is fair to say that it has been enforced long enough for its results to be assessed. In that regard, the first study to highlight the effects of Quebec’s ban on food advertising to children was conducted in 2007.⁸⁹ Although not focused on results regarding the obesity rate in Québec, the study highlighted that the ban “decreased expenditure on fast food in Quebec between \$13.73 and \$31.27 million per year in the 1980s and early 1990s”.⁹⁰

In 2011, it was highlighted that although “it is difficult to assess the effect of the ban on health outcomes without further knowledge of the detailed food and lifestyle habits (e.g., frequency and type of physical activity)”, Québec had one of the lowest obesity rates in Canada, though its children were deemed to have the most sedentary lifestyles.⁹¹ Consequently, Justin Trudeau called on the health minister of Canada in 2015 to adopt “new restrictions on the commercial marketing of unhealthy food and beverages to children, similar to those now in

⁸⁴ Office de la protection du consommateur, ‘Advertising directed at children under 13 years of age: guide to the application of sections 248 and 249 Consumer Protection Act’, (Office de la protection du consommateur, 2012), 2.

⁸⁵ Ibid 3.

⁸⁶ Quebec Coalition on Weight-Related Problems, ‘A review of Food Advertising to Children in Quebec’, <<https://cqpp.qc.ca/en/our-priorities/marketing-to-kids/review-food-advertising-children-quebec/>> accessed 17 July 2022.

⁸⁷ Kathy Baylis & Tirtha Dhar, ‘Effect of the Quebec advertising ban on junk food expenditure.’, (University of British Columbia, 2007), 2 <<http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.564.4479&rep=rep1&type=pdf>>.

⁸⁸ Timothy. A. Wise, ‘Eight countries taking action against harmful food marketing’, *Food Tank* (2016). <<https://foodtank.com/news/2016/06/eight-countries-taking-action-against-harmful-food-marketing/>>

⁸⁹ Kathy Baylis & Tirtha Dhar, ‘Effect of the Quebec advertising ban on junk food expenditure.’, (University of British Columbia, 2007), 2.

⁹⁰ Ibid.

⁹¹ Tirtha Dhar, Kathy Baylis, ‘Fast food consumption and the ban on advertising targeting children: the Quebec experience’, (2011) *Journal of Marketing Research* Vol. XLVIII, 811.

place in Quebec” in response to rising childhood obesity in Canada.⁹² However, such legislation has not yet been implemented at national level.

The ban proposed by our client for the Netherlands would cover advertisements displayed on television, online advertisements, as well as non-online advertisements such as marketing through product-packaging. Hence, it would be similar to Québec’s policy in terms of the types of media platforms covered. However, it would differ from Québec’s approach in respect to the age-range of the children concerned, as our client proposes a ban on marketing of food products targeting children under the age of 18.

1.4.3. *The Chilean example*

Before addressing the results of the Chilean policy, it is necessary to highlight that it was adopted as a response to a severe obesity problem faced across the Chilean population. In that sense, the Government of Chile published an “Evaluation report on the implementation of the law on nutritional composition of food and its advertising” in which it highlighted as background information for the policy that more than 60% of the population in Chile was overweight in year 2010.⁹³ When it comes to children specifically, obesity affected 10% of children under 6 years of age in 2016, 15% of pre-schoolers in 2015 and more than 25% of first graders in 2016.⁹⁴ In the Netherlands, obesity has similarly to Chile or Québec at the time, become a serious concern. CBS Netherlands reported that in 2021, the obesity rate was “far above the target” set by the Dutch government for 2040.⁹⁵ Regarding children specifically, it appears that “16% of all children and young people in the Netherlands aged 2 to 24 years were overweight” in 2018.⁹⁶ Additionally, a study conducted by the University of Maastricht in February 2022 found that the total societal cost of obesity for the Netherlands amounts to over €79 billion a year.⁹⁷

⁹² Yasmine Ghania, ‘Health Canada to study impact of online food ads on children’, *Canada’s national observer* (8 December 2020) <<https://www.nationalobserver.com/2020/12/18/news/health-canada-study-online-food-ads-children>>.

⁹³ Subsecretaría de Salud Pública, Departamento de Nutrición y Alimentos (Public Health subsecretariat, Department of Nutrition and Food, Ministry of Health, Government of Chile), ‘Evaluation report on the implementation of the law on the nutritional composition of foods and their advertising’, (June 2017) 3.

⁹⁴ Ibid.

⁹⁵ CBS Netherlands, ‘Obesity, smoking and drinking hardly down since 2018’, (CBS Netherlands, 16 March 2022) <<https://www.cbs.nl/en-gb/news/2022/10/obesity-smoking-and-drinking-hardly-down-since-2018>> accessed 17 July 2022.

⁹⁶ CBS Netherlands, ‘One-quarter of young adults were overweight’, (CBS Netherlands, 10 April 2019) <<https://www.cbs.nl/en-gb/news/2019/15/one-quarter-of-young-adults-are-overweight>> accessed 17 July 2022.

⁹⁷ Maastricht University, ‘Costs overweight and obesity over €79 billion a year’, (Maastricht University, 1 February 2022) <<https://www.maastrichtuniversity.nl/news/costs-overweight-and-obesity-over-%E2%82%AC79-billion->



In 2016, Chile’s “Law 20.606, on the nutritional composition of foods and their advertising” (Law 20.606) came into force.⁹⁸ The extensive content of the Chilean ban has served as an inspiration for many countries across North and South America⁹⁹ and its post-policy results appear encouraging. Law 20.606 aimed at requiring “front-of-package warning labels to identify pre-packaged HFSS foods and beverages”, forbidding “HFSS foods in school kiosks and feeding programs”, and restricting “the marketing of HFSS foods to children under age 14 years across different media platforms”.¹⁰⁰ Among the media platforms covered by the Chilean policy are “websites, social media, magazines, billboards, pamphlets, newspapers, radio and television”.¹⁰¹ Regarding television which is the main platform on which advertising is displayed in Chile, Law 20.606 provides that the advertising of a product is deemed to be targeting children under the age of 14 if it appears that 20% of the audience at the time of its display are within that age-range.¹⁰² In that sense, Chile supplemented its legislation by adopting Law 20.869 in 2017 which “extends the television advertising restriction across the broadcast day from 06.00 to 22.00 hours”.¹⁰³ Finally, the Chilean legislation addresses numerous marketing strategies that are targeted by the ban such as “taste, happiness, nutrition and promotional content, fantasy, popularity cues and animated or licensed characters”.¹⁰⁴ As highlighted in the previous section, the ban proposed by our client would also be similar to Chile’s policy in terms of the types of media platforms covered, but differ in terms of the age-range of the children concerned.

[year#:~:text=Costs%20overweight%20and%20obesity%20over.a%20year%20%2D%20news%20%2D%20Maastricht%20University>](#), accessed 17 July 2022.

⁹⁸ Law No. 20.606. on nutritional composition of food and food advertising (as amended by Law No. 20.869 on food advertising), 2015 <<https://wipo.lex.wipo.int/en/legislation/details/16343>>.

⁹⁹ Azam Ahmed, Matt Richtel, Andrew Jacobs, ‘In Nafta Talks, U.S. tries to limit junk food warning labels’, *New York Times*, (New York, 20th march, 2018). The article mentions that “Officials in Mexico and Canada – along with governments in Brazil, Peru, Uruguay, Argentina and Colombia – are discussing options like the use of colors, shapes and other easy-to-understand symbols that warn consumers of health risks”. They were inspired in large part by Chile’s introduction of stringent regulations in 2016 that include requirements for black stop-sign warnings on the front of some packages” <<https://www.nytimes.com/2018/03/20/world/americas/nafta-food-labels-obesity.html>>.

¹⁰⁰ Stephen Daniells, ‘By how much will Chile’s food labelling and advertising law slash advertising of junk food to kids?’, (Food Navigator, 10 January 2019) <<https://www.foodnavigator-latam.com/Article/2019/01/10/By-how-much-will-Chile-s-food-labeling-and-advertising-law-slash-advertising-of-junk-food-to-kids>>.

¹⁰¹ Teresa Correa and others, ‘The prevalence and audience reach of food and beverage advertising on Chilean television according to marketing tactics and nutritional quality of products. Public Health Nutrition’, (NIH, 2019), 1114 doi:10.1017/S1368980018003130

¹⁰² Ibid.

¹⁰³ Teresa Correa and others, ‘The prevalence and audience reach of food and beverage advertising on Chilean television according to marketing tactics and nutritional quality of products. Public Health Nutrition’, (NIH, 2019), 1114 doi:10.1017/S1368980018003130

¹⁰⁴ Ibid 1116.

After the introduction of the Law 20.606, a study found that significant decreases in exposure to television advertising of HFSS products and consumption of those products were observed after only 1 year of implementation.¹⁰⁵ When it comes to high-sugar beverages only, their consumption post-policy was deemed to have declined by 20-30%.¹⁰⁶ However, these decreases were allegedly not caused by the policy alone. The study adds that the implementation of the policy was supported by mass media campaign aimed at raising awareness in the consumers about the labelling components of the law as well as “ample coverage of the law in the main media outlets, such as newspapers and broadcasts news”.¹⁰⁷

What the Chilean example illustrates is that changes in consumptions of unhealthy foods and drinks are achievable in a relatively short period of time provided that statutory regulation is adopted regarding the advertising, but also the access that children have to these products. Although our client proposes to start with a ban on advertising of unhealthy foods and beverages to children only, it is fair to affirm that such a policy would be a first step leading to changes in consumption of the said food products.

1.5. Comparative analysis with tobacco policy control in the Netherlands

1.5.1. An area initially subject to self-regulation

Certain similarities can be found when it comes to the Dutch policy on food marketing of unhealthy foods to children and the previous Dutch policy on tobacco advertising. It appears that up until the adoption of the EU Tobacco Advertising Directive in 2003 and ratification by the Netherlands of the World Health Organization (WHO) Framework Convention on Tobacco Control (FCTC) in 2005, the Dutch policy consisted in “trusting the industry that it could restrain its advertising without needing direct governmental intrusion”. For that matter, the Dutch government blocked the adoption of the EU Tobacco advertising Directive multiple times due to its preference for self-regulation.¹⁰⁸

Eventually, the Directive was adopted but only covered cross-border advertising. The legal instrument that substantially affected the tobacco advertising policy in the Netherlands was the FCTC Treaty. It included numerous measures including bans on tobacco advertising and

¹⁰⁵ M.L. Jensen., and others, ‘Examining Chile’s unique food marketing policy: TV advertising and dietary intake in preschool children, a pre-and post-policy study. *Pediatric obesity*’ (Wiley, 2021) 6. See “TABLE 3 Associations between policy implementation (2017 vs 2016) and consumption of overall high-in accounting for mediation by advertising exposure (n = 853)”

¹⁰⁶ M.L. Jensen., and others, ‘TV advertising and dietary intake in adolescents: a pre- and post- study of Chile’s Food Marketing Policy’ (2021) *International Journal of Behavioral Nutrition and Physical Activity* 18(1):60.

¹⁰⁷ *Ibid* 7.

¹⁰⁸ Marc C. Willemsen, *Tobacco control policy in the Netherlands: between economy, public health, and ideology*, (Springer Nature, 2018) 149-150.

promotions. However, although the measures of the FCTC were binding, there was no enforcement mechanism to ensure their implementation.

1.5.2. *The role of civil societies in getting States to adopt legislation*

What the tobacco policy control in the Netherlands has illustrated is that when it comes to WHO or UN provisions that have no enforcement mechanism, it is left to civil societies to play a role by calling on governments to comply or challenging them in court.

This happened in a case that was brought in the Supreme Court of the Netherlands. In *Clean Air Netherlands v. the Dutch State*¹⁰⁹, the Dutch Supreme Court ruled that by refraining to adopt legislation aimed at protecting citizens from exposure to tobacco smoke in indoor workplaces and other public places, the Dutch State had violated article 8.2 of the WHO Framework Convention on Tobacco Control.¹¹⁰

Regarding food marketing to children, certain provisions which will be introduced in section 2 are found in United Nations Conventions like the Convention on the Rights of the Child, with no enforcement mechanism. Similarly, to the *Clean Air Netherlands* case, this paper will address in section 3 procedural strategies including the possibility of taking the Dutch State to Court.

1.6. Concluding remarks section 1

The report produced by prof. Seidell shows the adverse consequences of the advertisement of HPF and other foods and beverages containing high amounts of fats, sugars and salts (HFSS). Particularly, the findings show how the regular consumption of these products severely affect children's physical and mental health. For example, the regular consumption of these foods is correlated with a wide range of diseases in youth such as type 2 diabetes mellitus, obesity, inflammation, and neurocognitive disorders. These can in turn cause more severe health risks. Furthermore, the consumption of HPF is particularly damaging to children as it dysregulates the brain's reward and satiety mechanisms and composition of the microbiome at the early stages of life, which can have a drastic impact on life-long eating patterns. The report emphasises that children and adolescents are particularly vulnerable to advertisements directed towards them because they typically do not have the ability to make an informed decision on their eating pattern.

¹⁰⁹ *Clean Air Netherlands v. Dutch State*, (2014), ECLI:NL:HR:2014:2928

¹¹⁰ Marc C. Willemsen, *Tobacco control policy in the Netherlands: between economy, public health, and ideology*, (Springer Nature, 2018), 157.



Based on these findings, our client wants to pursue a ban in the Netherlands on all forms of marketing of unhealthy foods and drinks directed towards children and adolescents. Currently, the Netherlands does not have any particular binding regulations on the marketing of unhealthy food and beverages directed towards minors. Instead, the Netherlands regulates this marketing through general legislation in areas such as media and consumer protection, complemented by self-regulation. However, this regulatory system has numerous shortcomings. For instance, companies are still able to advertise HFSS products, as companies can utilise their own nutritional criteria in their self-regulation. Additionally, this self-regulation does not effectively regulate these undesired forms of marketing as the companies face few consequences for breaching these agreements. Lastly, many marketing tricks are not covered by the regulation, such as contests, promotions and giveaways, to market to children.

Our client wants to expand the scope of regulation beyond the system we currently have in three keyways. Firstly, to expand the framework of enforcement from a self-regulating system to a statutory basis of enforcement. Secondly, we seek to extend the age of the child to which restrictions apply from the current 7-12 age range, to 18 and under. Thirdly, our client wants to base the current Dutch ban on a stricter set of nutritional standards, specifically the Wheel of Five.

Our research found that relatively similar statutory bans on the marketing of HFSS foods and beverages directed towards minors exists in several countries. However, every ban differed in three substantial ways from the ban our client was pursuing:

Firstly, most countries have a different set of nutritional standards than those we seek upon which they base their regulation, are targeting different age groups, or are regulating different marketing techniques or platforms. For example, most countries' have strict enforceable bans on traditional media (e.g. TV, radio), but do not regulate online advertisements or physical advertisements (e.g. packaging) to the same extent.

Secondly, other countries with similar criteria to our ban have implemented their ban based on a risk-based approach (e.g. Chile, United Kingdom). This is a non-legal approach which is more closely linked to economic considerations and is usually implemented through risk-based societal pressure, thus falling beyond the scope of our rights-based litigation advice.

Thirdly, while some countries have passed bans that meet the criteria of our client, such as for Spain, the legal foundation for such a ban is primarily based on their national constitution. However, in the Netherlands, under Article 120 of the Constitution, courts may not assess whether laws and treaties in place are contrary to the Constitution, known as the



testing ban. Thus, we cannot base the duty of the State to pass a stricter ban on child marketing upon the Constitution. However, the constitution can still be used as an authoritative source to support other sources of law.



SECTION 2: THE LEGAL FRAMEWORK

2.1. Introduction

This section of the report aims to provide an overview of the current legal framework which relates to the marketing and advertisement of unhealthy products to children. The applicable laws and regulations will be discussed in three parts. Firstly, the applicable international law will be introduced. This part will include the United Nations Convention on the Rights of the Child, the European Convention on Human Rights and the European Social Charter.¹¹¹ Secondly, the applicable EU law will be described. This part will consist of the Audiovisual Media Services Directive. Lastly, the applicable Dutch laws will be highlighted. This part will include articles 6:193a to 6:193j of the Dutch Civil Code.

2.2. International law

2.2.1. Article 3 United Nations Convention on the Rights of the Child: Right to health

The United Nations Convention on the Rights of the Child (UNCRC)¹¹² is legally binding to all countries that became a party to the Convention by signature and ratification or by accession. While the signature does not create a binding legal obligation for states, as they solely need to refrain from acts that “would defeat or undermine the treaty’s objective and purpose”, ratification entails that a state is “legally bound by the terms of the Convention”.¹¹³ The Netherlands has ratified the UNCRC in 1995 and is therefore bound by its provisions.¹¹⁴

Article 3 of the UNCRC is of importance, especially in conjunction with article 24 UNCRC.¹¹⁵ Paragraph 1 of this article states that “all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, [should have] the best interests of the child [as] a primary consideration”. According to General Comment No. 14 on article 3 of the UNCRC, article 3 UNCRC creates an *intrinsic obligation* for States, is directly applicable and can be invoked before a court.¹¹⁶ This obligation does not only stand for State obligations concerning judicial

¹¹¹ The Convention on Economic, Social and Cultural Rights (article 11 and 12) will not be discussed. The Dutch government has taken the view that the treaty provisions of this Convention are not directly binding. See Kamerstukken II 1975/76, 13932, nr. 3, 12-13 (MvT).

¹¹² In the context of the Convention on the Rights of a Child a ‘child’ is every human below the age of eighteen (article 1 UNCRC).

¹¹³ UNICEF, ‘How the Convention on the Rights of the Child works’ (*UNICEF.org*)

<<https://www.unicef.org/child-rights-convention/how-convention-works>>.

¹¹⁴ OHCHR, ‘Ratification Status for CRC – Convention on the Rights of the Child’ (*OHCHR.org*)

<https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CRC&Lang=en>.

¹¹⁵ Martijn Geurts, ‘Een Voedselzaak tegen de Overheid: De Juridische Mogelijkheden en Grenzen voor een Urgenda-achtige Vordering’ [2022] NJB 354.

¹¹⁶ UN Committee on the Rights of the Child, ‘General Comment No. 14: on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)’ (29 May 2013) UN Doc CRC/C/GC/14 <<https://www.refworld.org/docid/51a84b5e4.html>> 4.

and administrative decisions or policies and legislation concerning children, but also transfers to an obligation to ensure that the interest of the child has been assessed and is “taken as a primary consideration in decisions and actions taken by the private sector”.¹¹⁷ While the UN Committee on the Rights of the Child (hereinafter: the Committee) acknowledges that almost all activities by the State or the private sector could affect children in one way or another, they argue that a greater level of protection and more detailed procedures focused on the best interests of the child are required when a decision has a major impact on children.¹¹⁸

In terms of the discussion how ‘the best interests of the child’ should be interpreted, the Committee argues that this should be decided on a case-by-case basis. It is recognized however that the child's right to health and the right to protection against economic exploitation are central in assessing the child's best interest.¹¹⁹ In case that there are potential conflicts between the best interests of the child and other interests, there should be a careful balancing-act. In this balancing-act “a larger weight must be attached to what serves the child best”.¹²⁰

2.2.2. Article 6 United Nations Convention on the Rights of the Child: Right to life¹²¹

Article 6 paragraph 1 of the UNCRC stipulates that every child has an inherent right to life. Paragraph 2 of article 6 UNCRC states that State Parties shall insure, to the maximum extent possible, the survival and development of the child. The Committee interprets this article broadly, as they have stated that this article “encompasses the minimal conditions for a life with dignity”.¹²² As a result, the right to life also effectively covers other economic, social and cultural rights that contribute to the quality of that life, such as food.¹²³

In General Comment No. 16 on State obligations regarding the impact of the business sector on children's rights, the Committee has highlighted that the realisation of this right can be heavily impacted by the activities of businesses.¹²⁴ As an example they specifically address the marketing to children of foods and drinks which are high in saturated fats, trans-fatty acids,

¹¹⁷ Ibid 5.

¹¹⁸ Ibid 7.

¹¹⁹ Ibid 16.

¹²⁰ Ibid 10.

¹²¹ Also see the paragraph on article 2 ECHR to this regard.

¹²² UN Committee on the Rights of the Child, ‘General Comment No. 21: on children in street situations (21 June 2017) UN Doc CRC/C/GC/21 <<https://digitallibrary.un.org/record/1304490#record-files-collapse-header>> 11.

¹²³ John William Tobin, *The UN Convention on the Rights of the Child: A Commentary*, (Oxford University Press 2019) 196.

¹²⁴ UN Committee on the Rights of the Child, ‘General Comment No. 16: on State obligations regarding the impact of the business sector on children’s rights’ (17 April 2013) UN Doc CRC/C/GC/16 <<https://www.refworld.org/docid/51ef9cd24.html>>.

sugar, salt or additives, all of which can have long-term impact on children's health.¹²⁵ The Committee continues with stating that “[m]easures for implementing article 6 with regard to the business sector will need to be adapted according to context and include preventive measures such as *effective regulation and monitoring of advertising and marketing industries* [...]” (emphasis added).¹²⁶

In paragraph 59 the Committee further elaborates that a focus on the marketing of unhealthy foods and beverages is necessary. The Committee argues that children may regard these advertisements as ‘truthful and unbiased’, therefore overly consuming products that are actually harmful. Consequently, the Committee argues that States should ensure that marketing and advertisements do not have adverse effects on children's rights by encouraging self-regulation of businesses, but also by adopting the appropriate legislation.

While the Committee may not seem to have formulated a clear duty for State Parties in one of their General Comments,¹²⁷ State parties still have a general obligation under article 4 of the UNCRC to take all the appropriate legislative, administrative and other measures to ensure the implementation of the rights under the Convention. Additionally, positive obligations for State Parties have been more clearly summarized by the Human Rights Committee concerning the similarly phrased article 6 of the International Covenant on Civil and Political Rights. The Human Rights Committee stated there that the State does not only need to refrain from actions which might violate the child’s right to life, but must also take positive steps to prevent interference with this right by third-parties.¹²⁸ It can be argued that a similar positive obligation can be assumed under article 6 of the UNCRC.

2.2.3. Article 24 United Nations Convention on the Rights of the Child: Right to the enjoyment of the highest attainable standard of health

Article 24 of the UNCRC contains the right of the child to the enjoyment of the highest attainable standard of health. Article 24 paragraph 1 of the UNCRC states that “children shall have the right to such protection and care as is necessary for their wellbeing”. Additionally,

¹²⁵ Ibid 6.

¹²⁶ Ibid 7.

¹²⁷ In other UNCRC articles and accompanying General Comments, the word ‘obligation’ was more specifically mentioned. Here it is phrased as something the State *should* do. It could be argued that this is a normative standard rather than a compulsory duty. Therefore, we are taking a careful approach by combining article 6 UNCRC with the general obligations under article 4 UNCRC.

¹²⁸ Human Rights Committee on the Covenant on Civil and Political Rights, ‘General Comment No. 36: on the right to life’ (30 October 2018) UN DOC CCPR/C/GC/36 <https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/1_Global/CCPR_C_GC_36_8785_E.pdf> 5; John William Tobin, *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press 2019) 198.



paragraph 2 of this article states that in all actions relating to children, regardless of whether these actions are instigated by public authorities or private institutions, the child's best interest should be a primary consideration.

As the Committee has highlighted in their General Comment on article 24 of the UNCRC, "article 24 [...] [is] an inclusive right, extending not only to timely and appropriate prevention, health promotion, curative, rehabilitative and palliative services, but also to a right to grow and develop to their full potential and live in conditions that enable them to attain the highest standard of health [...]".¹²⁹ Similarly to article 12 of the ICESCR, it has been argued that 'the highest attainable standard of health' does not only refer to the right to health care. Instead, it also supposedly includes the *underlying determinants of health*, such as food and nutrition.¹³⁰

Read in conjunction with article 4 of the UNCRC, this entails that State Parties should undertake "all *appropriate* legislative, administrative, and other measures [...]" to ensure the right to the highest attainable standard of health can be properly fulfilled. The Committee specifies that while States enjoy a level of discretion to decide what means are utilized to ensure this right, "measures are considered appropriate when they are relevant to directly or indirectly advancing children's right".¹³¹ In other words, the principle of effectiveness is relevant in determining whether the appropriate measures have been taken. As an example of an 'appropriate measure' to ensure article 24 of the UNCRC, the Committee mentions the implementation of programmes that address the underlying determinants of health.¹³² The Committee seems to give an example of such a program.¹³³ To address obesity in children, it argues that children's exposure to fast food,¹³⁴ drinks with high levels of caffeine or other potentially harmful substances should be limited. Especially the marketing of these substances,

¹²⁹ UN Committee on the Rights of the Child, 'General Comment No. 15: on the right of the child to the enjoyment of the highest attainable standard of health (art. 24)' (17 April 2013) UN Doc CRC/C/GC/15 <https://www2.ohchr.org/english/bodies/crc/docs/GC/CRC-C-GC-15_en.doc> 3.

¹³⁰ UN Committee on Economic, Social and Cultural Rights, 'General Comment No. 14: The Right to the highest attainable standard of health (art. 12)' (11 August 2000) E/C.12/2000/4 <<https://www.refworld.org/docid/4538838d0.html>>.

¹³¹ UN Committee on the Rights of the Child, 'General Comment No. 19: on public budgeting for the realization of children's rights (art. 4)' (20 July 2016) UN Doc CRC/C/GC/19. <<https://digitallibrary.un.org/record/838730>> 7; John William Tobin, *The UN Convention on the Rights of the Child: A Commentary*, (Oxford University Press 2019) 929.

¹³² UN Committee on the Rights of the Child, 'General Comment No. 15: on the right of the child to the enjoyment of the highest attainable standard of health (art. 24)' (17 April 2013) UN Doc CRC/C/GC/15 <https://www2.ohchr.org/english/bodies/crc/docs/GC/CRC-C-GC-15_en.doc> 3.

¹³³ Ibid 12.

¹³⁴ Ibid 12. Defined as "foods that are high in fat, sugar or salt, energy-dense and micronutrient-poor".

specifically when focused on children, should be regulated.¹³⁵ This nudge towards regulation on the marketing of harmful substances is repeated as the Committee subsequently argues for "regulation of the advertising and sale of substances harmful to children's health and of the promotion of such items in places where children congregate, as well as in media channels and publications that are accessed by children [...]".¹³⁶

Moreover, article 2 UNCRC states that State Parties have an obligation to 'respect and ensure' the rights under the Convention, which naturally also includes article 24 UNCRC. In paragraph 73 of General Comment No. 15 on article 24 of the UNCRC, the Committee determines the core *obligations* that all States need to adhere to with respect to the child's right to health, irrespective of their level of development. These core obligations for instance include: 'reviewing the national and subnational legal and policy environment and, where necessary, amending laws and policies', 'ensuring universal coverage of quality primary health services, such as prevention and health promotion' and 'providing an adequate response to the underlying determinants of children's health'.¹³⁷ Paragraph 74 clarifies that States should demonstrate their commitment to *progressive fulfilment* of the core obligations mentioned in article 24 of the UNCRC. States have the accompanying obligation to ensure that they do not take any retrogressive steps that could hinder the enjoyment of the right laid down in article 24 of the UNCRC.¹³⁸

While article 3 of the UNCRC was argued to be an 'intrinsic obligation' for the State, the Commission seems to outwardly phrase a positive obligation for the State in the case of article 24 of the UNCRC, even if they describe these core obligations in relatively general terms and argue that a State's available resources should be taken into account.¹³⁹

¹³⁵ UN Committee on Convention on the Rights of the Child, 'General Comment No. 15: on the right of the child to the enjoyment of the highest attainable standard of health (art. 24)' (17 April 2013) UN Doc CRC/C/GC/15 <https://www2.ohchr.org/english/bodies/crc/docs/GC/CRC-C-GC-15_en.doc> 12.

¹³⁶ Ibid 15. Yet, note that this paragraph previously mentions solvents, alcohol, tobacco and other illicit substances. Therefore, 'harmful substances' in the sense of unhealthy foods may not lie within the intended meaning of 'harmful substances' in this paragraph.

¹³⁷ UN Committee on Convention on the Rights of the Child, 'General Comment No. 15: on the right of the child to the enjoyment of the highest attainable standard of health (art. 24)' (17 April 2013) UN Doc CRC/C/GC/15 <https://www2.ohchr.org/english/bodies/crc/docs/GC/CRC-C-GC-15_en.doc> 16.

¹³⁸ Ibid.

¹³⁹ Ibid 16. Note that this obligation seems in accordance with the State's duty of care phrased in article 22 of the Dutch Constitution. Due to article 120 of the Dutch Constitution it is not possible for a judge to review the constitutionality of Acts of Parliament. Yet, the Constitution can still be considered an authoritative source.

2.2.4. Article 32 & 36 United Nations Convention on the Rights of the Child: Right to be free from exploitation

Article 32 of the UNCRC stipulates that States Parties must recognise the right of the child to be protected from economic exploitation. While this article seems to be more directed towards child labour,¹⁴⁰ article 36 of the UNCRC adds that State Parties shall protect children against “all *other* forms of exploitation [which] are prejudicial to any aspects of the child's welfare”. Article 36 of the UNCRC is generally considered an umbrella provision, encompassing several forms of exploitation such as the exploitation of children as consumers.¹⁴¹

According to the Committee, “the requirement that States shall protect children against exploitation means that the obligation to protect is mandatory”.¹⁴² In General Comment No. 13 on violence against children, the Committee specifically stated that the phrasing ‘shall take’ leaves no leeway for State discretion.¹⁴³ It has however been argued that States do enjoy a level of discretion in terms of *what* measures they want to adopt to secure the freedom from exploitation. Yet, the measures taken should be effective and should be consistent with the other articles under the UNCRC.¹⁴⁴

Tobin has tried to distinguish the different types of State obligations by the typology of article 2 of the UCNRC, which has been understood to mean that States have an obligation to respect, protect and fulfil each right under the Convention. With respect to article 36 of the UNCRC it has been argued that this entails that States must take appropriate measures to protect children from state actors (obligation to respect), to protect them from non-state actors (such as advertising companies) (obligation to protect) and to empower and equip them to protect themselves against exploitation (obligation to fulfil).¹⁴⁵ While the Committee has used this typology in other contexts, they “[have] not embraced this typology in the context of article

¹⁴⁰ Even though it has been argued that article 32 UNCRC may also include manipulating children to gain economic advantages. Universiteit Leiden en Waag, ‘Voorkom ten allen tijde economische exploitatie van kinderen’ (*Code voor Kinderen*) <<https://codevoorkinderrechten.nl/beginsel/voorkom-economische-exploitatie-van-kinderen/>> accessed 17 July 2022.

¹⁴¹ John William Tobin, *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press 2019) 1403.

¹⁴² *Ibid* 1404.

¹⁴³ UN Committee on the Rights of the Child, ‘General Comment No. 13: on the right of the child to freedom from all forms of violence’ (18 April 2011) UN Doc CRC/C/GC/13 <<https://www.refworld.org/docid/4e6da4922.html>> 14.

¹⁴⁴ John William Tobin, *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press 2019) 1403.

¹⁴⁵ *Ibid* 1404.

36”.¹⁴⁶ Nevertheless, this typology makes it easier to identify the areas in which measures should be taken to fully protect children from economic exploitation.¹⁴⁷

2.2.5. Article 2 United Nations Convention on the Rights of the Child: Right to non-discrimination

Combating discrimination is not only about prohibitions to discriminate; it is also about a duty that governments have to promote equality and to be proactive in tackling discrimination. Regarding discrimination against children, the provisions of the UNCRC are relevant to identify the positive obligations in terms of tackling discrimination that apply to governments.¹⁴⁸

Article 2 of the UNCRC provides in its first paragraph that the rights set in the Convention shall apply to each child within their jurisdiction “without discrimination of any kind”. The second paragraph states that the “State Parties to the Convention shall take all appropriate measures to ensure that the child is protected against all forms of discrimination”. The scope of this right to non-discrimination has been clarified multiple times. First, by the Committee which defined it as a right that should be “interpreted broadly as to include circumstances and behaviours that are overtly discriminatory and policies that are covertly discriminatory”.¹⁴⁹ In an “official guide for policy makers on a child rights-based approach to food marketing”, UNICEF later added to that interpretation and outlined that the scope of article 2 on the right to non-discrimination “shall include policies with an intentional purpose of discrimination, but also the effect or outcome of discrimination whether or not discrimination was intended”.¹⁵⁰ The same guide of UNICEF then mentions that the duty to tackle discrimination that applies to States requires first, for governments to identify the causes of discrimination rather than just the discriminatory events themselves. Then, governments have an obligation to then take affirmative action to diminish or eliminate the conditions that cause or perpetuate discrimination.¹⁵¹

¹⁴⁶ Ibid 1405.

¹⁴⁷ Ibid.

¹⁴⁸ Amandine Garde and others, ‘A child rights-based approach to food marketing: a guide for policy makers’, (UNICEF, 2018) 44.

¹⁴⁹ UN Committee on the Rights of the Child, ‘General Comment No. 1: The aims of Education’, (17 April 2001) CRC/GC/2001/1, para. 1.

¹⁵⁰ Amandine Garde and others, ‘A child rights-based approach to food marketing: a guide for policy makers’, (UNICEF, 2018) 44.

¹⁵¹ Amandine Garde and others, ‘A child rights-based approach to food marketing: a guide for policy makers’, (UNICEF, 2018) 44; Bruce Abramson, *Article 2: The right of non-discrimination*, (Martinus Nijhoff Publishers, 2008), 48; UN Committee on the Rights of the Child, ‘General Comment No. 7: Implementing child rights in early childhood’ (20 September 2006) CRC/C/GC/7 para. 12.



According to UNICEF, discrimination can be reinforced through unhealthy food marketing in multiple situations. The first is one is stigmatization. Article 2 of the UNCRC provides that “no child should be treated unfairly on any basis”. UNICEF highlights in its paper on a child rights-based approach to food marketing that cases of discrimination against children occur due to the fact that “obese children are more likely to face adverse consequences in life as a result of their obesity”.¹⁵² The second one relates to the impact of food marketing on already vulnerable groups. Studies highlight that children up to the age of 18 that come from socio-economically disadvantaged backgrounds are disproportionately exposed to “all forms of advertising promoting HFSS foods” across numerous countries.¹⁵³ One reason behind this is that marketers of unhealthy food products seem to target individuals from lower socio-economic categories.¹⁵⁴ Therefore, it could be argued that there is discrimination in the sense that children from socio-economically disadvantaged backgrounds are more exposed to the adverse health effects that stem from exposure to food marketing. This has the consequence of exacerbating inequalities that are already present for these groups.

2.2.6. Article 2 & 8 European Convention on Human Rights: Right to life & right to respect private and family life

The European Convention on Human Rights (ECHR) protects the human rights of people in countries that belong to the Council of Europe, including the Netherlands. The ECHR is enforced by the European Court of Human Rights which has the power to give a judgement when it finds that a Member State has violated one or more of the rights enshrined in the Convention.¹⁵⁵ The judgments rendered by the European Court of Human Rights are binding on the Member States concerned which face the obligation to comply to them as per article 46 ECHR. Finally, regarding the content of the judgements, they can consist in a call by the Court for legislative reform in the concerned Member State.¹⁵⁶

¹⁵² Amandine Garde and others, ‘A child rights-based approach to food marketing: a guide for policy makers’, (UNICEF, 2018), 45

¹⁵³ Paul C. Coleman and others, ‘A rapid review of the evidence for children’s TV and online advertisement restrictions to fight obesity’ (2022) Preventive Medicine Reports, Volume 26.

¹⁵⁴ Zandile Mchiza, ‘How marketers target poor illiterate people with unhealthy food ads’ *The Conversation* (15 February 2017).

¹⁵⁵ Equality and Human Rights Commission, ‘What is the European Court of Human Rights’ (*Equality and Human Rights Commission*, 9 August 2016) <<https://www.equalityhumanrights.com/en/what-are-human-rights/how-are-your-rights-protected/what-european-court-human-rights#:~:text=Set%20up%20in%201959%2C%20the,alleging%20violations%20of%20human%20rights>> accessed 17 July 2022.

¹⁵⁶ K. Mujezinovic Larsen, ‘Compliance with judgements from the European Court of Human Rights: The Court’s call for Legislative Reforms’ (2013) *Nordic Journal of Human Rights*, abstract <<https://www.idunn.no/doi/10.18261/ISSN1891-814X-2013-04-03>>.



Although no provision of the ECHR specifically provides for a general right to health, that right is derived from article 8 of the Convention on the right to respect for private and family life,¹⁵⁷ as well as article 2 which provides that “everyone’s right to life shall be protected by the law”.¹⁵⁸ Under these two articles, Member States are bound by several positive obligations¹⁵⁹. Regarding the scope of application of these articles, it is important to highlight that the case law of the European Court of Human Rights derived a positive obligation for the States from article 2 of ECHR initially. This first positive obligation was defined in the case of *Osman v United Kingdom* as the obligation “in certain well-defined circumstances, to take preventive operational measures to protect an individual whose life is at risk”¹⁶⁰. The European Court of Human Rights has then broadened the factual circumstances during which that positive obligation applies. In *Oneriyildiz v Turkey*, it was ruled that the positive obligation of article 2 ECHR applies in the context of “any activity, whether public or not, in which the right to life may be at stake”.¹⁶¹ As for article 8, it has been clarified later by the European Court of Human Rights in a case about exposure to asbestos, that it requires national authorities “to take the same practical measures as those expected of them in the context of their positive obligation under article 2”, meaning to protect the health of individuals.¹⁶² This implies that similarly as article 2, Member States are subject to a second positive obligation under article 8 to protect the right to health in the context of “any activity, public or not, in which it may be at stake”.

2.2.7. Article 11 European Social Charter: Right to the protection of health

The European Social Charter aims at guaranteeing fundamental social and economic rights. It is seen as a Social Constitution of Europe and guarantees a broad range of everyday human rights related to social protection, welfare and more importantly for our topic, health.¹⁶³ The Charter is enforced by the European Committee of Social Rights which has the role of monitoring compliance with the Charter. The Committee adopts decisions and conclusions that

¹⁵⁷ European Court of Human Rights, ‘Guide on Article 8 of the European Convention on Human Rights’ (Council of Europe, 2021) 9.

¹⁵⁸ Ibid 15.

¹⁵⁹ See *Vasileva v. Bulgarie*, (2016), ECHR 273 paras. 63-69 & *Ibrahim Keskin v. Turkey*, (2018), ECHR 266 para. 61.

¹⁶⁰ *Osman v. United Kingdom*, (1998), ECHR 101 para. 155.

¹⁶¹ Elizabeth S. Bates, ‘Covid-19 symposium: article 2 ECHR’s positive obligations – how can human rights law inform the protection of health care personnel and vulnerable patients in the Covid-19 pandemic?’, *OpinionJuris* (1 April 2020). *Oneriyildiz v Turkey*, (2004), ECHR 657 para. 71.

¹⁶² *Brincat and Others v. Malta*, (2014), ECHR 836, summary by UN Special Rapporteur <<http://www.srenvironment.org/node/1971>>.

¹⁶³ Council of Europe, ‘The European Social Charter’ <<https://www.coe.int/en/web/european-social-charter>> accessed 17 July 2022.

are not enforceable in domestic legal systems, but that still have significant influence for policy makers and domestic judicial systems.¹⁶⁴

The right to health is guaranteed by the European Social Charter in article 11 which provides that: “With a view to ensuring the effective exercise of the right to protection of health, the Parties undertake, either directly or in cooperation with public or private organisations, to take appropriate measures designed inter alia: (1) to remove as far as possible the causes of ill-health; (2) to provide advisory and educational facilities for the promotion of health and the encouragement of individual responsibility in matters of health; (3) to prevent as far as possible epidemic, endemic and other diseases, as well as accidents.”

The European Committee of Social Rights has included food matters within the scope of application of article 11 of the European Social Charter. However, this was only done in the angle of food safety, through a positive obligation for States to adopt adequate food hygiene standards.¹⁶⁵ As for children, the European Committee of Social Rights has only interpreted article 11 as creating an obligation for States to educate children on health at school,¹⁶⁶ as well as to guarantee healthcare to all children without discrimination.¹⁶⁷ However, another paragraph of article 11 which could be relevant regarding health is paragraph 3 on the States obligation to take appropriate measures “to prevent as far as possible epidemic, endemic, and other diseases as well as accidents”. Indeed, obesity has been referred to as an epidemic by the World Health Organization, as well as by soft law instruments like the European Charter on Counteracting Obesity.¹⁶⁸ According to a definition of the World Health Organization, the term “obesity epidemic” refers to “the growing number of people globally, who are overweight or obese and who often have accompanying medical illness such as chronic disease and disability.”¹⁶⁹ Although the European Committee of Social Rights has not officially adopted a decision or

¹⁶⁴ Council of Europe, ‘European Committee of Social Rights’ <<https://www.coe.int/en/web/european-social-charter/european-committee-of-social-rights>>, accessed 17 July 2022.

¹⁶⁵ *Conclusions XV-2, Addendum, Cyprus*, (2011), 32; Secretariat of the European Social Charter, ‘The Right to health and the European Social Charter’, (Council of Europe, 2009), 3.

¹⁶⁶ *Conclusions 2003 and 2005, Statement of Interpretation on Article 3§4* (2003; 2005); Secretariat of the European Social Charter, ‘The Right to health and the European Social Charter’, (Council of Europe, 2009), 7

¹⁶⁷ See *International Federation of Human Rights Leagues (FIDH) v. France, Complaint No.14/2003* (2003); Statement of Interpretation on Article 3§4 (2003); Secretariat of the European Social Charter, ‘The Right to health and the European Social Charter’, (Council of Europe, 2009), 3.

¹⁶⁸ WHO European Ministerial Conference on Counteracting Obesity, ‘European Charter on counteracting obesity’, (WHO, 2006) 1. The WHO highlights that “The epidemic of obesity poses one of the most serious public health challenges in the WHO European Region”.

¹⁶⁹ *Ibid.*

conclusion on the obesity pandemic, it has highlighted the fact that State are required to “reduce the incidence of these [epidemic diseases]”.¹⁷⁰

2.3. European Union law

2.3.1. *Audiovisual Media Services Directive*

The 2010 and 2018 EU Directives on the provision of audiovisual media services (AVMSD) administer restrictions surrounding audiovisual media services to be implemented by Member States into their national regulations. The 2010 EU Audiovisual Media Services Directive by the European Parliament and the Council establishes a framework for cross-border audiovisual media services.¹⁷¹ It aims to strengthen the internal market for the production and distribution of programs and to ensure a fair competition guarantee.¹⁷² In November 2018, the EU Directive 1808 made amendments to the 2010 Directive in view of the changing market realities. These regulations have been transposed into the Dutch national law through the *Mediawet* [Dutch Media Act], the most recent 2018 directive having been transposed in September of 2020.¹⁷³ The following paragraphs provide an overview of the articles on audiovisual media directed towards children from the recently transposed Directive.

There are multiple articles on the regulation of commercials that may have a negative impact on a minor’s development. Subsection (a) under article 28b states that EU Member States must protect minors from programmes, user-generated videos and audiovisual commercial communications which may impair a minor’s physical, mental or moral development.¹⁷⁴ If the audiovisual commercial communication that impairs a minor’s development is provided by a media service which falls under the member state’s jurisdiction, stricter standards apply. Article 6a paragraph 1 directs that in these cases Member States shall take the appropriate measures to ensure minors will not normally hear or see them. This includes, but is not limited to, technical measures such as changing the time of broadcast or age-verification tools.¹⁷⁵ Under article 9, subsection (g), the directive adds that therefore, commercials that impair a minor’s development may not exploit their inexperience or credulity. This can include pushing the child to persuade their parents to buy said product or in any other

¹⁷⁰ *Conclusions XVII-2, Latvia*, (2005) 504; Secretariat of the European Social Charter, ‘The Right to health and the European Social Charter’, (Council of Europe, 2009) 4.

¹⁷¹ Audiovisual Media Services Directive 2018/1808, Preamble, paragraph 1.

¹⁷² *Ibid.*

¹⁷³ European Audiovisual Observatory, ‘Which EU Countries Have Transposed The AVMSD Into National Legislation?’ (European Audiovisual Observatory, 2022).

¹⁷⁴ Article 28b, subsection (a) 2018 Audiovisual Media Services Directive.

¹⁷⁵ Article 6a, paragraph 1, 2018 Audiovisual Media Services Directive.

way exploit their trust in parents, teachers or other persons.¹⁷⁶ Lastly paragraph 20 of the preamble states that the content which may impair the development of minors must undergo a higher degree of protection. However, the Directive does not prejudice the adoption of even stricter measures on these protections for minors set in the Directives if they meet the proportionality principles under article 28b, paragraph 3 of the directive.¹⁷⁷

In terms of regulating the showing of commercials containing unhealthy foods and beverages directed towards minors, Article 9 paragraph 4 of the AVMSD states that Member States shall encourage the use of co-regulation and the fostering of self-regulation for commercials included in children's programmes, for foods and beverages containing nutrients and substances with a nutritional or physiological effect of which excessive intakes in the overall diet are not recommended.¹⁷⁸ Those codes shall aim to effectively reduce the exposure of children to audiovisual commercial communications for such foods and beverages. Article 28b paragraph 2 states this again, additionally encouraging self-regulating and co-regulating measures that aim at effectively reducing the exposure of children to commercials for such foods and beverages.¹⁷⁹ This 'effective standard' is restated under paragraph 28 of the preamble, whereby member states are encouraged to ensure their measures effectively reduce the exposure of children to commercials regarding food and beverages that do not fit national or international nutritional guidelines.¹⁸⁰

2.4. Dutch national law

2.4.1. Article 6:193a-6:193j Dutch Civil Code

Children are not specifically mentioned in Dutch or European consumer law. However, when seen through the scope of article 3 of the UNCRC, one should take the best interest of the child in consideration where consumer law affects children.

However, besides the more generally phrased article 3 of the UNCRC, the Dutch regulations regarding unfair commercial practices could also be of use in supporting a ban or restrictions on the advertisement and marketing of unhealthy foods and beverages. These Dutch regulations, stated in section 3A of Title 3 of the Dutch Civil Code ('DCC', articles 6:193a to 6:193j), are directly based on the European Directive on Unfair Commercial Practices.

¹⁷⁶ Article 9, subsection g, 2018 Audiovisual Media Services Directive.

¹⁷⁷ Preamble, paragraph 20, 2018 Audiovisual media Services Directive.

¹⁷⁸ Article 9, paragraph 4, 2018 Audiovisual Media Services Directive.

¹⁷⁹ Article 28b, paragraph 2, 2018 Audiovisual Media Services Directive.

¹⁸⁰ Preamble, paragraph 28, 2018 Audiovisual Media Services Directive.

A trader¹⁸¹ acts unlawfully towards a consumer if he or she engages in a commercial practice which is deemed unfair (article 6:193b paragraph 1).¹⁸² Certain commercial acts are always deemed unfair due to their ‘aggressive’ or ‘misleading’ nature. These are blacklisted commercial practices. If the situation in question amounts to a blacklisted commercial practice, the agreement between the trader and the consumer is void according to article 6:193j paragraph 3 of the DCC. Moreover, article 6:193j paragraph 2 states that the trader is liable for any damages caused as a result of the unlawful act.

Firstly, article 6:193g of the DCC lists commercial practices that are deemed *misleading* in all circumstances, and therefore unlawful, because of the trader providing factually incorrect or misleading information, omitting certain information or being unclear about certain information.¹⁸³ For instance, sub a of this article states that commercial practices are misleading when traders claim to be bound by a code of conduct and act upon it, while this is not the case in practice.

Secondly, article 6:193i of the DCC lists commercial practices that are deemed *aggressive* in all circumstances because the trader influences the consumer in an inappropriate manner, thereby making the commercial practices unfair.¹⁸⁴ Article 6:193i sub e specifies that a commercial practice is always deemed aggressive when advertisements are used to directly incite children to buy advertised products or to persuade their parents to buy those products for them. However, based on the considerations of the Directive Unfair Commercial Practices it has been established that this article does not apply to ‘accepted advertising and marketing activities’ *such as* product placement, brand differentiation and the offering of premiums.¹⁸⁵ These advertising and marketing activities affect the consumer’s image of the product and *lawfully* influences their behaviour towards the product without limiting their ability to make an informed decision.¹⁸⁶ However, as this consideration does not seem to entail a limited list of ‘accepted advertising and marketing activities’, and there seems to be no jurisprudence based on article 6:193i sub e in general, this leaves a lot of room for interpretation.

Yet, besides these blacklisted commercial practices, a consumer can also argue that a commercial practice is misleading or aggressive based on the more open-phrased norms in

¹⁸¹ Any natural or legal person who is acting in the course of his professional practice or business and anyone acting in the name of or on behalf of such a trader (article 6:193a paragraph 1 sub b).

¹⁸² Allowing the consumer to start a procedure on the basis of 6:162 of the DCC.

¹⁸³ Autoriteit Consument & Markt, ‘Leidraad. Bescherming van de online consument: Grenzen aan online beïnvloeding’ (2020) <<https://www.acm.nl/sites/default/files/documents/2020-02/acm-leidraad-bescherming-online-consument.pdf>> 14.

¹⁸⁴ Ibid.

¹⁸⁵ Directive 2005/29/EC concerning unfair commercial practices [2011] OJ L149/22, para. 6.

¹⁸⁶ Ibid.

article 6:193h or article 6:193c of the DCC. Article 6:193c of the DCC stipulates that a commercial practice is especially unfair when factually incorrect information is provided or when the information misleads or may mislead the *average consumer*, for instance in terms of the benefits, the risks and the expected results a product may give (paragraph 1, sub b). Generally, the European Court of Justice expects a lot of this average consumer, as the average consumer should be reasonably informed, circumspect and observant.¹⁸⁷ However, when a trader specifically caters to a group of consumers who are particularly susceptible to the commercial practice because of a specific trade, for instance their younger age, it is argued that the commercial practice is judged on the basis of the *average member of this group*. This has been laid down in article 6:193a paragraph 2 of the DCC.

If a commercial practice is not necessarily aggressive or misleading, but it could be considered unfair, the consumer can also argue on the basis of article 6:193c of the DCC (the safety-net provision). According to this article, a commercial practice is unfair if a trader acts contrary to their professional diligence and if they act in such a manner that the *average consumer's* ability to make an informed decision about an economic transaction is limited, causing the consumer to make a decision that they would not have made otherwise (article 6:193b paragraph 2 of the DCC).¹⁸⁸ What is considered professional diligence is determined according to the professional standard in a particular sector.¹⁸⁹ Moreover, article 6:193a paragraph 2 of the DCC is still relevant in terms of the average consumer.

2.5. Concluding remarks section 2

Our research found that the positive obligation of the State to protect minors from physically and mentally harmful advertising of HFSS food products is based on international law, European law, and national law. Under international law, we find the UNCRC, the ECHR and the European Social Charter to be relevant, as the Netherlands is bound to these Conventions. Under the UNCRC, we find Article 6 (the right to life), Article 24 (the right of the child to the enjoyment of the highest attainable standard of health), Articles 32 and 36 (the right of the child to be protected from economic exploitation) and to an extent Article 2 (the right to non-discrimination) to be applicable to our legal framework. Under the ECHR two articles can be

¹⁸⁷ European Court of Justice 16 July 1998, case 210/96, ECLI:EU:C:1998:369 (Gut Springenheide). This case is also relevant for the Dutch interpretation of the 'average consumer', as the Dutch law is directly based on the European Directive on Unfair Commercial Practices.

¹⁸⁸ Autoriteit Consument & Markt, 'Leidraad. Bescherming van de online consument: Grenzen aan online beïnvloeding' (2020) <<https://www.acm.nl/sites/default/files/documents/2020-02/acm-leidraad-bescherming-online-consument.pdf>> 14.

¹⁸⁹ Ibid.



used to argue for stricter food product marketing regulations, those are Article 8 on the right to respect for private and family life and Article 2 on the right to life. Furthermore, under the European Social Charter, we found Article 11 (the right to health) to oblige the Netherlands to respond appropriately to contain the Dutch ‘obesity epidemic’, which could include restricting advertisement that may cause ill-health. Under EU law, we can use the 2018 EU Directive on Audiovisual Media Services to create a positive obligation to restrict audiovisual media that may have a negative impact on a minor’s development. Lastly, Articles 6:193a till 6:193j of the Dutch Civil code can be used against individual food and beverage companies if shown that they are using aggressive and misleading advertising techniques.



Section 3: Procedural Strategies



3.1. Introduction

Based on the legal framework presented in section 2 of this report, we see two main possibilities towards more comprehensive legislation on the marketing and advertising of unhealthy foods and beverages to children. In this section of the report we will be highlighting these possibilities. Firstly, utilising the previously discussed legal framework, we will propose several legal arguments which could be used to either lobby the government or to argue against the Dutch State in a legal proceeding. Secondly, we will set out legal arguments that could be utilized in legal proceedings against individual food and beverages companies.

3.2. Lobbying the government or initiating court proceedings against the Dutch State

3.2.1. Article 3 United Nations Convention on the Rights of the Child

In cases against the tobacco-industry, article 3 UNCRC has been utilized to support tobacco control policies. These policies, for instance, contain a ban on the marketing or advertising of tobacco-products to children. Using scientific evidence that tobacco control policies for children have specific health benefits, it was argued that adherence to these control policies by the tobacco-industry was therefore in the best interest of the child.¹⁹⁰ A similar legal argument based on this ‘best interest-norm’ can be constructed in order to restrict the marketing or advertisement of unhealthy foods and beverages to children.

Research has shown that there is a relation between the marketing of unhealthy foods and beverages and childhood obesity and other non-communicable diseases, as advertisements influence children's product preferences, requests and diet.¹⁹¹ It has been established that food marketing to children leads to an increased preference for, and intake of, unhealthy foods.¹⁹² In combination with article 24 of the UNCRC, stipulating the child's right to health, it seems reasonable to argue that restricting the marketing and advertisement of unhealthy foods and beverages is not only necessary to safeguard the child's right to health by addressing the underlying determinants of health (e.g. nutrition). Instead, it is also necessary from the viewpoint of making decisions with the best interest of the child in mind. As it has been shown

¹⁹⁰ Brigit Toebes and others, ‘A missing voice: The human rights of children to a tobacco-free environment’ [2017] BMJ 3.

¹⁹¹ American Psychological Association, ‘The impact of food advertising on childhood obesity’ (*apa.org*, 2010) <<https://www.apa.org/topics/obesity/food-advertising-children#:~:text=Food%20industry%20advertising%20that%20targets,low%20self%20Desteem%20and%20depression>> accessed 17 July 2022; Rachel Smith and others, ‘Food marketing influences children’s attitudes, preferences and consumption: A systematic critical review’ (2019) 11 PMC; Jaap Seidell and others, ‘Marketing of unhealthy foods and drinks to children and adolescents: The behavioural and biomedical consequences’ (VU Honours class, 2021).

¹⁹² Lindsey Smith Taillie and others, ‘Changes in food purchases after the Chilean policies on food labelling, marketing, and sales in schools: a before and after study’ (2021) 5 Lancet Planet Health 526.

that the marketing of unhealthy food products increases the preference and intake of unhealthy food products, which in turn is a risk factor for obesity and other non-communicable diseases, it is *not* in the best interest of the child to allow this kind of marketing.

However, one particular issue with this legal argument should be addressed. Currently there is no research to prove that a ban on this kind of marketing has lowered obesity rates or fundamentally changed people's eating habits to a healthier eating pattern.¹⁹³ This is mostly due to the fact that there are hardly any countries where such extensive legislation has been enforced long enough for researchers to compose data over a longer period of time.¹⁹⁴

While the lack of such data would be detrimental for the use of article 3 UNCRC as a legal argument, there seems to be a silver lining. In countries where child-marketing bans of unhealthy foods were imposed and front-of-package nutrient warning labels were placed, it has been found that the respondents were more aware of which products were unhealthy and respondents perceived a shift towards healthier eating.¹⁹⁵ Additionally, research in Chile has found significant decreases in overall purchases of calories, sugar, saturated fat and sodium, in comparison with the scenario in which the law¹⁹⁶ had not been introduced.¹⁹⁷ While more research in this field is required to confidently speak of health benefits *stemming from* the introduction of stricter regulations on the marketing and advertising of unhealthy products to children, these existing studies at least seem to indicate an increase in people's awareness of unhealthy foods and a possible change in purchase and eating habits.

3.2.2. Article 6 United Nations Convention on the Rights of the Child

As mentioned in Section 2, the Committee has recognized that the marketing to children of unhealthy foods and beverages can hinder the realisation of article 6 of the UNCRC. While this hinderance is mostly caused by non-state actors, Section 2 has mentioned that it is reasonable to assume that there is a positive obligation for the State to prevent interference with this right

¹⁹³ In comparison to the tobacco control policies, where effectiveness was sufficiently proven.

¹⁹⁴ Teresa Correa and others, 'Responses to the Chilean law of food labelling and advertising: exploring knowledge, perceptions and behaviours of mothers of young children' [2019] *International Journal of Behavioural Nutrition and Physical Activity* ; Lindsey Smith Taillie and others, 'Changes in food purchases after the Chilean policies on food labelling, marketing, and sales in schools: a before and after study' (2021) 5 *Lancet Planet Health* 526.

¹⁹⁵ Teresa Correa and others, 'Responses to the Chilean law of food labelling and advertising: exploring knowledge, perceptions and behaviours of mothers of young children' [2019] *International Journal of Behavioural Nutrition and Physical Activity*.

¹⁹⁶ See 1.4.3. of this report.

¹⁹⁷ Lindsey Smith Taillie and others, 'Changes in food purchases after the Chilean policies on food labelling, marketing, and sales in schools: a before and after study' (2021) 5 *Lancet Planet Health* 526.

However, one has to consider that the research in Chile was based on a multicomponent policy, including warning labels on packaging, restrictions on marketing of unhealthy foods and a ban on school sales of unhealthy foods. Therefore, making it impossible to disentangle the effects of the measures separately.



by third-parties. The Committee has also stated that the implementation of *effective* regulation and *monitoring* of advertising and marketing industries is necessary.

While the Dutch government can argue that they have implemented self-regulation and have the ACC in place to monitor the advertising and marketing taking place, paragraph 1.3.4 of this paper has already clearly defined the deficits of this system. Food and beverage companies do not only not adhere to the self-regulation, thereby displaying the ineffectiveness of the current regulations, but the ACC cannot effectively monitor these companies either. If the ACC determines that a company is in violation with the current regulations, based on a third party starting this claim proceeding in the first place, the ACC consequently lacks sanction-power to assure that companies truly improve their behaviour. Considering the abovementioned information, it can be argued that the Dutch government is currently failing their positive obligation to enhance the right to life and the survival and development of the child.

3.2.3. Article 24 United Nations Convention on the Rights of the Child

The fact that the Committee argues that States should undertake all measures to ensure the right to the highest attainable standard of health, while seemingly stressing that States should do this by providing an adequate response to the underlying determinants of children's health (e.g. food), and should do so in a progressive manner, makes it reasonable to argue that the Commission has phrased a relatively far-reaching obligation for the State.

One of the core obligations in relation to article 24 of the UNCRC is to review the existing legal and policy environment and amend these laws and policies if this is deemed necessary to secure the highest attainable standard of health. This paper has already discussed the negative influence that advertising and marketing of unhealthy food products has on (especially) children in terms of their eating pattern. Moreover, this paper has discussed the dangers of consuming unhealthy food products. Additionally, paragraph 1.3.4. of this paper has clearly stated that the current self-regulation that should mitigate these negative effects of the consumption of unhealthy food products, by ensuring that children are not specifically targeted by advertisements or marketing, is ineffective. Therefore, it is reasonable to argue that in order to properly secure and progressively fulfil the right to the highest standard of health, the Dutch State has to at least amend their system of self-regulation. Not doing so does not only mean that the Dutch State is not adequately responding to the underlying determinants of children's health by not sufficiently addressing the influence that advertisements and marketing have on the health of children. It also means that the Dutch State is failing their positive obligation to secure the right to the highest attainable standard of health properly and progressively.

3.2.4. Article 32 & 36 United Nations Convention on the Rights of the Child

As previously addressed in section 2, article 32 and 36 of the UNCRC, in conjunction with article 3 of the UNCRC, stipulate that children should be protected from exploitation. In cases against the tobacco-industry, this article has been utilised to establish that the government has a responsibility to protect children from tobacco marketing, as children are more susceptible to tobacco marketing than the average adult.¹⁹⁸ A similar legal reasoning can be adopted in support of a ban on the marketing or advertisement of unhealthy foods and beverages to children. Research has shown that children lack the cognitive ability to make a clear differentiation between 'fact and fiction' in advertisements. Moreover, they are not only unaware of the marketing techniques that are used to target them, but with an undeveloped prefrontal cortex, they also lack self-control.¹⁹⁹ Consequently, children are more susceptible to the marketing of unhealthy foods and beverages than the average adult, the latter of whom is equipped with the cognitive knowledge to make an informed choice on their eating pattern. This reasoning has also been supported by scientific evidence, with research showing that almost all marketing concerning unhealthy food increases the requests for, purchase of and eating of unhealthy foods. This in turn leads to an increase of childhood obesity, weight gain and other non-communicable diseases.²⁰⁰ Considering the abovementioned information, it can be reasonably argued that the government is failing in their responsibility to protect children against behavioural manipulation, in other words exploitation of children by the food and beverage industry, by allowing the extensive marketing and advertisement of unhealthy products.

To further support the argument that the Dutch State is currently failing their duty to protect children against (economic) exploitation by food and beverages industry, one could argue that the possibility of exploitation is even greater in the context of the current targeted advertising. Termed as 'surveillance –based advertising', this type of marketing no longer confines itself to tv commercials, papers and billboards. Instead, a consumer-profile of an individual is formed based on likes and dislikes on social media, shopping patterns, internet searches and other factors.²⁰¹ Based on this consumer profile, certain advertisements will be

¹⁹⁸ Brigit Toebes and others, 'A missing voice: The human rights of children to a tobacco-free environment' [2017] *BMJ* 3.

¹⁹⁹ Jaap Seidell and others, 'Marketing of unhealthy foods and drinks to children and adolescents: The behavioural and biomedical consequences' (VU Honours class, 2021) 4-5.

²⁰⁰ Mimi Tatlow-Golden & Amandine Garde, 'Digital food marketing to children: Exploitation, surveillance and rights violations' (2020) 27 *Global food security* 1,2.

²⁰¹ Robert Bodle, *A Critical Theory of Advertising as Surveillance. Explorations in Critical Studies of Advertising* (1st edition, Routledge 2016) 138.

shown solely or simply more frequently to certain consumers. This targeted advertising has been argued to 'magnify the persuasive power of marketing'. For instance, "content of such targeted advertising, with a focus on role models, influencers, and others of particular appeal to children, to increase its receptivity, combined with greater exposure based on targeting, is likely to result in amplified responsiveness to such media".²⁰² Therefore, the targeted advertisement could also increase the likelihood of exploitation, making the State's interference even more pressing.

This type of exploitation argument was successfully used in a case in Brazil in 2016.²⁰³ While this case was brought against a marketing-company, and thus not the State, it gives an example of the kinds of situations which can be deemed as 'economic exploitation of children'. In this case it was about a marketing-campaign, specifically a television advertisement featuring the image of the children's movie character 'Shrek'. The commercial heavily encouraged children to buy packets of cookies, because the commercial explained that with 5 products and some additional money, children could collect watches with a picture of cartoon characters from the movie Shrek. The non-profit organisation Alana challenged the lawfulness of this campaign. The Superior Court of Justice decided that the advertisement was abusive, and therefore indeed unlawful. The Court stated that the advertisement was abusive because it was aimed, directly or indirectly, at children. Moreover, the advertisement was especially considered abusive because "*children's recreational universe*" was used and manipulated for commercial purposes. Children were deemed especially vulnerable for this form of manipulation and exploitation, thereby making this form of marketing and advertisement abusive.²⁰⁴

3.2.5. Article 2 United Nations Convention on the Rights of the Child

As highlighted in section 2, States have the duty under article 2 of the UN Convention on the Rights of the Child to be proactive in tackling discrimination which implies identifying the causes of discrimination on the one hand and taking affirmative action to diminish eliminate

²⁰² Mimi Tatlow-Golden & Amandine Garde, 'Digital food marketing to children: Exploitation, surveillance and rights violations' (2020) 27 Global food security 3, 4.

²⁰³ N.B. This case was not based on the UNCRC, but on Brazilian consumer law. It is merely discussed as an example where a court decided children were economically exploited.

²⁰⁴ Alana, 'Brazil's Superior Court of Justice publishes unprecedented decision on ending advertising aimed at children' (*Criancaconsumo.org.br*, 2016) <https://criancaconsumo.org.br/wp-content/uploads/2014/02/Ac%C3%B3rd%C3%A3o_STJ_ENG.pdf>; Di André Brandao, 'The abusive advertising of foods directed to children: The case of the Brazilian Superior Court of Justice' (2017) 4 *Persona e Mercato* 39-39; Mimi Tatlow-Golden & Amandine Garde, 'Digital food marketing to children: Exploitation, surveillance and rights violations' (2020) 27 Global food security 4.

the conditions that cause or perpetuate discrimination on the other hand.²⁰⁵ When it comes to the stigmatization faced by obese children, it appears that food marketing to children is one of the factors that cause discrimination since directly causes obesity and therefore exposes children to weight-based discrimination.

As for the discrimination suffered by children coming from socio-economically disadvantaged households and more specifically their higher exposure to obesity, it appears that one of the factors responsible for this discriminatory result are food marketing techniques which target these groups of children specifically.

In both cases, food marketing to children appears as a cause leading to situations of discrimination or perpetuating them. Therefore, the Dutch State should take affirmative action to eliminate food marketing to children in order to safeguard children's right to non-discrimination as per article 2 of the UNCRC.

3.2.6. Article 2 & 8 of the European Convention on Human Rights

Article 2 of the ECHR read in conjunction with cases *Osman v. United Kingdom*²⁰⁶ and *Oneryildiz v. Turkey*²⁰⁷, highlights that there is a positive obligation that applies to States to take preventive operational measures to protect the right to life of individuals within the context of any activity, public or not in which it may be at stake. In the same sense, it appears from the reading of article 8 of the ECHR and the general right to health derived from it in conjunction with the *Brincat and Others v. Malta*²⁰⁸ case that there is a positive duty for States to take preventive operational measures in order to protect the health of individuals, here again, within the context of any activity or not in which it may be at stake.

From the broad wording of case *Oneryildiz v. Turkey* and more specifically the term "activity", it is arguable that commercial activities are part of those in which the positive obligations of States to protect the rights to life and health as per articles 2 and 8 apply. Within commercial activities, there is sufficient data as highlighted in section 1 which proves the adverse health consequences that are associated with marketing of unhealthy foods and drinks to children. Additionally, it is also arguable that food marketing to children causes a larger risk

²⁰⁵ Bruce Abramson, *Article 2: The right of non-discrimination*, (Martinus Nijhoff Publishers, 2008), 48. Committee on the Rights of the Child, 'General Comment No. 7: Implementing child rights in early childhood', (20 September 2006) CRC/C/GC/7, para. 12.

²⁰⁶ *Osman v. United Kingdom*, [1998], ECHR 101.

²⁰⁷ *Oneryildiz v Turkey*, [2004], ECHR 657.

²⁰⁸ *Brincat and Others v. Malta*, [2014], ECHR 836.

to life as among the adverse health consequences that it implies can be found deadly medical conditions such as cardiovascular diseases and cancers.²⁰⁹

3.2.7. *Article 11 European Social Charter*

Article 11 of the European Social Charter sets a positive obligation for States to “prevent as far as possible epidemic, endemic and other diseases”. Section 2 contributed in highlighting that the growing number of cases of obesity is qualified by international bodies as the “obesity epidemic”. Regarding obesity in the Netherlands, there is sufficient data available to support the argument that the country is not spared by the obesity epidemic. As mentioned in section 1, CBS Netherlands reported that in 2021, the obesity rate was “far above the target” set by the Dutch government for 2040.²¹⁰ Additionally, it appears that in 2020, 1 in 7 of children aged 2–19 years was either overweight or suffered from obesity.²¹¹ For all those reasons, Dutch news have referred to obesity as a “growing problem” in the Netherlands.²¹²

Therefore, the Dutch State has a duty to act as per article 11 in order to prevent the current obesity epidemic from developing further at the expense of the population and more specifically the children. As food marketing to children has been proved to be a factor leading to the increase of obesity in children, one way in which the Dutch State could tackle the obesity epidemic is by banning all advertising of unhealthy foods and drinks to children.

3.2.8. *The Audiovisual Media Services Directive: protecting minors from harmful audiovisual media content*

The Audiovisual Media Services Directive (AVMSD) urges, under numerous of its articles, States to regulate advertisement that is of detriment to minors, establishing a duty of the state to protect minors. Hereby we must consider that the AVMSD is an EU directive, meaning that although it is binding upon member states, states have some freedom in how they implement the articles. States must nonetheless meet the minimum requirements (or ‘floor’) set by the directives, which we are aiming to assess. Secondly, it must be considered that the directive

²⁰⁹ Jaap Seidell and others, ‘Marketing of unhealthy foods and drinks to children and adolescents: The behavioural and biomedical consequences’ (VU Honours class, 2021).

²¹⁰ CBS Netherlands, ‘Obesity, smoking and drinking hardly down since 2018’, (*CBS Netherlands*, 16 March 2022) <<https://www.cbs.nl/en-gb/news/2022/10/obesity-smoking-and-drinking-hardly-down-since-2018>> accessed 17 July 2022.

²¹¹ Jacob C. Seidell, Jutka Halberstadt, ‘National and Local Strategies in the Netherlands for Obesity Prevention and Management In Children and Adolescents’, (2020), *Obes Facts*. 2020;13(4), abstract <<https://pubmed.ncbi.nlm.nih.gov/32810860/>>.

²¹² DutchNews, ‘Netherlands’ growing problem : 100,000 people are morbidly obese’ (4 July 2018) <<https://www.dutchnews.nl/news/2018/07/netherlands-growing-problem-100000-people-are-morbidly-obese>>.



does not regulate physical advertisements, such as packaging, meaning it needs to be used in combination with the other legal sources to justify the extensive ban we are seeking.

Under EU law, the term ‘minor’ typically refers to a person who, according to the law of their respective country, is under the age of majority, i.e. is not yet entitled to exercise specific civil and political rights²¹³. Therefore, the definition of a ‘minor’ will depend on a state’s understanding of maturity and the age of responsibility. So, while some EU countries have interpreted the term ‘minors’ in the AVMSD to refer to persons under the age of 18, others, such as the Netherlands, categorize a minor to be anyone up to 16 years of age²¹⁴. The AVMSD being an EU directive, it gives the Netherlands some leeway in the form and method it interprets or applies the articles to its restrictions. Thus, it is the Netherlands' prerogative to use this 16 and under definition of a minor. The AVMSD can therefore not likely be used to establish a duty to ban the advertisement of food products directed to children in the 16 to 18 age group.

3.2.9 Articles 6a, 9 and 28b of the Audiovisual Media Services Directive

Next, to determine whether the AVMSD could oblige stricter standards to protect minors from harmful audiovisual content, we should determine the type of content directed towards minors that is banned under the directive. Under article 28b (a), Art 6a para. 1 and Article 9 subsection (g), a duty is established for member states to protect minors from programmes, user-generated videos and commercials which may impair a minor’s physical, mental or moral development. Literature indicates that unhealthy foods impair both the physical and mental development of minors²¹⁵. If interpreted in this manner, the advertisement of certain non-nutritious foods and beverages could be restricted under the aforementioned articles. Also, under Article 9(g), the directive states that commercials that impair a minor’s development may not exploit their inexperience or credulity. This article forms a good basis for the regulation of advertisement directed towards children with child icons or other figures, or any advertisement directed towards children that entices them to persuade their parents to buy the unhealthy product. Next, in terms of regulating the showing of commercials specifically containing unhealthy foods and beverages directed towards minors, Articles 9 and 28b para 2 are relevant. Both articles leave the state the freedom to choose particular nutritional standards to base these regulations on, meaning a regulation based on the Wheel of Five would be in line with the directive. However,

²¹³ European Commission, Migration And Home Affairs, ‘Minor’ (European Commission, 2022)

²¹⁴ European Audiovisual Observatory, ‘Analysis Of The Implementation Of The Provisions Contained In The AVMSD Concerning The Protection Of Minors’ (European Audiovisual Observatory, 2015) 16.

²¹⁵ Jaap Seidell and others, ‘Marketing of unhealthy foods and drinks to children and adolescents: The behavioural and biomedical consequences’ (VU Honours class, 2021).

both articles only suggest self- and co-regulation as appropriate solutions, making it thus difficult to establish a stricter regulation solely based on these standards.

When going over the appropriate measures to protect minors, all solutions provided by the European Commission relate to the organization of the content and not to the content as such. Solutions may range from systematic content descriptors (or other means of description) to visual symbols and age verification tools, transparent and user-friendly content reporting mechanisms, as well as parental control systems.²¹⁶ However, the directive also states that the level of restriction will be proportional to how harmful the content is to the development of the minor. This will determine whether it is fully banned from audiovisual media services outright, or whether other restrictions apply.

3.2.10 Articles 4a, 4 and the preamble of The Audiovisual Media Services Directive

So, how can the AVMSD create a basis to oblige the Netherlands to move beyond a self-regulatory system towards an enforceable system? First the directive states generally, under paragraph 31 of its preamble, that States must ensure the effectiveness of self and co-regulating measures aiming at protecting consumers or public health. The effectiveness of measures concerning the protection of consumers or public health is thus important, but this specific clause only indicates a requirement, however, is not binding. Regarding the co-regulation and self-regulation measures, Article 4a of the Directive states that these should provide for effective enforcement including effective and proportionate sanctions. What is important to home in on is that the regulation must effectively reduce the exposure of children to commercials for these foods and beverages. Article 4a, which was added through the 2018 amending EU directive, states that co-regulation and self-regulation measures should provide for effective enforcement including effective and proportionate sanctions. The effectiveness of a regulation must be read in light of the objectives of the directive, which can be found under the preamble.²¹⁷ This ‘effective standard’ can be found under paragraph 28 of the preamble, which encourages EU member states to ensure their measures effectively reduce the exposure of children to commercials regarding food and beverages that do not fit national or international nutritional guidelines.

While the directive often mentioned the use of self and co-regulation as an appropriate solution, if indeed we can push forward evidence that the self-regulating system does not work effectively, then the Netherlands could have a duty under these articles to adopt stricter

²¹⁶ Article 9(a) Audiovisual Media Services Directive.

²¹⁷ Preamble, paragraph 8, 2018 Audiovisual Media Services Directive.

measures regarding advertisements directed towards minors that do not fit the Wheel of Five guidelines. Establishing stricter rules in this manner, beyond co- and self-regulation, are allowed by the directive under Article 4. The Article states in the first paragraph that “Member States shall remain free to require media service providers under their jurisdiction to comply with more detailed or stricter rules in the fields coordinated by this Directive, provided that such rules are in compliance with Union law” such as the proportionality standard.²¹⁸ Therefore, whether the Netherlands should implement stricter standards than those suggested in the directive, such as moving beyond self-regulation, will entirely depend on the evidence supporting the claim that the current self-regulation is ineffective.

Lastly, when implementing a regulation through the AVMSD, it must be considered that the directive mandates true regulatory independence from the government and industry to ensure that the best interests of viewers (including children) are upheld.²¹⁹ Therefore, any regulatory system that is created based on the AVMSD articles must meet these standards at any cost.

3.2.11 Concluding remarks on the 2018 Audiovisual Media Services Directive

In conclusion, this Directive could be an essential tool in the passing of the stricter restriction we are seeking in the Netherlands. The AVMSD has a few significant limitations as to the type of regulations it obliges states to implement in order to protect minors from certain forms of harmful audiovisual media (States have leeway to its implementation, no clear definition of ‘minor’, it encourages a co- or self-regulating system). However, it also has numerous articles under which stricter regulation standards on audiovisual media can be established. Considering the directive is binding under EU-law, the Netherlands could have a duty to establish a stricter regulatory framework than the current self-regulating system if sufficient evidence is presented that the current system does not protect minors from being exposed to harmful content or being exploited by such content.

Additionally, if the legislators want to seek help on the interpretation of the AVMSD, the Audiovisual Media Services (ERGA) can give technical advice on the protection of minors under the AVMSD and the content of the commercial communications for foods high in fat, sat or sodium and sugars.²²⁰ Also the *Commissariaat voor de Media* [The Dutch Media Authority]

²¹⁸ Article 4, 2018 Audiovisual Media Services Directive.

²¹⁹ Preamble, paragraph 53, 2018 Audiovisual Media Services Directive.

²²⁰ European Commission, 'European Regulators Group For Audiovisual Media Services (ERGA)' (Shaping Europe's digital future, 2022).

has expertise on the implementations of the AVMSD in the Netherlands,²²¹ and could provide technical help on this matter.

3.3. Court proceedings against individual food and beverage companies

3.3.1. Articles 6:193a-6:193j DCC

As discussed in Section 2, commercial practices where traders claim to be bound by a code of conduct while they do not adhere to it in practice, can be deemed as misleading commercial practices and are therefore unlawful (6:193g sub a DCC). An argument can be made that companies which claim to be bound by the Dutch Advertising Codes (including the specific Advertising Codes regarding food and child/youth advertising), while not adhering to it in practice, are in violation of this particular article. Consequently, the conduct of these companies would be considered unlawful with regards to the consumer who bought their product because of the companies' misleading commercial practice.

Furthermore, advertisements that are used to directly incite children to buy advertised products or to persuade parents to buy those products for them, are considered (aggressive) unfair commercial practices (6:193i sub e DCC). While there does not seem to be jurisprudence based on this article, the *Autoriteit Consument en Markt* [the Dutch Authority for Consumers and Markets] has given examples of such advertisements. They argued that messages like 'buy now' or 'upgrade now' in online games, which are meant to directly incentive children to buy items in the game, can be considered aggressive and therefore unfair.²²² There is no reason to assume that this kind of reasoning cannot be used outside of the realm of the game-industry. While this article does not completely prohibit the advertising or marketing of unhealthy foods to children, it could at least provide some protection against the most direct forms of incentivizing the purchase of unhealthy foods and beverages.

Moreover, the stipulation that a commercial practice is unlawful if the given information misleads or may mislead *the average consumer*, for instance in terms of benefits, the risks, and the expected results the product may give (art. 6:193c paragraph 1 sub a), can be very relevant when children are being marketed or advertised to. It means that when certain information is directed at children, the misleadingness of the information will be analysed with regards to the question of whether the *average child* would be misled by the given information. Thus, if the

²²¹ Commissariaat voor de Media, 'Over Het Cvdm' (Cvdm.nl, 2022).

²²² Autoriteit Consument & Markt, 'Leidraad. Bescherming van de online consument: Grenzen aan online beïnvloeding' (2020) <<https://www.acm.nl/sites/default/files/documents/2020-02/acm-leidraad-bescherming-online-consument.pdf>> 30, 31.

trader specifically targets children with certain information, for instance through advertisements or marketing, they have to take into account the fact that children value information differently than adults. As a result, children are more protected than the average adult consumer.²²³ It may be argued that since children lack the cognitive ability to fully understand the difference between fact and fiction in advertisements directed at them and they are often not even aware that they are being advertised to,²²⁴ that many advertisements for unhealthy foods and beverages aimed at children are misleading to the average child and are therefore unlawful. To give an example, when a child idol (e.g. an athlete) is used in a cereal commercial, a child might infer from that commercial that they need that type of cereal to become their idol. As a result, they might buy the cereal, while they would not have made that decision if they were not misled about the expected benefits and results of the product.

Yet, with a legal argument based on article 6:193c of the DCC, one should keep in mind *who* the consumer in the civil transaction is. A legal argument on the basis of 6:193c of the DCC only works if the child is the consumer who enters the civil transaction based on misleading information.

Finally, any legal claim based on Dutch consumer law will not result in a ban on the marketing or advertising of unhealthy foods to children in general. Instead, it will clarify that a certain commercial practice is unlawful and will give the trader a duty to compensate the damages resulting from this unlawful act. However, the verdict that a particular type of advertising or marketing aimed at children is unlawful, could still be relevant for the broader goal of ultimately banning that type of advertisement of marketing all together.

²²³ Autoriteit Consument & Markt, 'Leidraad. Bescherming van de online consument: Grenzen aan online beïnvloeding' (2020) <<https://www.acm.nl/sites/default/files/documents/2020-02/acm-leidraad-bescherming-online-consument.pdf>> 15, 71.

²²⁴ Jaap Seidell and others, 'Marketing of unhealthy foods and drinks to children and adolescents: The behavioural and biomedical consequences' (VU Honours class, 2021) 4-5.



SECTION 4: CONCLUSION & LEGAL ADVICE



4.1. CONCLUSION & LEGAL ADVICE

The marketing of unhealthy food and beverages increases the intake of such products. This leads to a higher likelihood of childhood obesity and other non-communicable diseases, hence putting at risk the physical and mental health of children. Therefore, it appears necessary to adopt stricter regulation in that field. In that regard, our client's stance is that the Dutch state should adopt a ban on all marketing of unhealthy foods and beverages to children. The ban would target marketing techniques such as television advertisements, online advertisements, as well as marketing through product-packaging.

Both the rights-based and risks-based approaches would be suitable rationales for such a ban in the Netherlands. When it comes to the rights-based approach, section 2 on the legal framework illustrated that there are solid legal grounds based on human rights conventions ratified by the Netherlands than can sustain such a policy. As for the risks-based approach, it appears that negative externalities such as the average societal cost of obesity within the Dutch population could be used as a justification. Therefore, the choice between these two approaches depends on the willingness of policy makers to regulate. While the risks-based approach is developed on the basis of economic considerations, the rights-based approach has the advantage of providing legal tools which would compel the Dutch State to adopt stricter regulation in the field of marketing of unhealthy foods and drinks to children.

Our legal advice would be to first lobby the government into adopting stricter regulation on marketing of unhealthy foods and drinks to children. As lobbying policymakers on the basis of the risks-based approach has been deemed ineffective, we advise our client but also as any third-party striving towards stricter regulation to opt for the rights-based approach. To support such an approach, this report demonstrates that based on articles 3 UNCRC, 24 UNCRC and 8 ECHR, as well as articles 6 UNCRC and 2 ECHR, the Dutch State has a legal duty to protect respectively the health and life of the child. Because children have been shown to be susceptible to such marketing techniques, the Dutch State also has on the basis of articles 32 and 36 UNCRC, a responsibility to protect children against the exploitation they entail. Finally, the Dutch State has a duty under the AVMSD to establish a stricter regulatory framework than the current self-regulating model, provided that sufficient evidence shows the inability of the current system to protect minors from being exposed to harmful marketing content or being exploited by such content. Additionally, Dutch consumer law may be used to hold the individual food and beverages companies accountable for misleading or even aggressive commercial practices. It can also help with raising awareness on the amount of misleading and aggressive commercial practices that are visible to children every day.



In the event that lobbying based on the legal framework presented above would not be successful, we advise to follow the example of *Clean Air Netherlands v. the Dutch State* and challenge the Dutch State in court. The main claim would be that by not adopting stricter regulation on the marketing of unhealthy foods and drinks to children, the Dutch State has failed to comply with his duties to protect the Child from violations of their right to health, to life, and to be free from commercial exploitation.



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