A Children's Rights Perspective on Obesogenic Food Marketing

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Katharina Ó Cathaoir
# CHAPTER OVERVIEW

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ASA: Advertising Standards Authority

BAI: Broadcasting Authority of Ireland

BCAP: Broadcast Committee of Advertising Practice

BMI: Body mass index = weight (kg)/ height (m2)

BMS: breastmilk substitutes

CAP: Committee of Advertising Practice

CESCR: Committee on the International Covenant on Economic, Social & Cultural Rights

CoE: Council of Europe


CRC Committee: Committee on the Rights of the Child

CRIA: child-rights impact assessment

ECHR/ ECtHR: European Convention on Human Rights/ European Court of Human Rights

EU: European Union

EU Charter: Charter of Fundamental Rights of the European Union

ESC: European Social Charter

FAO: The Food and Agriculture Organisation

FCTC: Framework Convention on Tobacco Control

HFSS: high fat, salt or sugar

HRC: Human Rights Committee

ICC: International Chamber of Commerce


ICCPR: International Covenant on Civil and Political Rights

NCID: Non-communicable disease

OFCOM: The Office of Communications (UK)

UDHR: Universal Declaration of Human Rights

UNGP: The United Nations Guiding Principles on Business and Human Rights

WHA: World Health Assembly

WHO: The World Health Organisation

WTO: World Trade Organisation
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Chapter 1
Introduction

This thesis analyses children’s rights with a view to imposing obligations to limit unhealthy food marketing. The introduction identifies and explores the central issues that inspired the thesis: the global rise in rates of childhood obesity and the underexplored role of law in addressing its causes. It is argued that despite their recognised potential, laws on obesity prevention have been hampered by lack of political will, lobbying by businesses and equivocal evidence. Accordingly, children’s rights are introduced as an alternative approach. Following the introductory section, the aims, research questions, contribution, and limitations of the thesis are outlined. The methods and sources are also described.

1.1 Childhood Obesity as a Global Concern

The prevalence of childhood obesity has increased dramatically worldwide, posing a threat to children’s health and wellbeing.1 This has been a global trend in developed countries over the past thirty years.2 Accordingly, the World Health Organisation (WHO) estimates that there are approximately 42 million children with obesity.3 In Europe alone childhood obesity has doubled in the past 20 years. While rates in the developed world appear to be stabilising now, significant reductions in prevalence have not been achieved. Further, obesity is rising fastest in middle-income countries. Globally in 1990, 4 per cent of the world’s children were thought to be overweight. This estimate now stands at 6.7 per cent.4

Why is this shift worrisome? Firstly, childhood obesity impacts negatively children’s health and wellbeing.5 It is a contributor to and risk factor of non-communicable diseases (NCDs) in childhood and adolescence, including diabetes, cardiovascular problems,

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4 Ibid.
mental health disorders and certain cancers. Further, the toll of obesity is not limited to physical health; children with obesity experience stigmatisation, bullying and social isolation. Additionally, the effects of obesity are not confined to childhood as the likelihood of having obesity as an adult is substantially higher. Therefore, the benefit of preventing obesity in childhood is amplified as the condition can limit children’s later opportunities to pursue good health. Obesity in adulthood is associated with increased mortality.

Secondly, it is argued that childhood obesity is not only a health concern but also an issue of social justice, as it has a disproportionate impact on poor people and ethnic minorities. While obesity was classically a disease of the rich, in the developed world today, childhood obesity has a higher prevalence among poor families. Accordingly, higher rates of childhood obesity have been found in children of lower socioeconomic status in Western Europe. The same has been found in children of immigrants, particularly girls. In the US, childhood obesity is also linked to socioeconomic inequality, and there is a correlation between race and childhood obesity. These disproportionate impacts provide a compelling case for action to prevent childhood obesity, particularly on the basis of equality. However, these findings vary among states, with more comprehensive data required.

Thirdly, the spread of obesity from high-income to middle-income states adds a moral and international dimension to obesity prevention. Childhood obesity rates are rising

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6 Ibid.
16 Obesity is not a protected ground under EU anti-discrimination law, see further Katharina Ó Cathaoir, “On Obesity as a Disability,” European Journal of Risk Regulation 1 (2015).
fastest in middle-income states. Obesity is also increasing in low income countries, leading to a “double burden” of hunger side-by-side with obesity. Increased obesity prevalence is linked to globalisation, urbanisation and Westernisation through the so-called “nutrition transition”. This suggests that more people are becoming obese due to macro changes in the available diet and lack of opportunities to engage in physical activity, rather than a loss in will power. Therefore, as Thomas and Gostin suggest, NCDs are “communicated from wealthy nations to developing, facilitated by trade agreements, through the marketing and export of cigarettes, alcohol, and unhealthy processed foods”. For example, purchases of snack foods are increasing fastest in low income countries. This indicates that transformation of environment cannot be limited to the nation state.

1.1.1 Causes of Obesity

The causes of obesity in maturity and childhood are multifaceted and include behavioural, environmental and genetic factors. Evidence regarding the causes of obesity while inconclusive, is most often associated with “the big two”: poor diet and lack of physical exercise. Although genetic factors play a role, this is thought to be minimal. The causes of obesity are important however, as Russo points out, the essential question for public health is not only the causes of obesity, but the reasons for its increased

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13 David Stuckler et al., ”Manufacturing Epidemics: The Role of Global Producers in Increased Consumption of Unhealthy Commodities Including Processed Foods, Alcohol, and Tobacco,” *PLOS Medicine* 9, no. 6 (2012).
prevalence.27 The speed with which obesity has become an epidemic cannot be attributed to behavioural patterns only.

Accordingly, the “obesogenic environment” is one explanation for the rise in prevalence of obesity. The theory suggests that the environment in the developed world has become one “that promotes gaining weight and one that is not conducive to weight loss”.28 In this environment, unhealthy choices are the default, and healthy choices cumbersome.29 This limits the ability of individuals to exercise due to factors such as safety and urban planning of neighbourhoods to support physical activity, and the ability to pursue a healthful diet in terms of physical and economic accessibility of healthy food. Accordingly, the theory asserts that “individual responsibility” and “personal choice” do not adequately capture the causal factors of obesity, as individual habits are shaped by the structures around them. Instead, broader structural changes are needed to prevent obesity.30 This hypothesis is widely invoked, although not without criticism.31

Further, obesity itself remains contested. A critical perspective on the obesogenic environment argues that we should shift from seeing the environment as a cause of “fatness”, but rather as unwelcoming to “fat bodies”.32 Others argue that preoccupation

with body size is unnecessary and inappropriate, and will increase stigma. Greenhalgh alleges that the “war on obesity” in the US is damaging young people and leading to disordered eating. For some, state action cannot be legitimate without greater evidence of causal connections. While these are important perspectives that should not be dismissed, they do not provide a justification for state inertia. Although the causal connection between food and obesity is difficult to measure, an unhealthful diet and sedentary lifestyle are established as predictors of ill health. Therefore, it will be argued that instead of an obesogenic environment, states should pursue an environment that enables rights fulfilment.

1.2 Using Law to Prevent Obesity

Accordingly, it is argued that law has the potential to contribute to addressing the obesogenic environment. Law is a powerful exercise of state power that can shape and limit corporate and individual behaviour. Law, unlike policy, is binding on private actors under the state’s jurisdiction. Further, failure to comply with law tends to trigger sanctions, while policies normally set out a course of action that public actors should undertake but are not bound to. The idea that law has a role in preventing obesity is gaining momentum. Gostin argues that law can advance public health through taxation and spending, altering the informational environment, and built and socioeconomic environment, through direct regulation, and indirect regulation through tort and deregulation. Regarding obesity prevention, legislation has been suggested in areas including labelling, marketing restrictions, school settings, the retail environment, pricing strategies and food product consumption. At a broader level, law can ensure that populations have access to opportunities to buy healthful food through legislating for

36 Ulf Ekelund et al., “Does Physical Activity Attenuate, or Even Eliminate, the Detrimental Association of Sitting Time with Mortality? A Harmonised Meta-Analysis of Data from More Than 1 Million Men and Women,” *The Lancet* 388, no. 10051.
town planning including parks in which to exercise and sustainable transport options, such as active commuting. However, law is also limited. At a domestic level, law may be unfeasible without evidence, political will, respect for competing freedoms and adequate public support.

Firstly, the generally attributed causes of obesity fit well with neo-liberal politics that emphasises individual choice, parental autonomy, free market economics and limited government regulation. This political environment supports the position that adults with obesity are responsible for their condition and capable of losing weight through personal endeavour, without the need for state intervention. This ideology is opposed to a role for the state in shaping the food environment, and the use of state power and resources to prevent obesity. However, this rhetoric ignores that for one, law and government policies already promote obesity. It has been claimed that agricultural subsidies lead to overproduction of unhealthful foods, and to the neglect of fruit and vegetables, by driving their prices up. Similar claims have been made regarding agricultural subsidies for milk in the European Union (EU). Likewise, free trade agreements are linked to increased access to unhealthful food. Furthermore, the erosion of law through market deregulation has promoted the spread of processed foods to developing economies, leading to increased consumption of processed foods and displacement of traditional diets.

Secondly, law depends on political will to be enacted. The current Director General of WHO, Margaret Chan, has attributed states’ lacklustre responses to a lack of political will. Public health interventions must be justified as they incur economic costs through

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using state resources and limiting companies’ profit making. Policy-makers must do so in an era of neo-liberal policies which may oppose government regulation. States increasingly employ “better” regulation or “smart” regulation, which limits state control of corporate behaviour and looks to businesses for solutions to market failures. This climate can render law reform politically divisive and unfeasible. However, there are competing reasons why politicians should support law as a tool to prevent obesity. One compelling ground is that obesity has both direct and indirect costs for the health-care system and employee productivity. Persons with obesity have higher health-care expenditure and generate lower productivity, which can lead to greater costs for the state.

Thirdly, the legislature’s power to enact law is subject to limitations and must protect other interests and freedoms in tandem with health. For example, states must respect individual rights to privacy, property and autonomy. As will be explored further, this poses challenges in relation to obesity due to limited evidence on the causes of obesity and the success of legal intervention. Therefore, policymakers should justify proposed health regulation. Furthermore, laws may be repealed following a change in policy or government. Further, where states do not see the immediate benefit, they may repeal an initiative, due to pressure from industry or constituents. For example, it has been argued that the Danish “fat” tax was eliminated before being properly tested.

Fourthly, the food industry is mobilised to oppose greater regulation. Food companies exert power over standards as they occupy an influential position in many economies. There have been suggestions that the food industry is using similar tactics to the tobacco industry, which sought to limit WHO’s capacity to combat the industry, through reducing its budget, and discrediting its evidence. The food industry vigorously lobbies against limitations and invokes science in its defence. It is well documented that the sugar industry lobbied against the WHO’s Technical Report on Diet, Nutrition and the Prevention of Chronic Disease, resulting in a watering down of (non-binding)

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52 Ibid., 54.
53 Furthermore, the aim of the tax seems to have been increasing revenue, not health. S. Vallgarda, L. Holm, and J. D. Jensen, "The Danish Tax on Saturated Fat: Why It Did Not Survive," Eur J Clin Nutr 69, no. 2 (2015).
recommendations. In 2015, the New York Times revealed that Coca-Cola had been funding a research centre which advocated physical exercise to prevent obesity and downplayed the role of diet. In 2016, archival research showed that the sugar industry paid scientists to deliver research favourable to their interests. These exposures may make the public increasingly concerned that “Big Food” is not an appropriate partner in addressing obesity.

Thus, in order for politicians to find the necessary will, public support for governmental intervention is necessary. While support for public spending on obesity prevention is low in the case of adults, there is stronger support for state involvement in childhood obesity prevention. Individuals tend to favour public intervention where they believe that obesity is outside individual control, and caused by the food industry. Accordingly, as children rely on adults, they are generally viewed as “blameless” for their condition. The result is that legal measures designed to “protect” children may be more politically feasible than in the case of adults. At the same time, this can be problematic as the “blame” for the child’s condition is sometimes shifted to the parents. Further, focusing on preventing obesity in childhood alone is unlikely to be effective as children’s habits are influenced by their parents. Therefore, approaches should address the obesogenic environment, not only issues targeting children.

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61 For example: "Each of us is ultimately responsible for our health" Department of Health (England), "Healthy Lives, Healthy People: A Call to Action on Obesity " (London: Department of Health (England),, 2011). Compared with: "None of these upstream causal factors are in the control of the child. Therefore, childhood obesity should not be seen as a result of voluntary lifestyle choices, particularly by the younger child". World Health Organization, "Report of the Commission on Ending Childhood Obesity."
Fifthly, obviously the state cannot guarantee good health to all. It will be argued that good health encompasses duties of individuals, parents, organisations such as WHO, and companies. Mason Meier agrees that “the paradigm of state power is increasingly being challenged by a new normative reality” whereby private actors have influence akin to that of the state. Not every precondition or determinant of health is within the state’s prerogative, such as genetic dispositions to illness. Despite this, the state retains control over certain legal realms that are outside the power of individuals. Factors such as taxation, town planning and laws regulating food companies are outside the control of individuals or companies.

Finally, despite the potential of law, states have been slow to adopt legal measures designed to prevent childhood obesity. A review of current laws addressing obesity prevention in Europe and the US concluded that these are limited, with the majority of laws directed at consumer information through labelling, and school or programme specific nutrition policies. Most of these initiatives have been taken in France, the UK and Scandinavia. Thus, existing laws generally adopt an “individualist discourse”, whereby the consumer (or the parent) is responsible for acting in his/her interests. Thus, public health measures focus on creating informed consumers, not limiting choices. Accordingly, “structuralist” laws which target the factors that shape the obesogenic environment are limited. This approach has proved inadequate. For one thing, behavioural economics disputes that individuals are rational choice maximisers and therefore information alone is insufficient. Furthermore, information-focused measures may be less effective on immigrants and low-income families, who are already vulnerable to obesity, thus increasing inequality.

67 Roberto et al., “Patchy Progress on Obesity Prevention: Emerging Examples, Entrenched Barriers, and New Thinking.”
69 Paul Cairney Donley Studlar, "Obesity Prevention Policy: From Harm Regulation Towards a Neo-Prohibitionist Regime?,” in International Public Policy Institute Policy Brief (University of Strathclyde).
Accordingly, it is submitted that, while obesity prevention is within the scope of law’s function, it requires a paradigm shift. While public health law has classically focused on preventing infectious diseases transmitted by exposure,\(^{73}\) obesity develops in connection with consistent habits over time. The nature of chronic disease means that evidence emerges gradually through trying and testing a variety of interventions. Given obesity’s multifaceted nature, it is difficult to predict causality or the impact of one initiative.\(^{74}\) Therefore, a life course approach aimed at altering the obesogenic environment is more appropriate.

1.2.1 **REGULATING FOOD MARKETING**

The thesis focuses on regulation of unhealthy food marketing. As will be explored in the next chapter, HFSS food marketing forms part of the obesogenic environment through contributing to the proliferation of and demand for unhealthy products, and shaping unhealthy choices as a norm. Although food marketing is only one factor, it merits investigation as it encapsulates a range of legal issues linked to obesity prevention.

It seems in theory at least relatively easy to agree that widespread marketing of unhealthy food to children is problematic. Regulation of marketing of unhealthy food to children has received more attention at a political and societal level in the European Region than any other legal measure to prevent childhood obesity.\(^{75}\) WHO has been active in commissioning reviews on the impact of unhealthy food marketing on children and issued non-binding guidelines on best practice.\(^{76}\) Furthermore, for many years the UN and the EU have recommended limiting HFSS marketing in order to prevent childhood obesity, although neither body imposes an obligation on states to regulate.\(^{77}\)

\(^{(2007)}\): A Robertson, T Lobstein, and C Knai, "Obesity and Socio-Economic Groups in Europe: Evidence Review and Implications for Action" (Brussels 2007).


Additionally, regulating unhealthy food marketing has been given some consideration in legal literature. All EU Member States already regulate some aspects of advertising and marketing, due to harmonisation through the Audiovisual Media Services Directive and the Unfair Commercial Practices Directive. Further, by 2011, twenty countries from the WHO European region included explicit statements on food marketing to children in their obesity/ nutrition or health policies. There is also increasing regulation specifically targeting unhealthy food marketing. Yet, the fact that many states already regulate marketing may make targeted restrictions feasible.

However, reviews highlight that no state has effectively and fully implemented the WHO recommendations. Further, there are those that oppose regulation, arguing that it is premature prior to discovery of more compelling evidence. This position is supported by the fact that it is difficult to isolate individual causal factors in relation to obesity, given its multifaceted nature. Others argue that free market economics mandates that excessive restrictions are avoided. As will be discussed in the Chapter Seven, companies have a right, or at least an interest, in informing consumers of their products. Some express concern that strong regulation will affect competitiveness and lead to unemployment.

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78 In the last number of years, taxation has also been given attention and is now supported by WHO. However, taxation is not specifically child-centred. World Health Organisation, “Fiscal Policies for Diet and the Prevention of Noncommunicable Diseases,” (Geneva: WHO, 2016).


80 Ibid, 86.

81 Ibid, 91.


84 See, for example, Dipti A. Dev et al., "Risk Factors for Overweight/Obesity in Preschool Children: An Ecological Approach," Childhood Obesity 9, no. 5 (2013).

85 Barbara Battel-Kirk, ‘Marketing of Food and Beverages to Children Stakeholder Views on Policy Options in Ireland Findings from the Polmark Project Full Report,” (IrelandDecember 2009), 23.
Further, in light of globalisation, a national approach is unlikely to be effective as companies move marketing practices to developing countries.\textsuperscript{86} If only a few states regulate the conduct of the food industry, companies can move jurisdiction to avoid regulation.\textsuperscript{87} Therefore, one step in obesity prevention would be for the Convention on the Rights of the Child (CRC) to provide a global basis for the duty to regulate HFSS food marketing.

\subsection{Children’s Rights as a Basis for Food Marketing Regulation}

Because of the need for a novel and global approach to obesity prevention, the thesis focuses on states’ obligations to limit HFSS food marketing on the basis of children’s rights, primarily under the CRC.\textsuperscript{88} As will be explored, the CRC does not resolve all concerns but instead provides a basic framework of rights and obligations that can be harnessed to demand legal regulation. However, the obligations imposed on states are not absolute. Further, parents have the primary responsibility for their children, meaning that the interplay between these obligations must be explored.\textsuperscript{89}

A children’s rights perspective is adopted instead of other commonly applied economic grounds for regulation. According to Baldwin et al., market failure, such as monopolies, information inadequacies and predatory pricing, are normally the central justification for regulating.\textsuperscript{90} Such approaches are informed by liberal values which assume that information and wealth will lead to equality.\textsuperscript{91} Diller argues against market-based solutions for obesity given that the market has contributed to the obesity epidemic through the proliferation of cheap, nutritionally empty foods.\textsuperscript{92} Accordingly, asserting children’s rights represents a shift from the status quo.

Other grounds for regulation focus on protecting the public interest or children under \textit{parens patriae} jurisdiction.\textsuperscript{93} While there are convergences between these protective approaches and children’s rights, there are also clear divergences. As we will see, a

\begin{itemize}
  \item I assume that children have rights and do not engage in detail with whether or not children do or should have rights, given that this is resolved by the CRC. However, the idea that children possess rights is not universally accepted. For a succinct summary (and dismissal of the objections to children as rights holders) see: Tom D. Campbell, “The Rights of the Minor: As Person, as Child, as Juvenile, as Future Adult,” \textit{International Journal of Law, Policy and the Family} 6, no. 1 (1992).
  \item Colleen M. Flood et al., \textit{Conclusion: Contexts for the Promise and Peril of the Right to Health the Right to Health at the Public/Private Divide} (Cambridge University Press, 2014).
\end{itemize}
children's rights approach acknowledges that children hold rights - accordingly they should be the focal point of the analysis. For example, under Article 3 CRC, children's best interests must be considered, including through gathering their opinions on issues affecting them. In contrast, parens patriae seeks to protect children from harm, not invoke their citizenship. Public interest theories can ignore children's voice or allow them to be drowned among competing elements. Instead, rights-based approaches aim to empower and enfranchise children.

Further, the public interest is undeniably vague and in the “eye of the beholder”\(^94\), while children's rights are enshrined in the CRC as a normative standard-setting instrument. The CRC offers all states parties a basic framework which, if fully implemented, provides children with universal standards. Rights rely on law as a basis, and not morals or beneficence.\(^95\) This adds legal and moral impetus to public health duties, meaning that states must be held accountable for their obligations.\(^96\) Furthermore, rights can reframe health as a shared responsibility of the state, parents and child.\(^97\)

### 1.4 Aims of the Thesis

The central hypothesis invoked in this thesis is that children's rights (under the CRC) provide a legal basis and, in certain situations, impose an obligation on states to regulate unhealthy food marketing. Accordingly, the primary aim is to analyse the scope and content of children's rights and states' corresponding obligations to limit unhealthy food marketing in order to prevent childhood obesity. The thesis focuses on states' obligations but also recognises that responsibility for children's health and wellbeing, as well as childhood obesity prevention specifically, does not rest with one actor. Accordingly, the obligations of parents, the international community, and companies are also considered. Further, the thesis aims to develop an approach that respects the full spectrum of children's rights, not only those that support limitations. Therefore, states' obligations under the CRC are analysed in light of competing obligations under the same treaty, the European Convention on Human Rights (ECHR)\(^98\) and EU law. At the same time, the thesis seeks to address both the aim and the process of rights' fulfilment, through interpreting rights using a children's rights prism. Accordingly, it is argued that children's rights not only impose obligations to regulate, but also obligations to do so in a manner that fully respects children's rights.

The thesis focuses on the obligations of EU Member States in order to provide a more targeted analysis. These states are subject to a distinct and multi-layered legal order, comprising national, regional and international law, that poses challenges for fulfilment of obligations. Further, Europe experiences the highest burden of non-communicable diseases of any WHO region, including high obesity rates. At the same time, European states are ranked by the UN Development Index as “very high development”. This means that they should have the necessary resources to ensure children’s rights. Accordingly, it is argued that high income states must pursue comprehensive realisation for rights to be effective.

Finally, the thesis aims to provide guidance on how regulations to limit unhealthy food marketing can be designed and implemented in a manner that respects both international public health in line with WHO and children’s rights enshrined in the CRC. It is argued that these international regimes can pursue a reinforcing framework that promotes both public health goals and children’s rights.

1.5 Research Questions

Accordingly, the central research question addressed is:

To what extent do children have a right to freedom from HFSS food marketing and to what extent are duty bearers bound to fulfil this right?

In order to address this question, the chapters are divided into sub-questions:

1. Is HFSS food marketed to children in a manner that impacts adversely on their rights?
2. Who are the duty bearers of a right to freedom from obesogenic food marketing and how should their obligations be distinguished?
3. Does the CRC provide for a right to freedom from obesogenic marketing and corresponding obligations?
4. Do states comply with their international obligations?
5. What is the scope of states’ obligations in light of competing international legal regimes?

1.6 Contribution

The thesis aims to contribute a clear, practical and coherent analysis of children’s rights and states’ obligations in relation to HFSS food marketing. While obesity and law have been considered mainly from a public health perspective, a growing body of

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99 As of January 2017, the UK has voted to leave the EU but at the present time remains a Member State.
commentators suggest that obesity should be examined from the viewpoint of the rights of individuals and the obligations of states. For instance, Simpson and Simpson suggest that by integrating rights, childhood obesity can be tackled as a legal issue. This, it is contended, can alter the manner in which society sees health issues, from a private problem to a legal, governmental responsibility. A children’s rights approach to food marketing regulation is, moreover, recommended.

However, a more thorough and coherent analysis of the obligations of states is needed. Existing analyses are mostly short articles without detailed consideration of the content and scope of rights, or the competing obligations on states. Further, the focus is mainly on a particular country or legal system. For example, Garde has engaged in a detailed analysis of HFSS food marketing and children’s rights, primarily from an EU law perspective. While Handsley et al. offer the most comprehensive study available, the rights to health and adequate food are not analysed. Accordingly, as there is interest in upholding children’s rights in this area, a more detailed analysis can inspire future law-making.


Analyses of children’s rights and obesity prevention have been limited to date. One explanation lies in a fact emphasised by the health and human rights movement - realising health requires public mobilisation and empowered individuals to assert their rights. Such public mobilisation can urge the redistribution of power and demand accountability. However, obesity, and more broadly NCD prevention, has been marked by a lack of mobilisation in contrast to tobacco and HIV/AIDS. Existing NCD approaches have been described as “badly splintered”. WHO recognises that limited political and public awareness of NCDs is a limiting factor. This absence of mobilisation can be attributed to limited understanding of the causes of obesity and the propensity to blame individuals for their condition. At the same time, while civil society response to obesity has been limited, there is greater mobilisation and agreement against HFSS food marketing to children. I argue that the limited attention to obesity as a rights concern can at least in part be attributed to the lack of public outrage and engagement.

Further, there is also scope for deeper analysis of the precise contours of rights-based approaches to regulation. As will be outlined, children’s rights approaches vary and are often based on individual interpretation of the provisions of the CRC. Instead, the thesis seeks to provide a coherent account of a children’s rights-based approach, guided by the outputs of the CRC Committee. Accordingly, a detailed analysis of the CRC Committee’s

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109 I have discussed states’ obligations to prevent childhood obesity in a separate article, which much of this discussion expands upon: Katharina Ó Cathaoir, “Childhood Obesity and the Right to Health,” *Health and Human Rights Journal* 18, no. 1 (2016).


recommendations in relation to childhood obesity and food marketing is offered. This, it is hoped, will help to clarify the process by which states should fulfil children's rights.

The thesis also seeks to fill gaps in research on socioeconomic rights through offering an analysis of European states' obligations. It is argued that the rights to health and food are not adequately explored in the context of developed, high income states. Accordingly, the CRC Committee has been accused of engaging inadequately with the obligations of developed states, while issuing similar recommendations for under-developed countries. Thus, states of higher development may escape greater scrutiny instead of being held to higher standards. This is particularly relevant in light of the criticisms of cultural relativists, who claim that developed states use universal rights as a means of neo-colonialism, while avoiding scrutiny of their own actions.

Finally, the thesis offers a children's rights-friendly understanding of states' obligations to prevent obesity. Under the children's rights approach, every child's dignity should be respected. The focus is on states' obligations to limit the actions of the food and beverage industry to support children's open future. No claims regarding how families and children should live, look or eat are made or should be inferred. Instead, states should ensure that rights holders have opportunities and choice through limits on commercial intrusion. Children with obesity already face stigma and discrimination, which researchers, health-care professionals and governments should seek to eliminate rather than perpetuate.

1.7 Limitations

Firstly, the thesis does not analyse domestic legal systems in detail. National sources of regulation, such as parens patriae jurisdiction, public health laws or individual constitutional frameworks are not explored. Although regard is had to case studies in selected European jurisdictions, the thesis does not evaluate national administrative or constitutional law. Therefore, the precise contours of regulations in individual states require greater analysis, including through impact assessments and consultations. Secondly, the thesis does not address in detail whether the EU should adopt more

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120 Although some researchers argue that stigma is a valid method in public health, I believe that this is contrary to children's best interests. R. Bayer, "Stigma and the Ethics of Public Health: Not Can We but Should We," Social Science and Medicine 67 (2008); Mette Hartlev, "Stigmatisation as a Public Health Tool against Obesity. A Health and Human Rights Perspective," European Journal of Health Law 21 (2014).
stringent HFSS food marketing legislation as has been done elsewhere.\textsuperscript{121} Thirdly, international trade law is beyond the remit of this study.\textsuperscript{122} Intellectual property in relation to food packaging is also not addressed. Fourthly, the thesis does not provide an exhaustive review of food marketing and focuses on the forms of marketing with which there is the clearest risk of infringing children’s rights.

1.8 **Terminology**

The terms marketing, promotion and advertising are used interchangeably in the discussion. Marketing is defined following the WHO implementation framework:

Any form of commercial communication or message that is designed to, or has the effect of, increasing the recognition, appeal and/or consumption of particular products and services. It comprises anything that acts to advertise or otherwise promote a product or service.\textsuperscript{123}

Advertising is narrower and has been described as: “any communication, usually paid-for, specifically intended to inform and/or influence one or more people”.\textsuperscript{124} Promotion can be defined as actions to “keep the product in the minds of the customer and help stimulate demand for the product. Promotion involves ongoing advertising and publicity.”\textsuperscript{125}

Further, the terms “unhealthy” and “high fat, salt or sugar” (HFSS) food are used interchangeably. Food is often delineated as healthy or unhealthy through nutrient profiling: “the science of classifying or ranking foods according to their nutritional composition for reasons related to preventing disease and promoting health”.\textsuperscript{126} Nutrient profiling is comprised of two main models: those that relate to the nutrient levels in food (high fat/ sugar) or the effect of the food on people’s health (e.g. healthy/ unhealthy).\textsuperscript{127} Components commonly used in nutrient profiling systems include saturated fat and sodium, energy, and specific minerals and vitamins.\textsuperscript{128} As we will see in subsequent chapters, the design of the nutrient profile has a clear impact on what food is considered healthy or unhealthy, with different states and regions adopting varied categories.

\textsuperscript{121} See further: Alberto Alemanno and Amandine Garde, “Regulating Lifestyles in Europe: How to Prevent and Control Non-Communicable Diseases Associated with Tobacco, Alcohol and Unhealthy Diets?,” (Swedish Institute for European Policy Studies, 2013), 67.
\textsuperscript{122} For a discussion on international trade law and NCDs, including obesity, see Benn McGrady, *Trade and Public Health: The Wto, Tobacco, Alcohol, and Diet* (Cambridge; New York: Cambridge University Press, 2011).
\textsuperscript{124} Jeremy Bullmore, “What Is Advertising?,” Advertising Association UK.
\textsuperscript{126} Nutrient Profiling, Report of a WHO/ IASO Technical Meeting (London, 4-6 October 2010), 2.
\textsuperscript{127} Ibid. 3.
Although there is no single classification of healthy/ unhealthy food –when used in this thesis – the term is meant in line with WHO Europe's nutrient profile unless otherwise specified.\textsuperscript{19} In 2015, this regional nutrient profile was adopted in response to the Vienna Declaration on Nutrition and Non-communicable Diseases in the Context of Health 2020 for use and adaption by individual Member States.\textsuperscript{130} However, it is a non-binding technical document.\textsuperscript{131} The WHO Europe profile categorises food into fixed categories such as cakes and biscuits, chocolate, fresh meat and processed meat. Nutritional thresholds are set in light of total fat, saturated fat, total sugars, added sugars and salt. For example, processed meat can be advertised if it contains less than 20g total fat per 100g. Chocolate, cakes, energy drinks and juices, on the other hand, should not be advertised.\textsuperscript{132}

1.9 \textbf{Theory: Rights as Power Claims}

The thesis conceptualises children’s rights within the context of power. I regard power as “the capacity to influence and the exercise of that influence”.\textsuperscript{133} The underlying assumption is that rights offer a means to reshape the power balance governing children’s environment. Accordingly, rights are weapons that can lead children from being excluded to included.\textsuperscript{134} The power perspective is chosen, as a conservative approach to rights can serve to support the market-based status quo.\textsuperscript{135} Instead, a power-centred approach argues that it is necessary to reform social structures which benefit the powerful and neglect the vulnerable.\textsuperscript{136} According to Farmer, human rights violations are “pathologies of power” that lie behind social inequalities based on race, ethnicity or gender and social class.\textsuperscript{137} Accordingly, socioeconomic rights enshrine individuals’ rights to a “more just society in which the human dignity of all citizens may be equally respected and affirmed”\textsuperscript{138}.

\begin{itemize}
  \item \textsuperscript{131} WHO Europe, "Who Regional Office for Europe Nutrient Profile Model."
  \item \textsuperscript{132} Ibid.
  \item \textsuperscript{134} Michael Freeman, \textit{The Moral Status of Children Essays on the Rights of the Child} (Brill Nijhoff, 1997)., 17
  \item \textsuperscript{136} Meier, "An Agenda for Normative Policy Analysis in the Study of Global Health Governance.\textquotedblright, 631
  \item \textsuperscript{137} Paul Farmer, \textit{Pathologies of Power} (California/ Londond: University of California Press, 2005)., 219.
  \item \textsuperscript{138} Marius Pieterse, "Eating Socioeconomic Rights: The Usefulness of Rights Talk in Alleviating Social Hardship Revisited," \textit{Human Rights Quarterly} \textbf{29} (2007), 803.
\end{itemize}
This power-focused approach is necessary as children are generally powerless. Accordingly, they do not command resources that are useful to those with power. It is submitted that this leaves them vulnerable to neglect in law and policy-making. For example, children cannot vote or exercise control over money and property. Therefore, children cannot, unlike other groups, use their resources to force governments to consider their views. Although states consider child-protection, this is not tantamount to a children’s rights approach. Benevolent protection can instrumentalise children instead of transferring power to them. A children’s rights approach holds states and public bodies to account for their actions.

Yet, children’s rights as power is controversial as it implies a loss of influence by others. However, as will be discussed, children’s rights do not seek to elevate children to fully autonomous beings, but instead to ensure their perspective is included and weighed in decisions affecting them. We cannot assume that existing power structures will act with children’s interests in mind, as children’s concerns compete among many.

1.9.1 The Right to an Open Future

Children’s rights and rights-based approaches are underpinned by the best interests of the child as enshrined under Article 3 CRC. However, it is submitted that without an underlying theory of what serves the child best, rights-based approaches can be rendered empty or lack transparency. In order to serve the child best, we need a conception of “best”, i.e. what is the optimal final outcome? Accordingly, I adopt children’s “right to an open future” as an underlying theory of their rights.

Feinberg coined the right to an open future as a method of overcoming conflicts between parents’ and children's rights. The right to an open future is an autonomy-like right that should be preserved for children to exercise when they reach adulthood. If children’s rights are violated before they have the ability to exercise them, certain options will be closed. Following Feinberg’s approach, children and adults have A-C rights. A-rights, such as the right to vote, only belong to adults. In contrast, C-rights such as “dependency rights” to basic goods like food, generally belong to children only. A-C rights are those that children enjoy now, whereas A rights are those rights they may never come to exercise. Accordingly, protecting children’s future autonomy may require limiting current choices in a manner that would not be possible with adults who already exercise autonomy.

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139 Elisheva Sadan, Empowerment and Community Planning (Hakkibutz Hameuchad: Israel, 1997), 44-5
140 See 1.12, 3.2.
142 Ibid., 126.
143 Ibid., 125.
144 Ibid., 127
While Feinberg considered the right to an open future in the context of parents, I apply this right to the role of the state. I argue that the state's duty, when interpreting children's best interests, should be to ensure that children reach adulthood with the most options and choices intact. Accordingly, where there is a conflict between children's rights and other rights and interests, the state should adopt an approach that upholds children's open future. Thus, preventing irreparable harm can involve limiting children's autonomy. States should avoid decisions that close off children's enjoyment of their rights in later life. This approach is useful in the context of obesity prevention, as often the harm that laws and policies seek to mitigate does not appear until later in life. For instance, children with obesity are more likely to be obese as adults and experience diseases such as diabetes and cardiovascular disease. Further, children often do not have the capacity to envision long-term consequences of short-term behaviour. Accordingly, both current and future impacts should be considered.

However, Feinberg warns that the child's future should be interpreted in a neutral manner and courts (or the state) should not impose their conception of the "good life." Feinberg conceives the child's "own good" as essentially their self-fulfilment, described as:

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\text{the development of one's chief aptitudes into genuine talents in a life that gives them scope, an unfolding of all basic tendencies and inclinations, both those that are common to the species and those that are peculiar to the individual and an active realisation of the universal human propensity to plan, design and make order.}
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Therefore, this right should not be used to argue for vague or spurious views of an open future or as a basis to overrule and control. Instead, it must be used in a reasonable and coherent manner.

Accordingly, limitations on freedoms must be proportionate. Children cannot be protected from every potential harm and risk. Thus, in the area of obesity prevention, the state should seek to protect children's open future in order to avoid their health being already compromised by the time they have the capacity to make their own health choices. However, in doing so it is submitted that the state should focus on limiting corporate behaviour that undermines children's health, and where possible avoid intrusive regulation of individual behaviour. Accordingly, in pursuing a rights-based approach, states should avoid stigmatisation and normative assumptions on personal appearance and instead concentrate on health.

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145 Simmonds et al., "Predicting Adult Obesity from Childhood Obesity: A Systematic Review and Meta-Analysis."
146 Feinberg, "The Child's Right to an Open Future." 139.
147 Ibid. 143.
CHOICE OF SOURCES AND THEIR LEGAL STANDING

The thesis focuses primarily on developing a coherent analysis of the CRC. The CRC is further interpreted in light of complementary and clashing international treaties. Soft law and non-binding international recommendations are also included in the analysis. Furthermore, selected statutes and cases from South Africa, Colombia, the United Kingdom, Ireland, Denmark and Sweden are analysed. Finally, non-legal sources are also integrated into the analysis.

“HARD” INTERNATIONAL LAW

The thesis takes a legal positivist approach that relies on treaties, statutes and case law as the main sources of legal rights and obligations. International treaties are binding sources of law as they have been ratified by states that thereby agree to be bound by the provisions in good faith. Accordingly, treaties are deemed hard sources of law on grounds of good faith and effectiveness. However, as will be explored further in Chapter Three, there is opposition to this approach. Others contest the “hardness” of provisions of the CRC and the International Covenant on Economic, Social and Cultural Rights (ICESCR), and instead define them as akin to “soft” law. This view argues that international norms must be precise in order to be considered binding on states parties and not mere policy objectives. While treaties are given the status of binding law in this account, it is recognised that the precise standing of the norms and their interaction with other sources of law will differ among legal systems.

In light of the aims of the thesis, socioeconomic rights, specifically the rights to health and adequate food, occupy particular significance. The relevant sources of socioeconomic rights at European level are the CRC, the ICESCR, and the European Social Charter (ESC). In line with the doctrine of lex specialis, the CRC provides the primary source of obligations. However, the provisions of the ICESCR and ESC are also included to support and expand upon the scope of state obligations. While certain socioeconomic rights are protected by other conventions, such as the Convention on the Elimination of Racial Discrimination, the Convention on the Rights of Persons with Disabilities and the Convention on the Elimination of All Forms of Discrimination Against Women, they are beyond the scope of this analysis. The ECHR and the Court’s judgments are not included in the discussion on socioeconomic rights, as the ECHR primarily protects civil and political rights.

153 Literature suggests that these Committees have not been avant garde in their approach to socioeconomic rights William F. Felice, “The UN Committee on the Elimination of All Forms of Racial Discrimination: Race, and Economic and Social Human Rights,” Human Rights Quarterly 24, no. 1 (2002).
In the interest of coherency, however, the provisions of the ICCPR and ECHR that enshrine competing rights are analysed (the rights to expression, information and privacy).\(^{54}\) ECtHR judgments and Human Rights Committee complaints are analysed to clarify interpretations. An analysis of EU law’s impact on Member States’ freedom to regulate unhealthy food marketing is conducted primarily through a review of relevant case law on free movement of goods and services. As no cases were found directly addressing unhealthy food marketing restrictions, EU case law on advertising restrictions of alcohol is the primary focus.

1.10.2 **SOFT LAW**

At the same time, the thesis includes soft law for interpretative purposes and guidance. Soft law is contested, with no clear agreement between what standards can be regarded as hard or soft.\(^{55}\) For some, soft law is both primary and secondary: primary soft law imposes obligations but not implementation mechanisms, while secondary soft law creates standards that are normative but have not been adopted as a binding treaty.\(^{56}\) Further, some scholars object to the idea of soft “law” as only rules of binding force should be considered law *per se*.\(^{57}\) For both systems, lack of implementation by Member States at national level remains a challenge.\(^{58}\) Therefore, soft law can hold multiple meanings depending on the author’s view on law. Soft law is taken here to amount to agreements and recommendations that are not binding but offer a measure of agreement on the part of states. Accordingly, the WHO Recommendations is the primary soft law standard considered. While a technical document, these recommendations have been endorsed by the World Health Assembly, which means that they are subject to a measure of state support. The United Nations Guiding Principles are another important soft-law standard given prominence in the analysis.\(^{59}\)

The benefits of soft law over hard law are generally regarded as: agreement is easier to reach, the domestic ratification process can be avoided, and it is less difficult to amend or replace.\(^{60}\) Soft law standards may accordingly be agreed with greater specificity than states would commit to in a binding treaty.\(^{61}\) Soft law can be as effective in shaping

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\(^{60}\) Boyle, "Some Reflections on the Relationship of Treaties and Soft Law.,” 922-3.

behaviour with “similar effects, fewer costs, stronger language and greater coverage.” It can help to explain unclear provisions of hard law or function as a precursor to the adoption of binding treaty law (such as in the case of the CRC). Allyn et al suggest that non-binding international health instruments can embody political and legal significance where they include effective reporting and data collection. They are also more flexible, easier to update, may facilitate compromise and allow for greater co-operation with non-state actors such as civil society. However, soft law also has weaknesses. In spite of claims that soft law allows for speedy agreement, negotiating soft law can take many years. It can undermine the democratic process as it does not have to be ratified. However, it is submitted that soft law has an important role in international health law, where law is an under-utilised tool.

Other interpretive sources that are not law but instead expand our understanding of valid law are included in the analysis. Accordingly, in the analysis of socioeconomic rights, particular emphasis is given to the findings of the CRC Committee. The UN Committees help to clarify the content of socioeconomic rights, which are often broadly phrased. It is submitted that if the system for the protection of international rights is to function efficiently, the UN Committees’ views should be given normative weight for a number of reasons. Firstly, human rights treaties differ to classic public international law in that they are not based on reciprocity. Instead, states guarantee individual rights for the benefit of those under their jurisdiction. Secondly, unlike in the case of civil and political rights, there is no specialised children’s or socioeconomic rights’ court empowered to deliver binding judgments at international level, meaning there is no definitive interpretation of the rights. Thirdly, socioeconomic rights do not have a rich history of international or national case law, although jurisprudence is emerging, particularly in the Global South. Therefore, although the Committees’ interpretations are not strictly binding, their work should be given paramount consideration in terms of socioeconomic rights. However, this will depend on the quality of the outputs of the Committees as they do not have binding powers per se. While Footer argues that such sources should be categorised as secondary soft law, I am slow to suggest these sources as law as they do not reflect agreement among states parties. Instead, they are derived from an independent committee’s understanding of the law, which although important, is not legal per se.

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163 Footer, "The (Re)Turn to 'Soft Law' in Reconciling the Antinomies in Wto Law.", 244.
165 Chinkin, "International & Comparative Law Quarterly.", 865.
169 Footer, "The (Re)Turn to 'Soft Law' in Reconciling the Antinomies in Wto Law.", 257.
Non the less, they occupy an important place in the analysis as they deepen one's understanding of the rights at issue in this thesis.

Other recommendations by international human rights bodies are also given consideration: recommendations of the European Charter Committee, resolutions of the General Assembly and Human Rights Council, the work of the Special Rapporteurs on the Right to Health and Food, and the United Nations High Commissioner for Human Rights. Although these sources are not legally binding, they have the potential to further elucidate on rights in the view of limited jurisprudence.

1.10.3 Domestic legal sources

Legislation and case law from selected domestic systems are included to supplement the analysis where they serve to address the research questions. Firstly, in light of the limited case law on the right to health, cases from South Africa and Colombia are included in 3.3.3 and 7.5. The function of these sources is to provide an insight into the meaning and weight of the right to health in court decisions. Secondly, in Chapter Six, an analysis is undertaken of regulations that limit unhealthy food marketing to children in Sweden, Denmark, Ireland and the UK. These case studies are selected on the basis of a WHO review of regulatory approaches in Europe, which suggests that they are among the most restrictive rules to date. Furthermore, they offer a mix of regulatory approaches: co-regulation, state regulation and self-regulation. The extent to which these seemingly strong regulations uphold WHO Recommendations and children's rights is evaluated. A search was also conducted of the decisions of the dispute resolution bodies which examine complaints in relation to food marketing to children. The limited decisions available are included in the analysis of the regulations, where they elucidate aspects relevant of the chapter and the research question.

1.10.4 Non-legal sources

The thesis is also informed by other disciplines – an approach known as informed disciplinary. The purpose is to develop an account of law in its “context” with data drawn from other disciplines, as opposed to analysing law as a closed system. The thesis is informed by epidemiological, sociological, psychological and demographic data on childhood obesity. Empirical research on the prevalence and effects of marketing is included for informational purposes. Data from media studies and civil society reports are included to assist with evaluating whether the regulations meet WHO Recommendations. Finally, where possible, studies that include child participation are employed to encompass children's perspectives (following Article 12 CRC) to the greatest extent possible.

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171 Lisa R. Lattuca, Creating Interdisciplinarity: Interdisciplinary Research and Teaching among College and University Faculty (USA: Vanderbilt University Press, 2001), 82.
1.11 Methods

The four central methods applied in this thesis are literature review, legal doctrinal method, treaty interpretation and content analysis. Method is taken to mean “the way in which a research project is pursued”. This section details the methods of treaty interpretation and content analysis. Other methods are clarified in the final section of this introduction and in subsequent chapters.

1.11.1 Interpreting the CRC

As already outlined in section 1.10.1, the CRC is the central treaty analysed in this thesis. Accordingly, it is necessary to create a coherent interpretation of the meaning attributed to the rights and duties. However, the interpreter’s task is made difficult by the issues outlined above: vague provisions and absence of binding judgments. Further, existing rules on treaty interpretation are lacking. Accordingly, to create an account in good faith, it is necessary to outline clearly the approach taken when interpreting its provisions.

The Vienna Convention on Laws of the Treaties (VCLT) provides the basic rules of interpretation. However, these rules are so flexible that multiple meanings could be reached with little coherence. The central rule is that treaties must be interpreted in “good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose”. The relevant context includes the text, the preamble and annexes, as well as subsequent agreement and related agreements. Aust suggests that other treaties with similar terms may also be examined. Further, a treaty must be interpreted as a whole. Although provisions may have bearing on each other, they should not “render the main provision nugatory”. Recourse can be had to preparatory works where meanings are ambiguous, obscure or lead to a result that is manifestly absurd or unreasonable. Finally, under customary international law, lex posterior (the later rule prevails) and lex specialis (the specific rule prevails over the general) also apply. While these rules are used throughout the thesis, they are supplemented by further principles to provide more clarity.

In light of these ambiguities, the thesis is influenced by the interpretative methodology posited by Professor John Tobin. His account seeks to address many of the shortcomings

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174 VCLT, Article 31(1).
175 Article 31(2)(a)(b) VCLT.
176 Aust, Modern Treaty Law and Practice., 220
177 Ibid., 210.
178 JG Merrills, The Development of International Law by the European Court of Human Rights, 2nd ed. (Manchester: Manchester University Press, 1993), 75.
179 Article 32(a)(b) VCLT.
180 Aust, Modern Treaty Law and Practice., 221.
of sloppy reasoning based on humanitarian considerations or too much subjectivity.\footnote{Ibid., 76. Other commentators rely more heavily on the NCLT: Bhattacharya posits that applying the VCLT when deciding individual complaints allows for “foreseeable and justifiable decisions” Dru Bhattacharya, Global Health Disputes and Disparities: A Critical Appraisel of International Law and Population Health, Routledge Studies in Public Health (Oxon: Routledge, 2013), 45.} According to Tobin, human rights treaty interpretation must be persuasive as there are few mechanisms to secure compliance. Tobin views interpretations as multiple, meaning simply that which “attracts and achieves dominance over all other alternative understandings within the relevant interpretive community”.\footnote{Tobin, The Right to Health in International Law, 83.} The interpreter must convince the relevant interpretative community to accept her analysis, as the greater the level of support by this interpretive community, the better the prospect of acceptance by states.\footnote{Ibid., 84.}

Accordingly, Tobin argues that human rights interpretation should be principled, clear and practical, coherent in its reasoning and consistent with international law, and sensitive to the socio-political context within states and the international legal order.\footnote{Ibid., 78.} This should render the interpretative process more transparent and less subjective. Firstly, in order to be principled, the interpreter must have regard to the VCLT as principles agreed upon by states.\footnote{Ibid., 88} Secondly, for interpretation to be clear and practical, it must be within the reach of states acting in good faith and reflect reality. Whether the interpretation is practical must be interpreted in light of the socio-political context of the particular state.\footnote{Ibid., 97-99.} Furthermore, interpretation cannot bend to the lowest common denominator and instead must be principled, in so far as it “ensure[s] the effective realisation of the object and purpose” of the right.\footnote{Ibid., 100.}

Thirdly, interpretation must be coherent in reasoning and within the international legal system. Tobin asserts that there is a presumption in favour of harmonisation and contrary to normative conflict.\footnote{Ibid., 105.} The interpreter should be informed by the principle of lex specialis where there is a normative conflict.\footnote{Ibid., 105-6.} Furthermore, rights must be interpreted in light of the limits of other rights. Therefore, “the interpretation of any human rights must acknowledge other aspects of the international legal system that may overlap with and inform the potential scope of that right”.\footnote{Ibid., 107} The principles of indivisibility and interdependence of rights must be respected, as well as the general principles underpinning the implementation of rights under the different treaty regimes.\footnote{Ibid., 108-9.} Finally, Tobin calls for sensitivity in terms of the social, cultural and political demands so that
measures are tailored to meet local and global needs. While such factors should not work as trumps, they should be given consideration, for example, in the manner invoked by the European Court of Human Rights through the doctrine of the margin of appreciation. The interpretive methodology should be sensitive to political reality, while not appeasing to the extent that rights are rendered meaningless.

It is submitted that the methodology offers increased clarity in an area wrought with ambiguity. However, there are certain shortcomings. For one, the approach may prove overly mechanical. Equally, greater accountability could have been provided had the adoption of these principles been justified with reference to why they were selected over others, such as transparency. Furthermore, it is likely to prove challenging to satisfy the wide interpretative community suggested. The community’s views must be considered, although Tobin is aware that they cannot always be reconciled. Therefore, he concedes that states should be the central target as they hold the primary obligations. However, Tobin does not outline concretely how these differences in interpretation can be balanced. For instance, when should a state’s interpretation give way to the broader communities? Is it the state in question or the community of states’ interpretations that should be considered? The refusal to adopt a hierarchy among communities does not reflect the normative and political power of the various actors, such as companies, whose interests may conflict with the right to health. In the same breath, this approach may isolate the legal community which Tobin notes is slow to look outside its own system. These concerns notwithstanding, the interpretive approach guides the understanding of children’s rights in subsequent chapters.

1.12 CHILDREN’S RIGHTS APPROACHES

In support of these principles, the thesis applies a children’s rights approach to interpreting the CRC and competing/conflicting state obligations. Rights-based approaches are legal entitlements—not dependent on humanitarian aid or charity. Accordingly, empowerment runs through many accounts. In this regard, rights approaches highlight participation and accountability, whereby communities must be empowered and actively participate to gain control over decisions affecting their lives.

93 Ibid., 110-118.
94 Ibid., 112.
95 Ibid., 117.
and health. Moreover, principles of transparency and non-discrimination are also highlighted as a means to achieving these aims. Further, it has been argued that rights:

require that transparent, accessible, and effective monitoring and accountability mechanisms be established, providing rights holders (for example, individuals) with an opportunity to understand how duty bearers (for example, ministers and officials) have discharged their obligations.

Furthermore, children’s rights approaches often centre on the CRC’s “general principles” as outlined by its Committee. Tarantola and Gruskin highlight the unique role of the Convention’s general principles as a lens through which realisation of all CRC rights are analysed, implemented and evaluated - “this concept is unique to the CRC; no other human rights treaty contains rights which are meant to be discussed both in and of themselves, and as a means to analyse governmental progress toward implementation of other rights.” Kilkelly and Lundy also explore the CRC as an “auditing tool whereby its standards are used to children’s rights-proof law and policy at domestic level.”

On the other hand, rights approaches have not gained universal support. For example, Koskenniemi is highly critical of rights mainstreaming, claiming that as “rights are both unlimited and (thus inevitably) conflictual renders the call for administrative bodies to ‘take rights into account’ empty”. However, this analysis applies an overly legalistic perspective that focuses on what mainstreaming could have brought to court cases. Instead, rights-based approaches go beyond the singular fixation with violations and pursue transformation in the way in which laws and policies are drafted and applied. Koskenniemi claims that rights mainstreaming calls on administrative bodies to do merely what they already do, i.e. balance interests. This approach assumes that rights are already considered by public bodies and thereby, fails to capture the lived


210 Ibid., 51.
experiences of children and vulnerable groups. Mainstreaming calls for the transformation of both process and outcomes, not box ticking.

Similarly, Reubi argues that human rights’ treaties have failed to protect those at serious risk. Therefore, he suggests that resources used to devise a rights framework could be better spent elsewhere. He argues that rights unwisely ignore non-state actors and that litigation increases, rather than decreases, health inequalities.\(^\text{207}\) However, structural litigation can have dynamic effects.\(^\text{208}\) Further, litigation is only one approach to rights fulfilment. Additionally, as we will see, rights-practice is moving towards recognising non-states actors’ responsibilities. Finally, it has been argued that rights standards are ill defined and malleable, meaning that they may lead to less clarity not more. In particular, the best interests’ principle may pose difficulties given its flexibility.\(^\text{209}\) However, it is argued here that through applying a more coherent methodology, rights can be interpreted with greater clarity.

1.12.1 CHOICE OF METHOD

Following a review of a variety of rights and children’s rights approaches, I concluded that the approaches offered too little clarity and traceability. It has previously been recognised that rights-based approaches can become “an empty rhetorical vessel into which the subjective preferences of whichever group or individual that chooses to use the term can be poured”\(^\text{210}\). Accordingly, in light of the deficiencies of existing children’s rights approaches, I carried out an analysis of all the CRC Committee’s General Comments to construct a children’s rights approach guided by the CRC Committee. A focus on its guidance has already been justified on the basis that it is likely to ensure compliance with the CRC.\(^\text{211}\)

A form of qualitative content analysis, known as thematic analysis, was undertaken.\(^\text{212}\) Content analysis is a flexible method that can be applied in a number of ways.\(^\text{213}\) Although


\(^{209}\) Lundy and Kilkelly, "Children’s Rights in Action: Using the UN Convention on the Rights of the Child as an Auditing Tool.", 336


\(^{213}\) Satu Elo and Helvi Kyngäs, "The Qualitative Content Analysis Process," Journal of Advanced Nursing 62, no. 1 (2008), 113
not a mainstream method in legal science,\textsuperscript{244} content analysis is not alien to legal research, but the method is often not explicitly labelled as such.\textsuperscript{245} Qualitative content analysis “focuses on the characteristics of language as communication with attention to the content or contextual meaning of the text.”\textsuperscript{246} The goal of content analysis is to “attain a condensed and broad description of the phenomenon, and the outcome of the analysis is concepts or categories describing the phenomenon.”\textsuperscript{247} Thematic analysis seeks to establish patterns or themes within data.\textsuperscript{248} Themes should “capture something important about the data in relation to the research question, and represents some level of patterned response or meaning within the data set”.\textsuperscript{249} Themes are not necessarily that which is most prevalent, but instead that which is most relevant to the research question.\textsuperscript{250}

The method was selected over traditional close reading of text, which is common in legal research, for three reasons. Firstly, I wished to identify patterns in a scientifically rigorous, systematic, clear and objective manner in order to make a contribution to research into the CRC Committee’s approach. Qualitative content analysis aims to create results that are replicable by other researchers applying the same method, which separates it from traditional legal analysis.\textsuperscript{251} This systematisation enables the researcher to point to where she has derived her analysis, as opposed to more subjective methods of interpretation.\textsuperscript{252}

Secondly, classic legal research methods, such as doctrinal method, were deemed inappropriate for this analysis as General Comments are not legal texts but quasi-legal. The CRC Committee is comprised of both lawyers and non-lawyers.\textsuperscript{253} Unlike judicial decisions or legislation, General Comments are recommendations reached through consensus by a diverse membership of appointed experts that labour under a politically and culturally charged system. A General Comment seeks to convince the reader of a particular interpretation and therefore cannot be considered an objective dissection of rights and obligations.\textsuperscript{254} Nevertheless, General Comments are an important source in

\textsuperscript{244} For instance, it is not mentioned in either Research Methodologies in EU and International law or Getting a PhD in Law. Cian C Murphy Caroline Morris, Getting a Phd in Law (UK/ USA: Hart Publishing, 2001). Or Robert Cryer, Research Methodologies in Eu and International Law.


\textsuperscript{247} Elo and Kyngäs, “The Qualitative Content Analysis Process.,” 108.

\textsuperscript{248} Braun and Clarke, ”Using Thematic Analysis in Psychology.”

\textsuperscript{249} Ibid., 82.

\textsuperscript{250} Ibid. 82.

\textsuperscript{251} Wright, ”Systematic Content Analysis of Judicial Opinions.”, 65 & 106; Klaus Krippendorff, Content Analysis, an Introduction to Its Methodology, 3rd ed. (Los Angeles: Safe, 2012)., 24.

\textsuperscript{252} Braun and Clarke, ”Using Thematic Analysis in Psychology.”


\textsuperscript{254} See for example, on the HRC’s Committee’s General Comment on Reservations Elena A Baylis, “General Comment 24: Confronting the Problem of Reservations to Human Rights Treaties,” Berkeley Journal of International Law 17, no. 2 (1999); General critique of Committees’ approaches
light of the functions of the CRC Committee. Finally, it has been suggested that content analysis is best suited to systematising a large amount of data that carries the same normative weight, as opposed to rhetorical interpretations. In this instance, 370 pages of text were analysed which required a systematic method. The method also requires close scrutiny and, thus, a detailed understanding of the texts as a whole. To the best of my knowledge, there has not been a previous content analysis of the General Comments of any UN Committee. The approach thus, seeks to increase our understanding of the CRC Committee's work.

1.12.2 APPLICATION OF THE METHOD

The research question addressed in the content analysis was: “what are the elements of a children’s rights approach?” In its General Comment on Violence, the Committee described a rights-based approach as:

one which furthers the realization of the rights of all children as set out in the Convention by developing the capacity of duty bearers to meet their obligations to respect, protect and fulfil rights (art. 4) and the capacity of rights holders to claim their rights, guided at all times by the rights to non-discrimination (art. 2), consideration of the best interests of the child (art. 3, para. 1), life, survival and development (art. 6), and respect for the views of the child (art. 12). Children also have the right to be directed and guided in the exercise of their rights by caregivers, parents and community members, in line with children’s evolving capacities (art. 5). This child rights approach is holistic and places emphasis on supporting the strengths and resources of the child him/herself and all social systems of which the child is a part: family, school, community, institutions, religious and cultural systems.

In light of the above definition, the sub-research questions aim to answer the overall research question through separately identifying: By what means are the capacities of rights holders and duty bearers to be developed? What principles should inform the realisation of child rights (process)? While the CRC Committee’s definition was used as a basic framework, it does not clearly outline the means by which these aims should be achieved, besides that it must be guided by the general principles, respect for caregivers, the child’s capacities and support for his or her social structures (process). Accordingly, I attempt to go beyond this description and exploit the richness of the Committee’s General Comments to design a more systematic child-rights approach.


225 Elo and Kyngäs, "The Qualitative Content Analysis Process."; Wright, "Systematic Content Analysis of Judicial Opinions."

Content analysis can be divided into three phases: immersion, reduction and interpretation.\(^{227}\) The immersion phase involves repeatedly reading the data to gain an understanding thereof, followed by word-for-word reading. In the reduction phase, data is broken down into more manageable categories through the use of codes. The aim of coding is to structure data into “analytically meaningful categories”. Inductive codes are derived from the data itself, as opposed to pre-determined deductive codes.\(^{228}\) In the interpretive phases, the data is reorganised to allow for interpretation. Codes are then sorted and re-sorted into groups and categories.

Every General Comment of the CRC Committee (18 at the time) was analysed. An alternative approach could have been to analyse the judgments of the European Court of Human Rights relating to children’s rights, as the Court has been known to apply the CRC to cases relating to children.\(^{229}\) However, the General Comments were chosen above the ECtHR judgments as the ECHR does not enshrine the full spectrum of rights included in the CRC and adopts a violations based approach. The CRC Committee, on the other hand, seeks to outline the normative content of all CRC rights, and in its General Comments is not constrained by a particular set of facts. Its General Comments go beyond an assessment of the law and instead interact with both law and policy. An inductive approach was adopted, whereby the themes were derived from the data, not the other way round. Although there is literature on child rights approaches, this study did not seek to confirm or deny their reliability but instead sought to create an approach derived from the CRC Committee. Furthermore, from the outset this analysis does not seek to create a hermetically sealed singular account but an interpretation.

The texts were read a number of times and then analysed paragraph by paragraph. Phrases deemed of importance to the research questions were highlighted with notes added. Paragraphs considered unrelated to the research question were excluded. This captured detailed paragraphs that address the implementation of a right at a specific level, and those which were too general or descriptive to contribute to the central research question. Paragraphs that were not rights or obligations driven were generally excluded, unless they contributed to understanding the research question. Only the CRC Committee’s interpretations were included, in preference to secondary sources.

After the initial readings, I began to code the paragraphs by reducing the topic sentence to a shorter summary line and finally to one or two words to capture the central ethos of the paragraph. After this initial coding, I built themes that I considered best addressed the research question. The codes were then rechecked in light of the developed codes and some were rephrased. There was a quantitative dimension; infrequent codes were excluded as it was felt that without multiple references (4+), they could not be indicative

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228 See further, Elo and Kyngäs, "The Qualitative Content Analysis Process."
of an “approach”. Similarly, codes that did not relate to the research question were excluded at this point. After the themes had been designed, the codes were searched again to ensure coherence and accuracy. The results of the analysis are outlined in 3.2. The phrases, codes and themes are found in Annex Two.

1.13 OUTLINE OF THESIS CHAPTERS

Chapter Two

This chapter informs the later legal analysis through describing and analysing techniques used to market unhealthy food to children in light of their impact on children's rights. A review was conducted of the available research on the manner in which HFSS food is marketed to children, and the impacts of such marketing of their rights. WHO reviews were taken as a starting point, with subsequent searches of data from media studies and psychology using PubMed and Google Scholar. The results were narrowed and framed in relation to the WHO Recommendations, i.e. the impact of HFSS food marketing, children's exposure and the power of techniques. The analysis focuses on the aspects of food marketing that infringe on children's rights. The limitations of existing international guidelines on regulating HFSS food marketing are also outlined. Finally, these findings are explored in the context of children's rights under the CRC.

Chapter Three

This chapter outlines the responsibilities of the primary duty bearers of children's rights to freedom from HFSS food marketing as a framework that will guide the later analysis. This is pursued through an introduction to the CRC as the primary focus of the analysis, with the functions of its Committee outlined. The children's rights approach that will frame the forthcoming analysis is explained with particular emphasis on best interests. States' obligations in relation to socioeconomic rights of children are analysed using the treaty text, General Comments and the children's rights approach. Concepts that will form the basis for the analysis in Chapters Four and Five are explored: the tripartite typology, resources, reasonableness, accountability, and international co-operation. The duties of parents, children, companies, the EU and WHO are also streamlined in light of states' primary obligations.

Chapter Four

The rights to health, adequate food, freedom from exploitation and privacy are interpreted with a view to establishing children's rights and states' obligations relating to childhood obesity and food marketing to children. Following a textual analysis of the treaties in line with the children's rights approach, an analysis is undertaken of the CRC Committee's and CESCIR's General Comments. Concluding Observations of the CRC Committee and CESCIR were searched through uhri.ohchr.org using the terms “obesity”, “obese”, “overweight”, “advertising” and “marketing”. Concluding Observations on restrictions of marketing of alcohol, tobacco and breast-milk substitutes were also searched with a view to establishing whether the CRC Committee makes
recommendations on other forms of marketing restrictions. Recommendations of the relevant Special Rapporteurs are also evaluated. An analysis is undertaken of the text of the European Social Charter (ESC) and the complaints related to Articles 11 (right to health) and 17 (children's rights). The European Committee of Social Rights’ conclusions and complaints from 2010-2016 relating to Articles 11 & 17 were reviewed through HUDOC.

In relation to the right to health, rights and obligations are outlined in terms of states’ obligations to take public health measures in light of treaty text and academic interpretation, the CRC Committee’s recommendations, other UN bodies’ recommendations and the provisions of the ESC. States’ obligations under the right to adequate food are analysed through the treaty text, the General Comment, CRC Committee and CESCIR Concluding Observations, and academic interpretation. State obligations to provide nutrient profiling systems, promote empowerment and protect cultural rights were focused upon. Finally, the rights to freedom from exploitation and privacy are also analysed in light of CRC Committee, UN and Human Rights Council recommendations.

**Chapter Five**

In pursuit of a coherent approach, children’s competing rights to information and play are analysed through an assessment of treaty text, CRC and Human Rights Committees’ General Comments, CRC Concluding Observations, reports of the relevant Special Rapporteurs and judgments of the ECtHR, where relevant. Following an analysis of the content of the rights, the balance between children's rights to participation and protection is analysed in light of their best interests. Subsequently, states’ obligations are analysed in terms of the parameters outlined in 3.3: the principle of progressive realisation, accountability, international co-operation and parental responsibilities. Suggestions are made as to how the CRC Committee could pursue greater engagement with childhood obesity and food marketing in its recommendations.

Finally, food and beverage companies’ responsibilities are analysed with reference to treaty text, General Comments of the CRC Committee, the UN Guiding Principles, and the Children's Rights and Business Principles. A selection of food and beverage companies’ human rights and food marketing policies are also reviewed to assess the extent to which they recognise their responsibilities regarding the rights to adequate food, health and freedom from exploitation. Coca-Cola, Mars, PepsiCo, Nestlé, McDonald’s, General Mills and Mondelez were selected as they represent a mixture of food and beverage companies, and restaurants. These multinationals, given their market position, are likely to have both the most significant impact on the above mentioned rights and the resources to assess and remedy it.
Chapter Six

The aim of the chapter is to assess the extent to which existing regulation embodies WHO recommendations and children’s rights indicators. The chapter analyses the content of regulations on HFSS food marketing in the UK, Ireland, Sweden and Denmark. The online databases of the relevant complaints bodies (2006 – 2016) were searched for complaints related to HFSS food marketing specifically and the techniques outlined in 2.3. EU law relating to marketing and data protection is also analysed as it forms the legal backdrop in the case study countries. Literature from regulatory studies on the regulatory strategies used to regulate HFSS food marketing in the case study countries is included. Further, civil society reports supplement the analysis as they play an important role in monitoring in the UK and Ireland.

Valid law is outlined through legal doctrinal method; subsequently the law is evaluated in context, in light of international guidance and children’s rights: (1) the age used to define childhood; (2) how the rules determine that advertising targets children; (3) the food products covered; (4) the media covered: broadcast and non-broadcast, including advergames, social media, point of sale (5) the techniques employed: pester power, characters and celebrities, health/ nutrition claims, product placement, free gifts and discounts, and sponsorship; (6) the role of the state; (7) the scope of international cooperation; (8) monitoring, complaints, and presence or absence of sanctions; (9) the clarity of the regulations are analysed. Finally, a range of children’s rights indicators are also analysed: state obligations, accountability, consultation with children, information provision, gender and family unity.

Chapter Seven

This chapter analyses competing legal regimes: freedom of commercial expression under the ICCPR/ ECHR/ EU Charter, and free movement of goods and services under EU law. These case studies were chosen as they are predominant normative legal systems that limit states’ discretion when designing restrictions on food marketing to children. An initial survey of case law was conducted using Hudoc, Curia and juris.ohchr. As no cases were found specially addressing HFSS food marketing to children, case law related to children, and tobacco and alcohol restrictions are focused upon, as similar principles may apply.


The ECHR and its Court's judgments, CJEU judgments and the ICCPR are analysed using legal doctrinal method with a view to deriving general principles that could be applied to regulating HFSS food marketing. Case law from South Africa and Colombia is also analysed as the respective courts are required to balance the right to health with commercial operators' rights. Following the methodology invoked, rights within the same normative system should not be seen to conflict and instead harmonised in light of the intentions of the drafters.

Further, European Union case law on free movement of goods and services is also reviewed with a view to deriving central principles on how the CJEU approaches the balance between regulatory autonomy in relation to children and health, and EU free movement. Cases relating to alcohol marketing restrictions and children's rights are focused upon as they display certain similarities to the current case. However, EU law does not enjoy the same presumption of compatibility as the human rights cases, as it primarily pursues competing economic aims. Yet, as is explored, the EU Charter recognises that children's rights and rights to health are complementary to the functioning of the internal market.

**Conclusion**

Finally, the results of the analysis are summarised. Next steps and new approaches to the topic are explored.
Chapter 2

Is Food Marketed to Children in a Manner contrary to their Rights?

Generally speaking, tensions exist regarding the appropriate role of children in the consumer society. On the one hand, there is concern about the increasing scope, frequency, and emotive nature of modern advertising practice aimed at children. Empirical research shows that the level of marketing experienced by children today is unprecedented compared to previous generations. Children are targets of marketing as they are often consumers in their own right with purchasing power, influence over parents' shopping and a future as an adult consumer. On the other hand, the assumption that children should be kept out of the “economic world” is critiqued. This dichotomous image can leave children vulnerable to political wrangling regarding their appropriate position in the consumer world.

Food marketing to children has emerged as a major issue of concern because of the proliferation of unhealthy food and the increasing number of children with obesity. Children's role as consumers is sufficiently lucrative that, in some markets, food companies have developed special “kids” foods, while restaurants offer “children's’ meals. It is of concern that these meals tend to be of low nutritional value. Influences on children's eating habits are important, given the correlation between unhealthy diet and childhood obesity. Research shows that advertising tends to promote items of low

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nutritional content. Obviously, HFSS food marketing is not the sole cause of childhood obesity, but a contributory factor.

The subsequent sections present the main evidence relating to HFSS food marketing to support the analysis of the extent to which children have a right to be free from obesogenic marketing. In light of the World Health Organisation (WHO) recommendations (discussed in 2.5.1), the evidence is presented in terms of the impact of HFSS marketing, followed by children's exposure and its power. It will be asserted that food marketing affects children due to their limited abilities to identify and defend against marketing. Accordingly, HFSS food marketing impacts on children's brand and category purchase choices, food preferences, nutrition knowledge, brand loyalty, and food intake. This impact is intensified as children are exposed directly and indirectly to marketing on a variety of platforms, with television and digital media of particular concern. These media use techniques to promote HFSS food that are exploitative, tap into emotions, encourage frequent consumption, and are difficult for children to identify. Parents seem unable to adequately mediate these impacts. Nation states have so far failed to adopt internationally binding norms that limit HFSS food marketing. As a result, their impact on children's rights provides a basis for limitations. This structure aims to demonstrate the connection between children's rights and the scope of the issues that regulations should address in order to uphold those rights.

2.1 The Impact of HFSS Food Marketing on Children

Two issues emerge in mitigating the impact of marketing on children. Firstly, the underlying principles of ethical marketing claim that marketing is unfair unless the target can identify marketing from programming, and understand its persuasive intent, i.e. that marketers are using techniques to persuade the viewer to buy. These abilities normally develop with age, with identification of advertising starting at a younger age than the ability to grasp persuasive intent. Most researchers conclude that until the age of twelve, children cannot understand persuasive intent of advertising. 

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9 See, for example, World Health Organization, "Report of the Commission on Ending Childhood Obesity." for the range of recommended measures to address childhood obesity.
10 "Set of Recommendations on the Marketing of Foods and Non-Alcoholic Beverages to Children."
11 Mehta, "Statutory Restrictions on Unhealthy Food Marketing to Children: The Debate Continues."
However, secondly, research increasingly suggests that children may not be adequately able to withstand marketing until they are older than assumed by most regulations. Accordingly, a number have challenged the age at which children understand persuasive intent. For example, Roedder-John proposes that it is only in the reflective stage of age 11–16 that children are able to understand the persuasive intent of marketing, as they grasp abstract ideas and question what they are told. Furthermore, adolescents appear to receive inadequate consideration in the literature, meaning that their ability to mitigate the effects of advertising is less well catered for than that of younger children. Beyond this point, others reverse the burden and argue that there is insufficient evidence that once children understand advertising, they will not be exploited. In addition to that, marketing often operates on a non-rational level through appealing to emotions, meaning that even older children may not recognise advertising as such. WHO Europe agrees that the age-based cognitive model is outdated, and that children must also be aware, able, and motivated to resist marketing in order to counter the effects of advertising. This is discussed further in 2.3.

Turning to HFSS food marketing specifically, it is now well established by research that food marketing on television promotes a positive association among children with HFSS food. Food promotion can impact on children’s nutritional knowledge and perception of a healthy diet, influence food preferences, purchasing choice and requests, consumption behaviours, diet related health status, and act as a significant independent determinant of food behaviours and health status. This influence is documented at category and brand level. The strength and prevalence of these brands mean that children begin to request specific named products from a young age. There is modest evidence which

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18 Rozendaal et al., "Reconsidering Advertising Literacy as a Defense against Advertising Effects."
20 Ibid., 15.
21 Ibid., 5.
23 Ibid., 213.
shows that television advertising influences children’s food and beverage preferences, and strong evidence that it influences purchase choice and requests.\textsuperscript{25}

This is important as children who view advertisements primarily see depictions of “unhealthy” foods. A series of systematic literature reviews commissioned in the UK,\textsuperscript{26} US,\textsuperscript{27} and by WHO conclude that food marketing targeting children is widespread, with HFSS foods such as breakfast cereals, soft drinks, and fast foods, most heavily advertised.\textsuperscript{28} This means that marketing does not only influence children’s choice between two brands, but also children’s choices between food categories, i.e. healthy and unhealthy. Therefore, the food advertising environment is obesogenic, even schizophrenic – primarily promoting food that should be consumed in minimal amounts in line with dietary guidelines.\textsuperscript{29} The fact that marketing encourages children to consume “unhealthy” foods is particularly problematic in light of rising childhood obesity rates worldwide.

Food marketing benefits food companies beyond immediate purchases, and can impact on children’s cumulative nutrition knowledge. As food is not only a heavily branded commodity, but one that relies on repeat purchases,\textsuperscript{30} companies seek to ensure brand loyalty from an early age by building a relationship with individuals from childhood. Accordingly, companies pursue branding: “the creation of names, symbols, characters and slogans that help identify a product and create unique positive associations which differentiate it from the competition and create additional value in the consumer’s mind”.\textsuperscript{31} The intrusion into the children’s environments can normalise consumption of unhealthy foods, which may hinder children from making more balanced food choices later in life.\textsuperscript{32} Further, food brand awareness can lead children to not try new foods and eat the brands they know, rather than selecting food based on its qualities, such as

\textsuperscript{25} Cairns et al., “Systematic Reviews of the Evidence on the Nature, Extent and Effects of Food Marketing to Children.”
\textsuperscript{27} Gootman JA McGinnis JM, Kraak VI, “Food Marketing to Children and Youth. Threat or Opportunity?,” (Washington, DC: Institute of Medicine, 2006).
\textsuperscript{30} Story and French, “Food Advertising and Marketing Directed at Children and Adolescents in the Us.”
This commercial activity is facilitated by the fact that young children display a biological preference for salty and sweet foods. Thus, if the majority of food advertising is for unhealthy foods, the likely result is that young children have significantly greater brand knowledge of unhealthy foods than healthy. This knowledge emerges before children develop an understanding of the concept of “healthy”, meaning that advertising can shape their preferences before they have the ability to understand them and make rational decisions. The long-lasting influence of HFSS brand loyalty on consumer choices is of concern as childhood obesity assumes epidemic proportions.

A more nebulous effect beyond food preferences, purchase requests and nutrition knowledge is increased food intake. In 2013 the evidence on the influence of food marketing on consumption behaviour was determined to be modest. However, a recent meta-analysis demonstrated that “acute” exposure to internet and television advertising of both non-HFSS and HFSS food led to increased food intake in children, although not in adults. After watching television with advertisements for HFSS food, children eat more than those not exposed to this advertising. The authors concluded that small effects can have a large impact on public health due to the high levels of advertising. Studies have shown that HFSS food advertising increased intake of energy dense food, although none provided direct evidence of long-term changes in BMI. Further, a small number of studies suggest a connection between obesity and outdoor food marketing. Furthermore, research shows that boys are more affected by HFSS food advertising than girls. The evidence suggests that children with obesity are more vulnerable to HFSS food

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33 Pierre Chandon, "Does Food Marketing Need to Make Us Fat? A Review and Solutions."
40 Ibid.
advertising. Food adverts increase food intake in all children, with the strongest effect on children with obesity.

However, current research has tended to focus on children under twelve years, and relates mostly to television advertising. There is a need to establish stronger evidence about the impact on children of HFSS food in relation to other forms of marketing. Although evidence on the link between HFSS digital marketing and obesity remains limited due to the difficulties in measuring children's exposure, digital marketing appears to enhance “advertisement attention and recall, brand awareness, attitudes and purchase intent and product sales”. Equally, media exposure may be harmful to some children more than others. As will be discussed in later chapters, regulation may be legally and politically unfeasible without adequate evidence. Therefore, although not discussed here, regulating HFSS food marketing will not be sufficient to substantially reverse childhood obesity rates. It needs to be buttressed by supportive legislation and policies.

2.2 CHILDREN’S EXPOSURE TO HFSS FOOD MARKETING

Evidently, children’s exposure to HFSS food marketing is widespread and includes television, internet, mail, mobile phone messaging, magazines, comics, point of sale, gifts, loyalty schemes, sponsorship, in-school marketing and packaging as promotional means. However, this exposure has been best measured in relation to television advertising. At the same time, as explored in this section, concern is growing regarding children’s exposure to online HFSS food marketing. The broader advertising landscape, including children’s indirect exposure to marketing remains underexplored.

Companies target directly children through advertising designed to appeal to them and advertising in spaces designed for children. This encompasses advertising during programmes designated for children, times when a large number of children are watching, and advertising that targets children through using techniques that appeal to them (discussed in 2.3). It has even been documented that HFSS food advertising on US


50 Ibid.
television targets ethnic groups of children, such as African American and Latino youths.\textsuperscript{52} Further, marketing occurs in spaces designed for children, for instance, schools or daycare institutions. Shops near schools have been shown to display child oriented unhealthy food advertising.\textsuperscript{52} In the US, some schools allow the sale of soft drinks and agree to contracts whereby soft drink companies buy exclusive rights to sell their drinks in schools. Unhealthy food is advertised while food companies sponsor school materials.\textsuperscript{53}

This is less prevalent in Europe, but still occurs, in particular due to strained financial resources. For instance, in Ireland, one study found unhealthy foods are widely available in schools in the form of vending machines, canteens and shops. Although commercial sponsorship in schools appears limited in Ireland, a third of schools said they accept sponsorship due to funding limitations. There is no official tracking of such sponsorships.\textsuperscript{54} One can therefore conclude from existing studies, that children's direct exposure to HFSS marketing occurs both in the home and in school.

While television advertising remains a popular medium, it has limitations as an advertising mode. For instance, children's exposure to television advertising varies between markets. For example, in 1996, an average of 34 advertisements an hour were broadcast in Australia, with the next highest levels in the US and UK. The lowest levels of advertising were in Sweden and Norway.\textsuperscript{56} Further, as television advertising is expensive to purchase, it is beyond the reach of some companies. Even for larger companies that can afford it, individuals can now watch TV in different ways, such as by recording and watching later, or online, which allows the viewer to skip advertisements. Moreover, individuals increasingly use media devices to go online, including while watching television. Therefore, companies seek to fill the gaps and ensure maximum impact through using multiple platforms to market their products to children.

Accordingly, spending on digital advertising has continuously risen over the last years and is predicted to account for 50 per cent of overall media spending by 2018.\textsuperscript{56} This is largely fuelled by emerging markets gaining increased access to broadband and mobile phones.\textsuperscript{57} The internet has brought new potential for the level and reach of marketing,

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\textsuperscript{53} AACORN Rudd Center for Food Policy & Obesity, Salud America!, "Food Advertising Targeted to Hispanic and Black Youth: Contributing to Health Disparities," (Connecticut: Rudd Center for Food Policy & Obesity, AACORN, Salud America!, 2015).
\textsuperscript{55} Colette Kelly et al., "Food Marketing in Irish Schools," \textit{Health Education} 110, no. 5 (2010).
\textsuperscript{58} \textit{Ibid.}, 6.
given its accessibility and low cost compared with traditional media. Multiple platforms allow companies to take a cross media approach, whereby children are targeted with the same message through different media, making it difficult to identify the impact of a single medium. Thus, children’s engagement with marketing may be amplified as they increasingly access the internet through a variety of platforms.

While children benefit from greater access to information through the internet, this increased media exposure is of concern where companies target children because devices are designed to be used in private and with limited parental oversight. The OECD has found that a high percentage of older children use the internet, that internet use is on the rise, and that children access the internet for longer and on a variety of devices. EU figures suggest that 60 per cent of 6–10 year olds and 86 per cent of those aged 15–17 use the internet. They do so through a variety of mediums, including home computers but also laptops, iPads and internet enabled mobile phones. In the US, figures show that teens’ mobile phone use has grown exponentially, with 88 per cent of teenagers having access to a smartphone. In the EU, children aged 9-16 years report watching video clips (53 per cent), listening to music (53 per cent) and accessing social media online (53 per cent). They report using the internet daily in their bedroom (55 per cent). In a Danish study, the majority (60 per cent) of children aged 3–5 reported sitting alone while using an iPad, with only 34 per cent using it with adults. Thus, in practice, children are left to navigate the internet alone. Accordingly, researchers have become concerned that websites are used to advertise HFSS food to children, with children seemingly less equipped to identify this form of advertising than on television.

Finally, children also see promotion of HFSS food that is not principally directed at them. While the majority of research on children’s exposure to HFSS food marketing relates to television advertising, the wider advertising landscape also promotes HFSS food, and

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64 Mascheroni, “Net Children Go Mobile: Risks and Opportunities,” 25.
65 Ibid, 11
thereby potentially contributes to obesity. Many unhealthy food and drink billboards near schools have been catalogued in a number of developing countries. Equally, as will be explored in greater detail in Chapter Six, children view television programmes that are not specifically directed at them but the family at large. Additionally, marketers also reach children through their parents. Although research is limited, it has been shown that unhealthy food for children is marketed to parents. Parenting magazines have been found to contain a high number of advertisements for unhealthy foods. Advertisers appeal to parents to make purchases for the benefit of their children’s health and wellbeing, which is problematic where the food advertised is not sufficiently healthful. Further, parents’ perceptions of a healthy diet and relationship with brands may be impacted by their experiences with a brand during childhood. As will be discussed further in 5.6.1, targeting parents is seen as acceptable, with some companies even making corporate pledges not to advertise to children, but only to their parents. This is largely unregulated as parents are expected to act as gatekeepers – a role which is described in greater detail in 2.4.

2.3 THE POWER OF FOOD ADVERTISING

Accordingly, food companies harness this exposure through using powerful techniques that appeal to children’s emotions and loyalty, and encourage unhealthy habits. They typically make use of numerous persuasive techniques to promote their products, such as premium offers, promotional characters, nutrition and health-related claims, the theme of taste and the emotional appeal of fun. Further, they adopt techniques such as product placement and advergames that are not easily identifiable as marketing and instead tap into unconscious choices. Furthermore, interactive media gathers data on children and their peers. In an obesogenic environment, the use of certain techniques are of concern as they may encourage children’s liking for brands on the basis of impulse and emotion, by-passing rational thought, not objective and verifiable information.

69 Bridget Kelly et al., “Density of Outdoor Food and Beverage Advertising around Schools in Ulaanbaatar (Mongolia) and Manila (the Philippines) and Implications for Policy,” Critical Public Health 25, no. 3 (2015).
72 Calvert, “Children as Consumers: Advertising and Marketing.”
Firstly, food companies have been found to use techniques that appeal to children, exploit their credulity and encourage unhealthy habits. The use of children’s characters and personalities in advertisements and advergames is of particular concern due to the potentially exploitative nature of these communications. In the UK, an extensive analysis of food advertising on television showed a high prevalence of promotional characters (such as “Tony the Tiger”) and celebrity endorsements (for example footballers endorsing food companies). Further, breakfast cereals high in sugar have been found to widely use child-oriented colours, spokes-characters and premium offers on their packaging. Preschool children prefer the taste of foods that are wrapped in bright, colourful packaging, to plain packaging or even specific brands themselves. Therefore, advertisements are made attractive to children to promote the effects of food marketing, such as brand loyalty and category choice.

The use of these characters is troubling since it entices and appeals to children’s connections with characters that they know and trust. Using licensed characters that appear on television shows may render it more difficult for children to identify advertisements. Celebrities promote a positive image of the brand and thereby increase brand credibility. Further, children may assume that products are better or safer if an individual they know and trust claims to use them. As will be discussed in 7.3, while advertisers claim that marketing provides information, they do not use techniques that offer objective informative on their products, or boost critical reflection. Instead, it can be argued that these techniques appeal to emotions and the sub-conscious. For example, fun is most commonly used to appeal to children, whereas taste and health or nutrition are more frequently used to appeal to adults. Therefore, children are encouraged to develop a relationship with products based on emotions—not the quality of the product. This is a natural result of the lack of healthful food marketed to children, and the restrictions on health and nutrition claims.

76 G. Cairns, “Evolutions in Food Marketing, Quantifying the Impact, and Policy Implications,” Appetite 62 (2013). Brand characters are those coupled with the brand, while licensed characters are known by the audience mainly from a franchise distinct from the advertisement.
79 Kunkel, “Commentary Mismeasurement of Children’s Understanding of the Persuasive Intent of Advertising.”
Further, some of these techniques encourage children to eat frequent quantities of HFSS food to access promotions or offers. Food companies encourage excessive consumption through offering children a free gift when they collect a certain number of codes or wrappers with purchases. Additionally, collectable toys encourage repeat purchases to collect the full set, e.g. “happy meals”. Free gifts have also been shown to stimulate children’s liking for a brand. Television advertisements for fast food restaurants directed at children focus on toy giveaways and movie tie-ins, thereby encouraging children to make purchase requests on the basis of promotions, not the product itself.

While, good marketing practice requires that advertising is clearly identifiable and therefore separated from content, some techniques used to market HFSS food circumvent this distinction. Product placement (whereby branded items are integrated into programme content) strives to build brand recognition and positive feelings towards a brand. It has been employed in children’s movies and family programs. A study on brand placements in the top 20 US box office movies from 1996–2005 found that 69 per cent of the films contained at least one food, beverage or food retail brand. In another study, children who had seen a movie with Pepsi-Co product placement were more likely after seeing the clip to choose Pepsi over Coca-Cola, showing a valuable brand category effect. At a more general level, children’s programmes also feature unbranded HFSS foods and portray their consumption in a positive light. These techniques do not promote critical reflection and blur the distinction between programming and marketing.

As already noted, the switch to digital media raises fresh concerns regarding how and what is marketed to children. Cairns suggests that digital communications “are enabling a shift from traditional, centrally produced and distributed marketing to more ‘conversational’, collaborative marketing relationships.” Six concepts are used to define

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82 Cairns et al., "Systematic Reviews of the Evidence on the Nature, Extent and Effects of Food Marketing to Children."
digital marketing: ubiquitous connectivity, engagement, user-generated content, personalisation, social graph and immersive environments. Montgomery argues that digital marketing strategies are fuelled by increase in the number and sophistication of interactive games, the rise of social media, the increase in data collection and profiling, and the rise of smartphones as well as mobile marketing.

Digital media thereby allows advertisers to adopt techniques that were not possible with broadcast media and to create a complex and interwoven approach to persuade children to buy their products. For example, it has been claimed that through neuromarketing, companies such as Pepsi map the brain's responses to advertising techniques, instead of relying on self-reports as to why the individual liked the product. This allows companies to tailor their advertising to consumers' inherent responses.

A review of US food and beverage companies’ websites showed that most had links to televisions shows, movies or cartoons. Subsequent research uncovered that techniques similar to those used to market to children on television are used online, such as attention grabbing production features, brand characters, repetition, colourful text, animation and moving images. In 2006, a content analysis revealed that US companies which commonly advertise to children used their websites to market to children in 80 per cent of the cases. A recent analysis by a German consumer agency found that weak nutritional profiling by industry pledges meant that the majority of food advertising reviewed promoted “unhealthy” food to children online. Therefore, existing techniques that often have been limited on broadcast media, can now be employed in the digital arena. Companies also have new techniques at their disposal.

Due to its interactive nature, digital marketing may be even more successful at tapping into emotional or sub-conscious choices, allowing for more engagement than...

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One such technique is advergames. The brand is incorporated into an online game designed for children, which helps to develop positive feelings towards the brand, as well as an association of fun and entertainment. Advergames allow for longer exposure and interaction with the brand than a short commercial. In one review, advergames were present in 63 per cent of food and beverage websites, with almost half of them using cartoon characters. A UK content analysis of 290 food industry websites found that advergames were present on 81 per cent of websites. These games may serve to implicitly normalise consumption of HFSS food without allowing for critical reflection. Advergames are analysed as a specific case in 5.2 in relation to the rights to play and freedom from exploitation.

At the same time it has been suggested that online games can positively influence children’s health, through encouraging healthy eating practices or exergames that require physical activity to play. Nevertheless, a Dutch study finds that playing food advergames increases eating of energy dense food but not fruit. Furthermore, food companies producing unhealthy foods may harness games that promote exercise for promotional purposes, as restaurants have done with the popular Pokémon Go game. Therefore, these games should also be scrutinised to avoid corporate manipulation.

Further, privacy risks arise where children’s personal data is automatically collected online (such as through cookies) or where children are required to part with personal information. 

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103 Staiano and Calvert, “Digital Gaming and Pediatric Obesity: At the Intersection of Science and Social Policy.”
data in order to access a webpage.\textsuperscript{109} While children (and adults) may share their data for short-term gain, for companies this personal data is an important commodity.\textsuperscript{110} Using web analytics, marketers can monitor and track individuals' internet preferences and use, and tailor advertising accordingly.\textsuperscript{111} Companies gather personal information from players of advergames, such as preferences and attitudes.\textsuperscript{112} Through using cookies, marketers are able to gather data on user preferences and thereby adapt advertisements to the unique user.\textsuperscript{113} Equally, location based loyalty programmes encourage customers to “check in” online at a restaurant in order to gain promotions, while at the same time gathering data on their preferences and habits.\textsuperscript{114} Accordingly, companies gain valuable data from their consumers, who may be unaware that they are parting with data and what it will be used for due to unclear privacy policies.\textsuperscript{115} In Ireland companies have been found to collect children’s personal information online and to share this information with third parties. Only 24 per cent of websites surveyed encouraged parental involvement.\textsuperscript{116} Such exploitative techniques may breach children’s privacy rights.

Further, through social media, “unprecedented intimacies” are created between marketers and children, whereby marketing is integrated not only into media but into children’s socialising, with companies encouraging users to use their social media profiles to “like” their page or “share” competitions that promote the brand.\textsuperscript{117} This kind of viral marketing provides free advertisement for companies, valuable data on preferences, and may also mean that children do not identify their friends’ recommendations as marketing per se. Examples include Mountain Dew’s use of social media to encourage youths to vote on a new taste for their soft drink.\textsuperscript{118} Frito-Lay also used social media to allow consumers to vote on a new flavour and share their vote online.\textsuperscript{119} This is of added concern as

\textsuperscript{109} OECD, \textit{The Protection of Children Online}, 26.  
\textsuperscript{112} Staiano and Calvert, “Digital Gaming and Pediatric Obesity: At the Intersection of Science and Social Policy.”  
\textsuperscript{114} Public Health Institute, “The New Age of Food Marketing How Companies Are Targeting and Luring Our Kids — and What Advocates Can Do About It.”  
\textsuperscript{117} Montgomery et al., “The New Threat of Digital Marketing.”  
\textsuperscript{118} Andrew Hampp, 'Marketers Hop on Augmented Reality Bandwagon to Promote 'Avatar',' AdvertisingAge.; Everett Rosenfeld, "Mountain Dew's 'Dub the Dew' Online Poll Goes Horribly Wrong." Time.  
\textsuperscript{119} Marina Nazario Hollis Johnson, "We Tried the Lay's Chip Flavor Contest Contenders — Here's Who We Thought the Real Winner Should Be," Business Insider.
research suggests that individuals find recommendations from friends more trustworthy than traditional advertising. These techniques may be exploitative as they encourage children to use their friendships to (sometimes unwittingly) promote products to their friends.

Finally, in an obesity context, techniques such as “brand stretching” and “health halos” are also of concern when used to promote “unhealthy” food brands. Brand stretching occurs where a company’s logo appears on an unrelated product. Food and beverage branding in areas associated with health and physical activity can build an incorrect association regarding the healthfulness of the product. Therefore, companies sponsoring sports events and using their brand to promote their sponsorship is problematic. This features, with McDonalds among the brands that act as official sponsor of the FIFA World Cup, and Coca-Cola sponsoring both the Olympics and FIFA competitions. Marketers also use sporting events where large numbers of families are watching to promote their food; for example, in the US during the Super Bowl, junk food marketers spend millions of dollars on advertising snack foods through commercials and mobile sites.

Food marketing in sports’ environments specifically for children has also been flagged as of concern. Studies show that sports sponsorship for young people at local level is prevalent and comes more commonly from companies promoting unhealthy food than those promoting healthful products. Children recall sports’ shirts sponsors, thus forming a positive impression of the company. Moreover, the issue is complicated as sports sponsorship is often not directed specifically at children, but their parents. Worryingly, companies that promote physical exercise also oppose regulations relating to diet. For instance, two leading soft drink companies have been found to extensively

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123 Cairns, “Evolutions in Food Marketing, Quantifying the Impact, and Policy Implications.”
124 Cornelia Pechmann and Jesse R. Catlin, “The Effects of Advertising and Other Marketing Communications on Health-Related Consumer Behaviors,” Current Opinion in Psychology 10 (2016);
125 Pierre Chandon, “Does Food Marketing Need to Make Us Fat? A Review and Solutions.,”
127 Keith Anderson, “There’s More to Super Bowl Marketing Than Paying $5m for a 30-Second Tv Spot,” Food Navigator.
129 A. Maher et al., “Patterns of Sports Sponsorship by Gambling, Alcohol and Food Companies: An Internet Survey,” BMC Public Health 6 (2006);
sponsor public health organisations, while at the same time lobbying against regulation.\textsuperscript{128} Therefore, these sponsorships can provide brand promotion, while lobbying undermines the professed aims behind closed doors. However, research on sponsorship remains limited and needs to be developed before advancing definitive claims.\textsuperscript{129}

### 2.4 Parental Mediation

Parents are, of course, an important source of guidance for children on how to interact with and interpret television and internet, and potentially broader media. Parents' role in mediating the effect of advertising includes (i) co-use, (ii) active mediation, (iii) restrictive mediation, (iv) monitoring, (v) and technical restrictions.\textsuperscript{130} Firstly, co-use includes watching television or using the internet together; parents guide and instruct their children on what they see and interact with. Secondly, active mediation includes parents explaining the fundamentals of advertising, and its persuasive intent to their children.\textsuperscript{130} Thirdly, with restrictive mediation parents limit children's exposure to advertising through avoiding televisions in their bedrooms, imposing rules on when children have access to media and limiting online activities.\textsuperscript{130} Fourthly, monitoring can occur where parents observe children's online behaviour after the fact through, for instance examining browser histories. Finally, parents can employ technical restrictions to limit the advertisements children see online through advert blockers.

Parents in the EU use active mediation of internet-use the most (68 per cent), followed by restrictive mediation (65 per cent).\textsuperscript{133} High numbers of parents (70 per cent) talk to their children about what they do on the internet and stay nearby when their children are online (58 per cent).\textsuperscript{134} Furthermore and importantly, 70 per cent of children found parental mediation helpful.\textsuperscript{135} Still, parents' use of other forms of mediation, such as technical safety tools is low in the EU.\textsuperscript{136} Accordingly, the recent WHO Europe study argues that due to the nature of the digital world, parents may not be best placed to protect and guide their children as they have limited awareness of children's online

\textsuperscript{128} Daniel G. Aaron and Michael B. Siegel, "Sponsorship of National Health Organizations by Two Major Soda Companies," American Journal of Preventive Medicine.

\textsuperscript{129} Carter et al., "Availability and Marketing of Food and Beverages to Children through Sports Settings: A Systematic Review."


\textsuperscript{133} Mascheroni, "Net Children Go Mobile: Risks and Opportunities.", 88, 92.


\textsuperscript{135} Ibid., 115.

\textsuperscript{136} Ibid., 8.
The majority of parents in the EU lack the knowledge to install and configure advert blockers and child safety applications.\textsuperscript{137} The same holds true for the US, with only 39 per cent of parents reporting filtering, blocking or monitoring their teen’s online activity.\textsuperscript{138} A further concern is that parents do not have the knowledge to help their children with navigating the digital environment. In the UK, 43 per cent of parents feel their children know more about the internet than they do.\textsuperscript{139} Nonetheless, this may be changing with more parents online and thereby better able to understand their children’s digital lives.

Although evidence is limited, it seems that active mediation is more effective than strict limitations. Furthermore, parents’ skills are important in shaping their ability to perform mediation effectively.\textsuperscript{140} However, these findings relate to media generally, not the effects of advertising. One study did find that active mediation is more effective than restrictive mediation at reducing the effect of marketing in terms of purchase requests.\textsuperscript{141} Parental mediation can further be challenged as based on a model of a two-parent family, where parents are at home in the evenings and have the time and capacity to oversee their children’s media use. The reality, particularly in the developing world, is very different for many children.\textsuperscript{142}

Thus, due to children’s limited capacities and parents’ limited role in oversight, children may be exposed to a range of risks. Accordingly, it will be argued that states should ensure child-focused regulatory framework to support both children and parents. There is scope for parents to provide greater guidance to their children, while there are limitations on the capacity of even engaged parents to monitor due to the fact that media is viewed in private.

\textbf{2.5 International Guidance on HFSS Food Marketing}

Despite this evidence on the impact, exposure and power of HFSS food marketing, there is no comprehensive, binding regulation at international or regional level. In light of the global nature of food marketing, binding international standards could offer an effective approach as companies would be bound by the same standards regardless of where they operate. However, as will be explored in 3.7, although the WHO and potentially the European Union (EU) have powers to regulate this form of marketing, they have declined

\begin{itemize}
\item Mascheroni, “Net Children Go Mobile: Risks and Opportunities.,” 93.
\item Blum-Ross, “Families and Screen Time: Current Advice and Emerging Research.”, ii-2.
\end{itemize}
to do so to date. Instead, governance is primarily through voluntary codes and sporadic regulations in different states. The failure of WHO to act is symptomatic of a wider global governance gap in health.

The current approach at an international level remains voluntary. Two different approaches are offered: intergovernmental recommendations endorsed by the World Health Assembly (WHA) to guide states, and private norms to guide companies. The first - World Health Organisation’s Set of Recommendations on the Marketing of Foods and Non-Alcoholic Beverages to Children (the WHO Recommendations) – provide guidance to states on limiting HFSS food marketing. As will be discussed, although the guidance is comprehensive, it has not been adequately internalised by WHO Member States. Secondly, at an industry level, the International Chamber of Commerce (ICC) – the world’s largest representative organisation for businesses- has issued a Code on Advertising and Practice, as a well as specific Framework for Responsible Food and Beverage Marketing Communications. Further, there are numerous company pledges, such as the International Food and Beverage Alliance – which are discussed further in Chapters Five and Six. It will be asserted that, although these standards have been important in terms of setting applicable norms, neither approach has adequately addressed HFSS food marketing.

These approaches reflect the current state of global governance, whereby non-state actors occupy an increasingly important role, instead of power centred on nation states. It is also part of a broader reliance on soft-law and private regulation that has been termed “re-regulation”. This move from government to governance suggests that multiple actors (besides states) have a role in regulation, including companies and

146 World Health Organization, "Set of Recommendations on the Marketing of Foods and Non-Alcoholic Beverages to Children."
intergovernmental organisations. However, as will be discussed in future chapters, this approach risks obscuring the public interest, and in particular children’s rights as vulnerable and often voiceless actors with limited power.

2.5.1 WHO RECOMMENDATIONS & TECHNICAL GUIDANCE

In response to the rise in childhood obesity and the evidence linking it to HFSS food marketing, in 2010 the WHA endorsed technical recommendations that guide WHO Member States in restricting food marketing to children. Although these recommendations are non-binding, WHO Member States were urged to implement the standards and reduce the impact of HFSS food marketing on children. A Framework for Implementing the Set of Recommendations was produced two years later to assist states in policy development, implementation, and monitoring, evaluation and research. The guidance provides practical advice to states, while recognising that approaches will vary due to differences among national legal systems and circumstances. Accordingly, WHO Member States have been supplied with a strong advisory framework for pursuing freedom from obesogenic marketing.

Twelve recommendations were endorsed. The first two guided the analysis above: the policy aim should be to reduce the impact of marketing, and the policy objective should be to reduce the exposure and power of HFSS marketing to children. The impact of marketing is caused by the exposure and power of the marketing message. The framework defines exposure as the “reach, frequency and media impact” of marketing, with power relating to the “creative content, design and execution of the message”. The latter relates to how often and how many view the message, whereas power is tantamount to the effectiveness of the message.

The recommendations do not mandate one form of regulation and instead suggest that regulation may be stepwise or comprehensive. Further, the framework recognises variations depending on the prevalence and extent of HFSS food marketing, available

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59 Resolution WHA 63.14 Marketing of food and non-alcoholic beverages to children (2010), para 2.
62 Recommendation 2. Ibid.
65 Ibid., 13.
information and the legal framework.\textsuperscript{161} It is suggested that states first undertake a situation analysis to assess the extent to which marketing occurs and the current legal landscape.\textsuperscript{162} The recommended approaches include limiting all forms of marketing, all forms of food marketing, or only removing HFSS food options, depending on the aim of the legislature and the available data.\textsuperscript{163}

However, the recommendations suggest that marketing should be avoided in child specific settings such as schools and playgrounds.\textsuperscript{164} Further, states should act as core stakeholders\textsuperscript{165} and co-operate to reduce the impact of cross-border marketing from and to the state.\textsuperscript{166} Accordingly, states should also identify and support research in the area.\textsuperscript{167} Further, the definitions used in rules and regulations should be clear.\textsuperscript{168} The framework specifies that the age of the child, the relevant commercial practices, and HFSS foods must be defined in order to implement legislation.\textsuperscript{169}

Enforcement mechanisms should include sanctions and a complaints system,\textsuperscript{170} as well as compliance monitoring in line with objectives.\textsuperscript{171} The framework further specifies that enforcement should punish breaches, deter future infringements and compensate victims for harm inflicted.\textsuperscript{172} The presence of legislation, enforcement and advertising should be monitored and evaluated.\textsuperscript{173} The guidance recommends setting process, output and outcome indicators on the presence or absence of mechanisms, the extent to which exposure and power of marketing is reduced and the extent to which awareness, consumption and weight change over time.\textsuperscript{174}

These recommendations have been subsequently supported and endorsed at international level. For example, in 2013, WHO released the global action plan for the prevention and control of non-communicable diseases (2013–2020), which includes an

\textsuperscript{161} “A Framework for Implementing the Set of Recommendations on the Marketing of Foods and Non-Alcoholic Beverages to Children.”., 15.
\textsuperscript{162} Ibid., 13.
\textsuperscript{163} Ibid., 17.
\textsuperscript{164} Recommendation 5. “Set of Recommendations on the Marketing of Foods and Non-Alcoholic Beverages to Children.”
\textsuperscript{165} Rec 6, 7. Ibid.
\textsuperscript{166} Rec 8. Ibid.
\textsuperscript{167} Rec 12. Ibid.
\textsuperscript{168} Rec 4. Ibid.
\textsuperscript{170} Rec 9. “Set of Recommendations on the Marketing of Foods and Non-Alcoholic Beverages to Children.”
\textsuperscript{171} Rec 10, 11. Ibid.
\textsuperscript{172} “A Framework for Implementing the Set of Recommendations on the Marketing of Foods and Non-Alcoholic Beverages to Children.”., 34.
\textsuperscript{173} Ibid., 39-41.
\textsuperscript{174} Ibid., 44-5.
indicator to monitor the restriction of HFSS food marketing to children. In 2014, delegates at the Second International Conference on Nutrition urged implementation. The Commission on Ending Childhood Obesity called on states to implement the WHO Recommendations. However, so far, states have been slow to implement the recommendations – in the developing world especially. As will be discussed in Chapter Six, even states that have regulated marketing to children do not adequately reflect the recommendations in their approaches.

2.5.2 ICC Code and Framework

While WHO recommendations approach food marketing from a health-centred perspective, the ICC’s code and framework offer global guidance on limiting unhealthy food marketing to children from a business standpoint. The “Code on Advertising and Marketing Practice” enshrines "basic principles" that should guide companies in pursuing truthful and responsible marketing activities. As we will see in Chapter Six, the ICC Code has become an influential framework in some domestic legal systems. However, the framework has had a less clear impact to date. Further, the code and framework are not legally binding on companies, or monitored at international level. Instead, they rely on state and private actors choosing to apply and implement the provisions.

The code states that marketing should not undermine the authority, responsibility, judgement or tastes of parents, or appeal to children to persuade their parents to buy products. Accordingly, children are considered mini-consumers, although their heightened vulnerability is also recognised. While the code is general, the framework offers more specific guidance on food marketing through demarking techniques that promote excessive consumption or unhealthful diets. The provisions recognise children’s vulnerabilities to HFSS food marketing and advise advertisers to avoid exploiting their inexperience and credulity through techniques such as fantasy, or misleading them on nutritional benefits.

However, it is submitted that the standards are excessively vague and guided by business interests, not children’s rights. The child’s right to information is the only right recognised:

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179 International Chamber of Commerce, “Framework for Responsible Food and Beverage Marketing Communications.,” Article 18.
180 Ibid., Article 5 & 17.
181 Ibid., Article 18.
As children are consumers of food and beverages, they are legitimately a focus of marketing and have the right to information about the products that interest them. However, because of their lack of experience as consumers, children deserve especially careful treatment by marketers in any marketing communications directed to them.\(^{36}\)

Further, the framework relies heavily on the interpreter’s approach. Vague statements of protection, such as not “undermining a healthy diet” or not “encouraging excessive consumption”, could be interpreted to prohibit some of the most flagrant abuses. However, as standards such as a “healthy diet” and “excessive” remain undefined, companies are free to interpret these subjectively. The flexibility of the code also leaves advertisers with wide latitude and relies on the interpreter to have detailed knowledge of concerns regarding these techniques. Accordingly, while the code and framework are not limited to one jurisdiction or marketing medium, and therefore have the potential to become a global standard, both leave too many important standards undefined.

Therefore, this thesis asserts that harnessing children’s rights as a basis and means of imposing child-centred regulation may provide a paradigm shift. The ICC Code recognises children as rights holders, although exclusively from the perspective of information rights. This is an inaccurate interpretation of children’s rights as provided for under international law, which, as we will see, include a broad spectrum of rights. Furthermore, the code and framework focus mainly on the rights of parents, without exploring whether parents’ rights can be limited to protect children. As will be examined, the growing power of companies in setting their own standards in global health runs counter to a children’s rights approach.

2.6 RELATIONSHIP TO CHILDREN’S RIGHTS

The impact, exposure and power of HFSS food marketing described in this chapter has the potential to infringe upon children’s rights. As will be investigated in greater depth in subsequent chapters, under the CRC children are recognised as rights holders. As Tables 1-III emphasise, children’s rights encompass both protective rights that seek to shield children from harm in light of their vulnerability, and participatory rights that pursue children’s empowerment as rights holders. As will be explored in greater detail in the next three chapters, protective rights place obligations on states to protect children from threats and incursions on their rights. Accordingly, survival rights, such as the right to life, health, and adequate standard of living, place obligations on states parties to limit the type of marketing described in this chapter. Furthermore, the right to freedom from exploitation – which is enshrined as a protective right - may be threatened by HFSS food marketing. The potential impact of HFSS food marketing on these rights is now highlighted, although the analysis is tentative without greater scrutiny, including of competing state obligations.

\(^36\) Ibid, 3.
Table I: Survival and Development Rights

<table>
<thead>
<tr>
<th>Survival &amp; development rights under the CRC(^{a3})</th>
<th>Supportive of limitations</th>
<th>Opposing limitations</th>
<th>Unrelated</th>
</tr>
</thead>
<tbody>
<tr>
<td>Article 4 (protection of rights)</td>
<td>X</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Article 5 (parental guidance)</td>
<td>X</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Article 6 (right to life &amp; development)</td>
<td>X</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Article 7 (registration, name, nationality, care)</td>
<td></td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>Article 8 (Preservation of identity)</td>
<td></td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>Article 9 (Separation from parents)</td>
<td></td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>Article 10 (Family reunification)</td>
<td></td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>Article 14 (Freedom of thought, conscience &amp; religion)</td>
<td></td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>Article 18 (Parental responsibilities &amp; state support)</td>
<td></td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>Article 20 (Children deprived of family environment)</td>
<td></td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>Article 22 (Refugee children)</td>
<td></td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>Article 23 (Children with disabilities)</td>
<td></td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>Article 24 (Health &amp; health services)</td>
<td></td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>Article 25 (Review of treatment in care)</td>
<td></td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>Article 26 (Social security)</td>
<td></td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>Article 27 (Adequate standard of living)</td>
<td></td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>Article 28 (Right to education)</td>
<td></td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>Article 29 (Goals of education)</td>
<td></td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>Article 30 (Minority children)</td>
<td></td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>Article 31 (leisure, play, culture)</td>
<td></td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>Article 42 (knowledge of rights)</td>
<td></td>
<td>X</td>
<td></td>
</tr>
</tbody>
</table>

Table II: Protection Rights

<table>
<thead>
<tr>
<th>Protection rights under the CRC(^{a4})</th>
<th>Supportive of limitations</th>
<th>Opposing limitations</th>
<th>Unrelated</th>
</tr>
</thead>
<tbody>
<tr>
<td>Article 4 (protection of rights)</td>
<td>X</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Article 11 (Kidnapping)</td>
<td>X</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Article 19 (Protection from violence)</td>
<td>X</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Article 20 (Children deprived of family)</td>
<td></td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>Article 21 (Adoption)</td>
<td></td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>Article 22 (Refugee children)</td>
<td></td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>Article 32 (Child labour)</td>
<td></td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>Article 33 (Drug abuse)</td>
<td></td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>Article 34 (Sexual exploitation)</td>
<td></td>
<td>X</td>
<td></td>
</tr>
</tbody>
</table>

\(^{a4}\) As categorised by UNICEF http://www.unicef.org/crc/files/Protection_list.pdf.
Firstly, the *impact* of marketing asserts that states parties have an obligation to protect children. As detailed, young children will often not grasp the persuasive intent of marketing, while older children may be vulnerable to the effects of advertising, even where they can identify its intent. This power imbalance and the ensuing potential for exploitation (Article 36 CRC) may prompt state obligations and parental responsibilities to protect children (Articles 4, 5 & 18 CRC). Secondly, the *impact* of HFSS food advertising appears to affect children’s knowledge of nutrition and a healthy diet, and influences food preferences and behaviours. In view of the connection between diet and obesity, this may impact on children’s rights to life (Article 6 CRC) and health (Article 24 CRC). Further, the effects of HFSS food marketing on children’s relationship to food, such as through category choice and brand loyalty, may interfere with the right to adequate food (Articles 24/27 CRC).

Thirdly, children’s widespread *exposure* to HFSS food marketing through a variety of mediums suggests that states parties may have an obligation to limit this. While the strongest evidence relates to television advertising, the wider media landscape is also of concern, in particular the depth of exposure offered by digital media. This level of exposure may promote the impact of HFSS food marketing on children’s rights. Furthermore, advertising in centres of child learning could conflict with the aims of education (Article 29 CRC) as it interferes with their pursuit of a healthy lifestyle. Further, in light of parents’ limited knowledge and ability to protect their children in this environment, states parties have an obligation to support parents (Article 18 CRC).

Fourthly, the *power* of the marketing techniques employed by food marketers, such as product placement, free gifts and toys, characters, brand stretching, celebrity endorsements and advergames may exploit children’s credulity and relationships in a manner contrary to their rights (Article 36 CRC). These techniques are often emotive and seek to bypass rational thought, thereby manipulating children’s inherent attraction to colours, cartoons and play. These techniques may also render it more difficult for children to separate programming from marketing.

Fifthly, children’s rights to privacy (Article 16 CRC) may be jeopardised where companies collect their data and use it for commercial gain. Finally, certain techniques such as pester power can pit children against their parents and result in family disharmony, leading to interference with parental responsibilities for their children’s upbringing (Article 18 CRC). Parents may lack the insight to provide adequate guidance for their children in navigating these environments. These potential conflicts with children’s
rights engage the state’s obligations to protect (Article 4) and support the family (Article 18 CRC).

On the other hand, the CRC does not automatically proscribe HFSS food marketing. It suggests that a balance between the threats and opportunities offered by media should be pursued. Children also have rights to participation, such as the rights to express themselves, freely associate and play, and rights to education and access to media, including in online environments (Articles 13, 15, 17 CRC). Highly restrictive limitations may conflict with the state’s obligations to respect children’s participation rights (Article 12 CRC). While media and technology expose children to sophisticated advertising strategies, they also offer benefits to child education, development, expression (Article 13 CRC), engagement with peers (Article 15 CRC) and play (Article 31 CRC). This interplay will be explored in subsequent chapters. It will be recommended that, following the text of the CRC, children’s best interests (steered by the right to an open future) should guide the determination of the appropriate balance.

### Table III: Participation Rights

<table>
<thead>
<tr>
<th>Participation rights under the CRC[^6]</th>
<th>Supportive of limitations</th>
<th>Opposing limitations</th>
<th>Unrelated</th>
</tr>
</thead>
<tbody>
<tr>
<td>Article 4 (Protection of rights)</td>
<td>X</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>Article 12 (Respect for the views of the child)</td>
<td>X</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>Article 13 (Freedom of expression)</td>
<td>X</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Article 14 (Freedom of thought, conscience and religion)</td>
<td></td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>Article 15 (Freedom of association)</td>
<td>X</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Article 16 (Right to privacy)</td>
<td>X</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Article 17 (Access to information; mass media)</td>
<td>X</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>


### 2.7 Conclusion

This chapter has outlined the impact, power and exposure of HFSS food marketing to children and its bearings on their rights in the consumer society. It tentatively suggests that the level of HFSS food marketing and the techniques employed by marketers may conflict with children’s rights, predominately the rights to health, adequate food and freedom from exploitation. At the same time, the text of the CRC highlights children’s competing rights to expression, information and play. Furthermore, the scope of children’s enjoyment of their rights is subject to the responsibilities of duty bearers. Accordingly, the next chapter addresses the interplay between the obligations of various duty bearers: the state, parents, businesses and the international community. The scope of children’s rights is analysed in greater detail in Chapters Four and Five.
Chapter 3
Duty bearers’ obligations to Children’s Rights

A well-versed criticism of children’s rights is that there is too much focus on rights and not enough analysis of the corresponding duties. Accordingly, the aim of this chapter is to map the duty bearers of children’s right to freedom from HFSS food marketing and develop a coherent account of the interplay of their responsibilities. The Convention on the Rights of the Child (CRC) is introduced as the central source of obligations. It is suggested that, although the CRC recognises children as rights holders, the scope of the ensuing obligations is not clear from the provisions of the treaty. The CRC Committee is therefore an important actor in shaping rights and duties.

Subsequently, the children’s rights approach is presented as a framework for interpreting states’ obligations. The European Social Charter (ESC) is also introduced as a complementary source of obligations. States’ obligations to children’s socioeconomic rights are outlined in terms of the tripartite typology, resources, reasonableness, accountability, and the international dimension to obligations. As states are not alone responsible for children’s rights, their obligations are interpreted in light of those of other actors with distinct but overlapping responsibilities for children’s rights, namely parents, food and beverage companies, the World Health Organisation (WHO) and the European Union (EU).

3.1 The Convention on the Rights of the Child

As maintained in 2.6, the CRC is invoked as the main legal source of children’s right to freedom from obesogenic marketing. Accordingly, the CRC offers the international community, civil society, and states the means to assess their own and other states’ compliance with international norms and rights owed to children. The scope of these rights and obligations should accordingly be interpreted in light of the aims of the CRC and its vision for children.

The CRC is a binding international treaty that recognises children as “fully fledged beneficiaries of human rights”. The treaty thereby calls for societal transformation whereby children are recognised as rights holders, whose best interests must be considered, and whose views on issues affecting them are sought, albeit subject to their age and maturity. Therefore, the CRC marks an important transition in the status of

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children from objects of beneficence to rights holders. In other words, the CRC recognizes children as human beings, not human "becomings". Hence, children's personhood is guaranteed and not tied to their eventual transition to adulthood.

Although the CRC's emphasis on child participation marks a radical shift in children's traditional position, the CRC is not a convention of liberation, or a basis "to be free of parental authority and control - it is foremost a charter to be free of abuse, neglect and oppression by the state." Therefore, children are not elevated to adults; their status is interwoven with parental responsibilities. Instead, childhood is a state of evolution during which children mature and increasingly exercise autonomy, while parental control diminishes. However, the CRC does not detail how harmony between these respective rights and obligations should be achieved. Therefore, responsibilities under the CRC are interpreted in light of the guidance of the CRC Committee, as the body responsible for overseeing the Convention.

### 3.1.1 Functions of the CRC Committee

Accordingly, the role of the CRC Committee is of particular importance as it is charged with monitoring states' progress in fulfilling their responsibilities under the CRC. The CRC Committee (a body comprising 18 experts "of high moral standing and recognised competence in the field") supervises the CRC by monitoring the progress made by the states parties in realising rights under the CRC and providing guidance on the steps necessary to fulfil their obligations. States must periodically submit a report to the Committee "on measures they have adopted which give effect to the [Convention] rights" and on the progress made on the enjoyment of those rights. The report must "indicate factors and difficulties, if any, affecting the degree of fulfilment of the obligations". Additionally, the CRC Committee's functions have been expanded recently through the

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5 For instance, the CRC preamble states "Considering that the child should be fully prepared to live an individual life in society".


9 Committee on the Rights of the Child, "General Comment No. 7: Implementing Child Rights in Early Childhood.", para 17.


11 Article 44, Ibid.
third optional protocol to the CRC, which provides a mechanism for individuals and states to bring complaints in relation to violations of the CRC by states parties.12 However, no substantive complaints have been decided to date.

Accordingly, the primary role of UN Committees is not to pronounce on violations of the Conventions, but to assist states in understanding and complying with their obligations.13 Thus, the CRC Committee approaches state reporting through “constructive dialogue” between the CRC Committee and the state, with the purpose of “improving the situation of children”.14 This concept has been implicit since the drafting of the Covenants, whereby, “the idea is to help governments to fulfil their obligations rather than to penalize them for violations.”15 The constructive dialogue approach thus seeks to reduce the politicisation of the UN Committees’ work through dealing with issues constructively, rather than in an adversarial manner.16 Thus, reporting should work as a catalyst for increased engagement and fulfilment of rights,17 including through changing attitudes towards rights.18 This approach has limitations, in that the UN Committees cannot enforce sanctions for non-fulfilment or violations, or compel states to comply with its recommendations. The concern with this modus operandi is that it stands in stark contrast to the binding force of other normative actors, such the EU. While the role of the CRC Committee may evolve with the introduction of the complaints mechanisms, state reporting will continue to lie at the heart of their function, given that all states are subject to reporting while only some ratify complaints mechanisms.

The CRC Committee issues two types of recommendations which are given particular prominence in this thesis. Firstly, state-specific recommendations, called Concluding Observations, are issued on the basis of the Committee’s examination of the state’s report

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13 However, CESCR has been known to, on occasion, to accuse a state of violating the Covenant: Phillip Alston, “Out of the Abyss: The Challenges Confronting the New U. N. Committee on Economic, Social and Cultural Rights,” Human Rights Quarterly 9, no. 3 (1987).
16 Felice, "The UN Committee on the Elimination of All Forms of Racial Discrimination: Race, and Economic and Social Human Rights.,” 217.
and data from civil society and UN agencies. The CRC Committee meets with civil society, national ombudspersons and UNICEF to gain practical information from a variety of sources in advance of its recommendations. Although non-binding, the CRC Committee has described its recommendations to states parties as “an authoritative statement.” Concluding Observations can be influential in shaping discussion at the national level as to how such recommendations and suggestions can be implemented in domestic law. Accordingly, their authority is strongest where a violation is pronounced.

In order to harness their impact, O’Flaherty calls for UN Committee recommendations to be SMART: “specific, measurable, attainable, realistic and time-bound.” Although non-binding, the thesis argues that states should give serious consideration to the recommendations in light of the obligation to fulfil international treaties in good faith and the Committee’s status as overseer of the CRC. However, as will be discussed in greater detail in Chapter Four, the quality of these recommendations varies and the majority cannot be considered SMART.

Secondly, General Comments are UN Committees’ non-binding, non-state specific analyses of the respective rights and obligations of all states parties under the relevant convention. They are widely viewed as an authoritative interpretation of obligations that carry “political and moral weight.” According to the CRC Rules of Procedure, their aim is to “promot[e] its further implementation and assist[...] States parties in fulfilling their reporting obligations”. As we will see, General Comments approach treaty obligations holistically - they go beyond merely outlining the normative content of rights


Ibid., 595.


and recommend a wide spectrum of action, from enshrining concepts in legislation to state-led action plans. Recommendations in General Comments range from “obvious and generic” to “more practical and precise”. However, General Comments are limited by the working methods and status of the UN Committees. For instance, UN Committees operate by consensus, meaning that while the Committees speak with one voice, it may result in the final document being the lowest standard of protection. However, as UN Committees have been criticised for acting *ultra vires*, this concern may be misplaced. Furthermore, the UN Committees’ powers are limited by their scope; they do not have the power to issue authoritative decisions or interpretations. At the same time it has been suggested that UN Committees should be the final arbiter on whether states have fulfilled their obligations; not individual states parties.

Accordingly, due to their limited powers, UN Committees must strike a balance between *realpolitik* and progressive interpretation. If they are too creative or expansive, states may withdraw engagement, whereas if they are overly cautious, civil society may disengage in disappointment. Riedel et al. noted that the UN Committees must “steer a careful course in its interpretation” between legitimate interpretation and illegitimate legislation” in its General Comments. Similarly, Bhattacharya attests that “a flawed process [of interpretation] compromises the acceptability of the outcome”. She further points out that UN Committee recommendations do not place obligations on states; states must “actively trigger the re-characterization of a recommendation into an obligation”. She concludes that it is “problematic to create obligations that are not reasonably foreseeable”, as it may lead to states withdrawing from the treaty or those which have not ratified it deciding against ratification.

Therefore, while the General Comments are an important source of states’ obligations, they need to be interpreted in light of the criteria suggested in the introduction to ensure that they are principled, clear and practical, coherent and consistent, and sensitive to local contexts. Due to their limited powers of persuasion, UN Committees should be principled in their approach in order to promote the effectiveness of their recommendations. Otherwise, it is unlikely that states will attribute sufficient weight to their recommendations and instead be guided by clearer obligations derived from other

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32 Riedel, Giacca, and Golay, “The Development of Economic, Social, and Cultural Rights in International Law.”


34 Ibid., 17.

35 Ibid., 50.
sources that may dwarf children's perspectives. Further, civil society may consider weak interpretations unhelpful to press for rights’ fulfilment. In the next Chapter, the CRC’s recommendations in relation to HFSS food marketing will be analysed in the light of these factors.

3.2 States’ obligations: a children’s rights approach

In view of the ambiguities surrounding states’ obligations, the thesis employs a children’s rights approach as a means of shaping these duties. In the following section, states’ obligations will be discussed in the context of this approach. In the next two chapters, children’s rights will be interpreted in light of this overarching method. In Chapter Six, a selection of domestic regulations on HFSS food marketing is evaluated in light thereof. Finally, in Chapter Seven, the balance between competing obligations and states’ obligations to children’s rights will be interpreted with regard to the children’s rights approach.

Although rights-based approaches are increasingly adopted, their precise contours are not always readily clear. Although children’s rights approaches are not expressly included in the text of the CRC, from its earliest General Comments, the CRC Committee recommended that states adopt child-centred, child-friendly or child rights-based approaches.36 Rights-based approaches originated in the context of development from a desire to move beyond addressing needs, and instead towards focusing on individuals’ rights and entitlements.37 Over time, rights-based approaches have lent themselves to a variety of subject matters.38 They have moved beyond focusing solely on developing countries, and are seen as applicable in all states.39 Rights-based approaches not only relate to states’ obligations, but have called on non-state actors, such as paediatricians, to embody the normative standards of the CRC in their work.40 Inter-governmental and non-governmental organisations, as well as academics often adopt their own conception of a child rights approach.41 For example, one account claims that there are three

38 Such as, social work S. Megan Berthold, Human Rights-Based Approaches to Clinical Social Work ed. Shirley Gatenio Gabel, Springerbriefs in Rights-Based Approaches to Social Work (Switzerland: Springer, 2015), and consent to vaccines (in the US, which interestingly is not a State Party to the CRC) R. Nathawad and J. Goldhagen, “A Child Rights and Equity-Based Framework to Advance Policy and Practice Related to Adolescent Consent to Vaccines,” J Adolesc Health 54, no. 5 (2014).
distinguishing features of a rights-based approach: all rights are equal and universal, all children should be recognised as rights holders and states obliged to work towards ensuring that all rights are met.\textsuperscript{43} Therefore approaches tend to be derived from an individual interpretation of the CRC.\textsuperscript{43} Tobin criticised this phenomenon in 2006, and called for a move away from “vague generalisations”.\textsuperscript{44} While rights approaches may be commended for their breadth, they lack a persuasive voice when they are not principled and coherent.

In light of the limitations of existing approaches, as detailed in 1.12, I conducted a content analysis of the CRC Committee's General Comments to establish a rights-based approach based on the CRC Committee's output.\textsuperscript{45} In light of the CRC Committee's status and its traceability, this approach offers a coherent, principled, practical method. On the basis of the CRC Committee's description of rights-based approaches (1.12.2), a children's-rights approach comprises three parts: rights-based aims and outcomes, rights fulfilment, and rights entrenchment. While the CRC Committee's express description provided a basis for the approach by framing the relevant elements, the content analysis sought to outline the actions that a state should take in greater detail. Accordingly, the content analysis addressed two main research questions: (1) By what \textit{means} should states develop the capacities of rights holders and duty bearers? (2) Which \textit{principles} should inform the realisation of children's rights? In the next chapter, the requirements of rights' fulfilment are explored.

\begin{itemize}
\item \textsuperscript{43} Discussed further 1.12 (introduction).
\item \textsuperscript{44} Tobin, "Beyond the Supermarket Shelf: Using a Rights Based Approach to Address Children's Health Needs.", 276.
\item \textsuperscript{45} The method applied was detailed in 1.12.1-2 (introduction).
\end{itemize}
By what means should states develop the capacities of rights holders and duty bearers?

On the basis of this analysis, it is submitted that a children's rights approach should build the capacities of rights holders and duty bearers, and fulfil children's rights, through crafting an enabling environment and pursuing empowerment through societal and legal transformation. These central themes are not hermetically sealed and instead interlink. For example, an enabling environment supports empowerment, which may in turn also contribute to developing an enabling environment. However, the distinction is that an enabling environment is conceived as more protective and addresses the legal and political structures. Empowerment instead focuses on supporting children and duty bearers, such as states, families, and businesses to fulfil their own potential to pursue rights/obligations.

An enabling environment requires that duty bearers develop a setting that not only avoids rights' infringements but also supports rights' fulfilment. The state should support
groups so that they can realise their rights and obligations. Duty bearers should also contribute to an environment that allows children to realise their rights. For children, this involves school and home environments built on trust and respect for privacy. At a broader level, it requires policy approaches, such as information campaigns to tackle harmful attitudes and discrimination, and legal means that ensure a clear regulatory framework that protects the rights enshrined in the CRC through procedural laws and regulation. An enabling environment includes an obligation to protect children from harm by non-state actors.

Empowerment requires that children are assisted in enjoying their rights, while duty bearers are supported in fulfilling their obligations. Children should be recognised and respected as right holders, and members of communities, cultures and religions. The CRC Committee identifies a number of duty bearers, such as states, parents and families, schools, the media and businesses. Both rights holders and duty bearers should be empowered through awareness raising, education, information, training, the provision of adequate resources and dissemination of the provisions and principles of the CRC. Further, accountability represents a “sub-theme” of empowerment and the enabling environment. Duty bearers should be held accountable through monitoring, evaluation and review of their duties and the measures taken to fulfil their obligations. Further, duty bearers must provide an accessible right of redress and remedy where rights are breached.

49 “General Comment No. 3: Hiv/AIDS and the Right of the Child.”, 42.
51 Ibid., para 8.
53 “General Comment No. 17, the Right of the Child to Rest, Leisure, Play, Recreational Activities, Cultural Life and the Arts” (U.N. Doc. CRC/C/GC/172013.), para 14.
55 “General Comment No. 1: The Aims of Education.”, para 21, “General Comment No. 4: Adolescent Health and Development in the Context of the Convention on the Rights of the Child.”, para 7;
“General Comment No. 5: General Measures of Implementation of the Convention on the Rights of the Child.”, para 56.
“General Comment No. 9, the Rights of Children with Disabilities ” (U.N. Doc. CRC/C/GC/92007.), para 26.
Turning to rights' realisation, the analysis further suggests that laws and policies should be guided by a number of principles. I have divided these into guiding themes that the CRC Committee has explicitly identified, and governing themes which are drawn from the analysis of the General Comments. The guiding themes are evidently best interests, non-discrimination, right to life, survival and development, and participation.\(^5\) The governing themes according to my analysis are: indivisibility, inter-dependence, interconnectedness and equality of rights, gender sensitivity, respect for human dignity, vulnerability and family unity. These principles will be used to guide the interpretation of children's rights so as to ensure a coherent, rights-based approach. My understanding of these principles is based on the CRC Committee's guidance in its General Comments.

The principles' basic essence is summarised here, followed by a more detailed analysis of best interests. Best interests provides a means of mediating where children's rights conflict with other rights and interests.\(^5\) Children's best interests should not only rely on adults' determinations but should include children's perspectives, as mandated by Article 12 CRC. Non-discrimination requires not merely that a state avoids discriminating against groups of children or children themselves, but also takes positive action to protect children from discrimination.\(^6\) The right to life and development suggests that rights-based approaches should strive to fulfil children's development as a priority, and address harmful behaviour.\(^6\) Similarly, the principles of indivisibility, interdependency, interconnectedness and equality require that rights are not analysed in a vacuum, but instead the spectrum of rights is considered.\(^6\) Furthermore, the CRC Committee advocates a gender perspective whereby account must be had of the particular harms facing girls and boys.\(^6\) The principle of human dignity underlines the basis for children's status as rights' holders.\(^6\) Vulnerability recognises that childhood is a state of evolution during which children as individuals and groups are particularly vulnerable to rights violations.\(^6\) Finally, family unity highlights the dependence of children on their parents,

\(^5\) "General Comment No. 4: Adolescent Health and Development in the Context of the Convention on the Rights of the Child.", para 39.
\(^6\) "General Comment No. 14: The Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration " (U.N. Doc. CRC/C/GC/142013), para 33.
and the need to preserve this relationship. These principles will be applied in the next chapter when interpreting the scope of rights and obligations. Furthermore, they are used in Chapter Six to evaluate domestic regulations that limit HFSS food marketing.

**Best Interests**

Best interests is central to this approach as it offers a means of reshaping the power imbalance governing how decisions are made regarding the macro environment shaping children's lives. Best interests is accordingly applied in the thesis as a means of interpreting the scope of children's rights, resolving conflicts between rights, and ensuring child-centred decision-making. Firstly, when interpreting the scope of children's rights, the CRC Committee suggests that "if a legal provision is open to more than one interpretation, the interpretation which most effectively serves the child's best interests should be chosen". Secondly, although there is no hierarchy of rights, "best interests" may serve as an interpretative principle when resolving conflicts between rights and interests. Accordingly, the principle can operate to resolve stalemates between competing rights, and to shift the balance in the direction of the child where his/her best interests are at risk. The CRC Committee suggests that harmonisation of rights should be the first response but, where this is not possible, the child's interests have “high priority and not just one of several considerations.” Therefore, “a larger weight must be attached to what serves the child best.” Finally, best interests can be adopted as a standard in decision-making related to children. This offers a process that considers the implications of all decisions that affect children's rights and interests, instead of focusing on economic concerns.

Accordingly, the CRC Committee has sought to add clarity to best interests - often accused of amounting to an unclear standard. The CRC Committee's analysis is far-reaching and sees best interests as applicable to every situation related to children. Given that the CRC only speaks of best interests as a primary consideration, not a determinative, overriding factor, the CRC Committee's approach may sound incoherent in some circumstances. Furthermore, it may be difficult to fully implement best interests when faced with binding norms that do not recognise children's best interests, such as

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66 “General Comment No. 7: Implementing Child Rights in Early Childhood.”, para 7.
67 “General Comment No. 14: The Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration “, para. 6(b).
68 Ibid., para. 4.
69 Ibid., para 33; "General Comment No. 15: The Right of the Child to the Enjoyment of the Highest Attainable Standard of Health.”para 13.
70 Tobin, "Judging the Judges: Are They Adopting the Rights Approach in Matters Involving Children?", 607.
71 Committee on the Rights of the Child, "General Comment No. 14: The Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration “, para 39.
international trade law. Still, the CRC Committee’s approach provides necessary detail and concretises the applicability of the standard to a range of situations.

The CRC Committee also emphasises that best interests should not be limited to adults’ perceptions of what best serves children’s interests. Article 12 CRC serves as a means of preventing a determination of the child’s best interests being solely based on adults’ conceptions. Thus, unlike traditional welfare models, children must have a role to play in the determination of their best interests. When assessing the best interests of children as a group, the state must gain input from a “representative sample of children” and give due consideration to their opinions. The assessment should consider children generally as well as the specific circumstances of particular groups. Accordingly, implementation should seek to achieve the optimal development for all children. The CRC Committee recommends that “the age and maturity of the child” should act as a guide for the weight which their views be afforded, having regard to the child’s “physical, emotional, cognitive and social development”. Obviously, a younger, immature child should be protected from harm to a greater extent than a mature older child. The weight of the child’s views is subject to his/ her capacity to express views in a “reasonable and independent manner”. It will vary depending on the issue under consideration and the degree of interest in relation to the child as well as the interests of others. The less severe the effect on the child, the more other interests may be considered. By respecting and supporting their participation:

children are no longer envisaged as mere recipients of services or beneficiaries of protective measures. Rather, they are subjects of rights and participants in actions affecting them. They need to be respected in their individuality and in their evolving capacity to influence decisions relevant to their lives.

Thus, the children’s rights approach streamlines states’ obligations in terms of aims and outcomes, and rights principles. However, it does not specify the precise actions that states should take to fulfil rights. Accordingly, these duties are analysed in greater detail next, in reference to the treaty text, work of the UN Committees and academic commentary.

74 Committee on the Rights of the Child, “General Comment No. 14: The Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration “, para 32.
75 “General Comment No. 5: General Measures of Implementation of the Convention on the Rights of the Child.”, para 12.
76 “General Comment No. 14: The Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration “, para 83.
77 “General Comment No. 12: The Right of the Child to Be Heard.”, para 30.
3.3 **OBLIGATIONS IMPOSED ON STATES UNDER THE CRC**

The nature and scope of states’ obligations in relation to socioeconomic rights have long been criticised as vague and unclear, as the provisions do not precisely spell out the steps that states must take to ensure compliance.\(^{85}\) As the focus here is on children’s socioeconomic rights, the historic neglect of these rights should be noted although it will not be explored in detail.\(^{88}\) Put succinctly, this neglect is often attributed to the UN's decision to separate civil and political and socioeconomic rights into two Covenants. This led to a perceived hierarchy of rights, whereby socioeconomic rights were judged as inferior, non-justiciable and aspirational.\(^{86}\) Other oft cited reasons for their lesser position include weaker enforcement mechanisms, lack of national institutes committed to their fulfilment, vagueness, their political nature and inadequate resources.\(^{87}\) They have also been regarded by some as obligations of result, not conduct – meaning that states should strive towards a result but the specific steps are undefined.\(^{88}\) Therefore, states' obligations for socioeconomic rights are often misunderstood and overlooked.

Under Article 2.1 CRC, states shall “respect and ensure” all CRC rights within their jurisdiction without discrimination. This provision should be read in tandem with Article 4 CRC, which obliges states to take “all appropriate legislative, administrative and other measures” to implement the rights under the CRC. This obligation leaves no discretion according to the CRC Committee\(^{85}\) and requires the state to review, develop and implement legislation, programmes and other measures.\(^{86}\) However, in relation to socioeconomic rights, this obligation is limited “to the maximum extent of their available resources, within the framework of international co-operation”. The corresponding clause

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85 Committee on the Rights of the Child, "General Comment No. 16, State Obligations Regarding the Impact of the Business Sector on Children’s Rights.", para. 18.

in the ICESCR requires states parties to take steps “to the maximum of its available resources, with a view to achieving progressively the full realization of the rights” (Article 2 ICESCR.)Neither text precisely outlines states’ specific duties, how to assess compliance with obligations, or what measures are “appropriate” to ensure the right is upheld.

In the next section, the scope of states’ obligations under the treaty text and following the CRC Committee’s interpretations are explored. As will be discussed, states have a measure of discretion in choosing what approaches to take in fulfilling children’s rights. However, this is not unlimited and the CRC Committee has outlined basic obligations to which all states should adhere. Building blocks are introduced that will be used to evaluate states’ obligations in the subsequent chapters, including, the tripartite typology, the role of resources, the minimum core, reasonableness, international co-operation and accountability.

3.3.1 TRIPARTITE TYPOLOGY

The tripartite typology is a widely invoked method of interpreting states’ obligations that seeks to transcend the entrenched distinction between negative and positive rights by inferring that all rights place obligations on states to respect, protect and fulfil. Although the typology does not appear in the text of the Conventions, nor was it originally devised by the Committees, it has reached a high standard of legitimacy in the UN and academic community. The obligation to respect is a negative obligation whereby states must avoid actions that would interfere with rights. Under the obligation to protect, states must protect individuals from incursions by third parties, such as companies or private individuals. Finally, the responsibility to fulfil includes the duty to facilitate and provide, where an individual or his guardian cannot or fails to do so. The requirement to fulfil may be the most resource onerous, requiring states to ensure rights through action. While the obligations should be interpreted in tandem, the obligation to protect is given particular attention in the next chapter as HFSS food marketing is conducted by non-state actors.

While the tripartite typology is widely endorsed and applied, it is not free from dissent. De Schutter regards the typology as “essentially static” as it fails to provide a benchmark for conduct required by states. Koch also finds the typology excessively verbose and argues that it is not equally applicable to all rights. Instead, she proposes “waves of duties” whereby the process of fulfilment of obligations is ongoing. In a similar vein, Maite San Giorgi suggests its application is over-emphasised as CESC rarely uses the

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89 UNOHCHR, “International Human Rights Law”.
92 Ibid, 30.
typology in its Concluding Observations.93 The concept has not featured widely in regional or domestic jurisprudence on state obligations, though it has been integrated into the South African constitution via Article 7.2. Despite these criticisms, it is submitted that the typology has served to enrich the understanding of rights as imposing more than simply negative or positive obligations.

3.3.2 RESOURCES AS A LIMITATION

Although the tripartite typology provides a means of shaping obligations, it does not tackle resources - an issue that is prominent in socioeconomic rights discourse. Under Article 4 CRC, states' obligations are limited by the scope of available resources. While the CRC does not expressly include the concept of “progressive realisation” found in the ICESCR, the CRC Committee considers that the formulation in the CRC is tantamount to that of the ICESCR.94 On the other hand, Nolan argues that references to “progressive realization” during the drafting of the CRC are “patchy” and received “limited attention”.95 She suggests that the CRC Committee needs to interpret the CRC on its own merits, rather than simply “copy and pasting” the approach of other supervisory bodies.96

Further, in their General Comments, the UN Committees stress that the resource-contingent nature of socioeconomic rights does not limit states' obligations to such a degree that they become meaningless. CESC specified that the obligation to “take steps” requires that these are “deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant”.97 Furthermore, states should move as “expeditiously and effectively” as possible towards full realisation of the rights.98 This includes but is not limited to “all appropriate means”, such as “judicial or other remedies”, “administrative, financial, educational, and social measures”.99 While legislation is not essential, it is particularly emphasised in the text.100 The CRC Committee has replicated CESC’s approach and added child specific elements.101 It demands that states show they have made “every effort to mobilise, allocate and spend budget resources to fulfil” children’s socioeconomic rights.102 Further, both Committees declare that socioeconomic rights contain elements that are not resource contingent: the right to non-discrimination

96 Ibid, 271.
98 Ibid, para 9.
99 Ibid, para 7.
102 “General Comment No. 16, State Obligations Regarding the Impact of the Business Sector on Children’s Rights.”, para 30.
and the obligation to take steps towards full realisation.\textsuperscript{103} Progressive realisation can be considered an immediate obligation, although full implementation will be progressive.\textsuperscript{104} States should not take “deliberate” retrogressive measures.\textsuperscript{105}

Further, it is submitted that this limitation should be re-interpreted in light of children’s best interests. Children are less able than adults to achieve their socioeconomic rights as they depend on others to meet their needs.\textsuperscript{106} Furthermore, children are especially vulnerable to rights’ violations. Accordingly, states’ obligations should be considered weightier in the case of children, with less room for deference in light of resources. However, the expertise of CESCR should not be dismissed, as the rights contained therein apply to both adults and children, and include some child-focused elements.\textsuperscript{107}

Although states have wide discretion in their use of resources, without supervision rights are rendered empty.\textsuperscript{108} On the one hand, implementing socioeconomic rights takes time. States parties must take steps, acting in good faith and subject to resources, to ensure full enjoyment of the rights. While taking steps is less than guaranteeing rights, states should approach obligations with commitment.\textsuperscript{109} This requires re-examination and continuous assessment of the scope of obligations.\textsuperscript{110} Further, resources go beyond simple budgetary calculations and include human, technical and scientific resources.\textsuperscript{111} Thus, limited resources does not absolve states of their obligations to children, rather they should seek to do the best for children with available resources, while not damaging other rights in the process. As will be discussed later, states should also seek international co-operation when their resources are limited.

In a similar vein, one approach, following the UN Committees, academics and certain courts, is to emphasise the non-resource contingent aspects of rights. This approach focuses on rights’ “minimum core” to shift the burden to states to prove that they have done everything possible to realise socioeconomic rights. Although controversial, the minimum core approach considers that all rights impose “a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights”. This amounts to

the nature or essence of a right, that is, the essential element or elements without which it loses its substantive significance as a human right and in the absence of which a State Party should be considered to be in violation of its international obligations.

The minimum core relies on a violation’s approach; failure to meet minimum standards is a breach of the CRC or ICESCR. It questions the assumption that socioeconomic rights are subject to resources and instead argues that certain aspects are inalienable.

However, core obligations are not without dissenters. They can be considered arbitrary, contradictory, impractical and to focus too much on the obligations of developing

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112 Committee on Economic Social and Cultural Rights, "General Comment No. 3, the Nature of States Parties’ Obligations (Art. 2, Para. 1),", para 10; Committee on the Rights of the Child, "General Comment No. 15: The Right of the Child to the Enjoyment of the Highest Attainable Standard of Health.", para 73.
113 The scope of each right must be analysed in terms of an outer edge, a circumstance and a core. The essential elements of the norm which are unrelinquishable and unchangeable for the guaranteed core must be determined. This would need extensive multi-disciplinary work. Once meaningful criteria for every right have been established which can be concretized for every right, it should be possible to formulate a lowest common denominator, and perhaps even the average, or ideally the highest, common denominator of all guaranteed cores. Esin Orucu, "The Core of Rights and Freedoms: The Limit of Limits," in Human Rights: From Rhetoric to Reality, ed. David Goldberg Tom Campbell, Sheila Mclean, Tom Mullen (Oxford: Blackwell, 1986). 55. See also, Limburg Principles.
114 See below (South Africa).
115 Some of the Human Rights Committee’s General Comments also support the idea of all rights having an essential core. See General Comment No 27: Freedom of Movement (Art 12) (1999); General Comment No 31: The Nature of the General Legal Obligation Imposed on states parties to the Covenant.
119 Vierdag, “The Legal Nature of the Rights Guaranteed by the Icescr.”, 143.
It asserts that urgent priorities can precede others when implementing rights. Focusing on a minimum core does not tackle structural inequalities, however, such as the underlying reasons for poverty and marginalisation. Smith describes core obligations as “impressive” but “more aspirational than determinative.” Violations’ approaches should avoid “rights inflation” through only labelling the most severe breaches as violations. Therefore, the minimum core is not routinely accepted due to underlying doubts about its appropriateness and the scope of socioeconomic rights.

Therefore, minimum core obligations can be interpreted in a more coherent manner. For instance, they do not need to be the same for all states and instead can be interpreted as developing in line with resources. States with greater resources possess more weighty obligations than those with less developed economies. Wesson suggests a baseline minimum core for all states, followed by individually progressive minimum cores for states depending on resources. Further, the minimum core should focus on measures in light of children’s best interests. Therefore, while the minimum core is considered in 5.4.1, it is approached with caution in light of its limitations and propensity to focus on violations.

### 3.3.3 Reasonableness

Reasonableness is a further influential standard in analysing state obligations towards socioeconomic rights that is likely to receive increased attention and application. The new complaints’ procedures provided for by the Optional Protocols to the CRC and ICESCR enshrine reasonableness as the relevant standard of review:

When examining communications alleging violations of economic, social or cultural rights, the Committee shall consider the reasonableness of the steps taken by the State party in accordance with article 4 of the Convention. In doing so, the Committee shall bear in mind that the State party may adopt a range of possible policy measures for the implementation of the economic, social and cultural rights in the Convention.

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124 Vierdag, "The Legal Nature of the Rights Guaranteed by the Icescr.," 143.

125 Wesson, "Grootboom and Beyond: Reassessing the Socio-Economic Jurisprudence of the South African Constitutional Court.," 298.

126 Wesson, "Grootboom and Beyond: Reassessing the Socio-Economic Jurisprudence of the South African Constitutional Court.," 299.

127 UN General Assembly, Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure: resolution / adopted by the General Assembly, 27 January 2012,
As the CRC Committee and CESCR have not decided any substantive complaints to date, the development of reasonableness as an international standard for socioeconomic rights adjudication remains conjectural. Meanwhile, CESCR has issued guidance on the manner in which it will assess states' compliance under the Optional Protocol, with the following factors considered:

a) The extent to which the measures taken were deliberate, concrete and targeted towards the fulfillment of economic, social and cultural rights;

b) Whether the State party exercised its discretion in a non-discriminatory and non-arbitrary manner;

c) Whether the State party's decision (not) to allocate available resources was in accordance with international human rights standards;

d) Where several policy options are available, whether the State party adopted the option that least restricts Covenant rights;

e) The time frame in which the steps were taken;

f) Whether the steps had taken into account the precarious situation of disadvantaged and marginalized individuals or groups and, whether they were non-discriminatory, and whether they prioritized grave situations or situations of risk.  

As the CRC Committee has endorsed these guidelines, they are likely to be also applied in relation to the CRC. These standards – although not binding - offer states a potential check-list within which they can determine the reasonableness of their actions in the pursuit of socioeconomic rights. Parts (a) – (c) are already well known in the practice of the UN Committees. Part (c) suggests that in its interpretation, the Committees will rely on their existing practices, i.e. the tripartite typology, and the minimum core. However, part d) suggests that proportionality may be introduced as a new standard; which, although well established in human rights, has not been considered in detail in the context of socioeconomic rights. Further, the adjudication of socioeconomic rights through the respective communications' procedures should serve to further highlight their legal nature and thereby increase engagement. In the meantime, these standards, although non-binding, can provide a useful method of interpreting states' obligations.

Further, the Committees may look to the jurisprudence of the South African Constitutional Court that has applied reasonableness as a standard for assessing rights


CRC Committee, Report on the Forty-Sixth Session, UN Doc CRC/C/46/3 (22 April 2008), para 93.

See further 7.2.
compatibility under its constitution.  Although South Africa had not ratified ICESCR, its post-apartheid constitution requires courts to take international law into account when interpreting its provisions.  The South African Constitution further expressly imposes obligations on the state to respect, protect, promote and fulfil rights, including a number of socioeconomic rights such as rights to housing and health.  Accordingly, South African courts have heard a number of cases relating to these rights and obligations which have gained prominence in international scholarship. In South Africa v. Grootboom and others, the Constitutional Court emphasised that under the right to housing, the state must "(a) take reasonable legislative and other measures; (b) within its available resources; (c) to achieve the progressive realisation of th[е] right." The discussion was revisited in Treatment Action Campaign, where the applicants complained that the government's refusal to make nevirapine (an antiretroviral drug) available in the public sector and its failure to set a time-frame for a national programme to prevent mother-to-child transmission of HIV was unreasonable.

Although these cases marked a watershed in the adjudication of socioeconomic rights, reasonableness has been criticised. Some commentators suggest that the standard is a simple repackaging of administrative law. Pietrese advocates that the court retreated into comfortable, familiar ground, which could allay fears that socioeconomic rights imposed an alien standard of review. This succeeds in affirming that 'vindicating social rights is not as removed from courts' 'ordinary' review function as is often contended, and accordingly that the notion of vindicating them judicially is not necessarily far-fetched.' For some, this cautious approach fails to produce the added value of a new standard of review going beyond administrative guarantees. Therefore, Stewart calls on the court to abandon its conservative approach and instead adopt a "comprehensive methodology" whereby grammatical, contextual, teleological, historical and comparative interpretation is applied. Davis agrees that the failure of the court to develop a new legal method to

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60 Constitution of South Africa 1996, Section 39.
61 Constitution of South Africa 1996, Section 7(2).
65 Ibid, 899.
adjudicate these claims is disappointing. It renders the court's approach a review based on "structural good-governance principles", not the assessment of the substantive content of the rights. Therefore, for some, reasonableness is not sufficiently transformative.

On the other hand, other commentators consider that the standard goes beyond simple administrative review. Wesson holds that the court evaluates reasonableness to a new intensity. Davis further contends that while the court's standard is that of administrative review, it is based on the principle of the protection of the most vulnerable. Bilchitz argues that the court does not need to create a definitive account of the rights, but does need to provide greater normative clarity on the obligations of states. This would require the court to scope the content of the right and thereafter determine the reasonableness of a measure adopted by the state.

While the manner in which the UN Committees will approach reasonableness remains to be seen, the Committees, as will be explored in the next chapter, already have been active in scoping the content of socioeconomic rights, meaning that reasonableness could be more stringent than the South African case-by-case approach. In the thesis, reasonableness will be used to explore states' obligations to ensure children's rights in relation to a right from HFSS food marketing. However, it is interpreted in light of children's rights to ensure a transformative standard.

### 3.3.4 Ensuring Accountability

Accountability is a central component of children's rights. It requires holding duty bearers responsible for their actions or inactions through multiple means. The CRC Committee's approach highlights accountability in terms of mapping duty bearer responsibilities, evaluating whether measures meet their aims, and finally, providing

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142 Wesson, "Grootboom and Beyond: Reassessing the Socio-Economic Jurisprudence of the South African Constitutional Court., 293.
145 Committee on the Rights of the Child, "General Comment No. 15: The Right of the Child to the Enjoyment of the Highest Attainable Standard of Health.," para 90.
146 Ibid., para 91.
147 "General Comment No. 13: The Right of the Child to Freedom from All Forms of Violence.," para 43.
complaints’ mechanisms and remedies where rights are violated. Therefore, accountability ensures that obligations are respected in the first instance and remedies are provided where this does not happen.

Human rights practice has accordingly moved from fixating on justiciability to encompassing empirical monitoring and evaluating of rights through multiple methods such as: national surveys gathering stakeholder views, children’s views, establishing national action plans, gathering both qualitative and quantitative data, disaggregated by variables such as age, sex, disability, socioeconomic status, sociocultural aspects, geographic location, ethnicity and educational level. Further measures of accountability include the development of indicators, targets and benchmarks, and child impact assessments, whereby the impact of a proposed law, policy or budget on children’s rights is evaluated. Further, the CRC should be incorporated into domestic law to ensure that its provisions are given in legal effect. Therefore, rights monitoring has become broader and more multidisciplinary. Thus, while academic discussion revolved around justiciability of rights for many years, accountability is now seen to go beyond legally enforceable rights claims.

Still, where rights are breached, independent complaints’ systems and remedies should be available, including access to court. Other complaint mechanisms may also be

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499 “General Comment No. 12: The Right of the Child to Be Heard.”, para 120.
500 “General Comment No. 1: The Aims of Education.”, para 22.
501 “General Comment No. 12: The Right of the Child to Be Heard.”, para 126.
502 “General Comment No. 1: The Aims of Education.”, para 23.
503 “General Comment No. 7: Implementing Child Rights in Early Childhood.”, para 39.
504 “General Comment No. 17, the Right of the Child to Rest, Leisure, Play, Recreational Activities, Cultural Life and the Arts “., para 58.
505 “Joint General Recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/General Comment No. 18 of the Committee on the Rights of the Child on Harmful Practice.”, para 38.
506 “General Comment No. 8: The Right of the Child to Protection from Corporal Punishment and Other Cruel or Degrading Forms of Punishment ” (U.N. Doc. CRC/C/GC/82006), para 52.
507 “General Comment No. 15: The Right of the Child to the Enjoyment of the Highest Attainable Standard of Health.”, para 11.
508 “General Comment No. 5: General Measures of Implementation of the Convention on the Rights of the Child.”, para 45.
suitable such as complaints to national human rights institutions or ombudspeople.\textsuperscript{62} Community-based complaints mechanisms that ensure reparations may also be considered.\textsuperscript{60} State reporting to the UN Committees is a form of accountability, which will be strengthened through complaints.\textsuperscript{64} Furthermore, complaints systems must be adequately accessible to children\textsuperscript{65} with timely and effective remedies.\textsuperscript{66} Accordingly, accountability for children’s right to freedom from HFSS food marketing goes beyond access to courts and includes a variety of approaches.

3.3.5 \textbf{INTERNATIONAL CO-OPERATION}

Finally, states’ have international obligations in relation to socioeconomic rights, including to support other states with fewer resources, and to co-operate with each other and international bodies to reach global solutions to children’s rights.\textsuperscript{67} In light of the challenges of globalisation, it is submitted that increasing consideration of states’ responsibilities beyond their borders - in the form of extra-territorial obligations – is necessary.

Firstly, states with greater resources should provide assistance to other states.\textsuperscript{68} International assistance – often in the form of technical support - should be availed of where a state has inadequate national resources to fulfil minimum standards.\textsuperscript{69} In reality, however, most states fail to see international assistance as a treaty obligation, and instead view aid as a form of benevolence.\textsuperscript{70} As Wolff observes, this can be problematic as humanitarian aid does little to change existing power structures.\textsuperscript{71} Therefore, states appear to see their obligations of international assistance as a moral imperative, or as a

\textsuperscript{62} “General Comment No. 16, State Obligations Regarding the Impact of the Business Sector on Children’s Rights.”, para 30.
\textsuperscript{63} “General Comment No. 15: The Right of the Child to the Enjoyment of the Highest Attainable Standard of Health.”, para 119; “General Comment No. 17, the Right of the Child to Rest, Leisure, Play, Recreational Activities, Cultural Life and the Arts “., para 57(g).
\textsuperscript{64} “General Comment No. 5: General Measures of Implementation of the Convention on the Rights of the Child.”, para 71.
\textsuperscript{65} “General Comment No. 9, the Rights of Children with Disabilities “., para 18(b).
\textsuperscript{67} These obligations are further included under the UN Charter, Articles 1, 55, 56. See further ETO Consortium, “Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights,” (Heidelberg: FIAN International, 2013).
\textsuperscript{68} \textit{Ibid.}, principle, 35; Committee on the Rights of the Child, “General Comment No. 15: The Right of the Child to the Enjoyment of the Highest Attainable Standard of Health.”, para 39.
\textsuperscript{69} ETO Consortium, “Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights.”, principle 34.
\textsuperscript{70} Saul, Kinley, and Mowbray, \textit{The International Covenant on Economic, Social and Cultural Rights: Cases, Materials, and Commentary}, 139.
means of advancing their own interests – not obligations owed to the children of the world."\(^\text{172}\)

Secondly, the CRC Committee calls on states to cooperate to ensure the global implementation of rights through common solutions where practicable.\(^\text{173}\) States should co-operate with UN agencies, such as WHO and UNICEF, through sharing data and technical resources.\(^\text{174}\) Thirdly, states should *respect*\(^\text{175}\) and *protect*\(^\text{176}\) rights in other countries through avoiding harm and ensuring that non-state actors under their influence cannot impair rights.\(^\text{177}\) States have obligations where they exercise effective control, where their acts or omissions "bring foreseeable effects" on socioeconomic rights, and where they have "decisive influence" or are in a position to realise socioeconomic rights extraterritorially.\(^\text{178}\) This includes protecting individuals in other countries from rights infringements by companies when operating in a host state. Such obligations could help to fill the governance gaps caused by globalisation and patchy regulation. However, again most states fail to see the above as binding obligations.

**3.3.6 Conclusions on States’ Obligations to Secure Children’s Rights**

In the preceding section, states’ overarching obligations were outlined in order to be applied to the case of HFSS food marketing in the forthcoming chapters. States’ obligations were framed through the children’s rights approach meaning that when pursuing rights’ fulfilment, states should aim to ensure an *enabling environment*, where duty bearers and rights holders are *empowered* and duty bearers are held *accountable* for non-performance of their responsibilities. Following this approach, states’ obligations should be interpreted in light of children’s rights principles, inter alia best interests, with children’s views sought in decisions affecting them.

States’ obligations include positive and negative obligations to pursue rights fulfilment, including protective measure to ensure non-interference from third parties. Although

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\(^\text{174}\) “General Comment No. 15: The Right of the Child to the Enjoyment of the Highest Attainable Standard of Health.”, para 69; GC No 8, para 49; "General Comment No. 2: The Role of Independent National Human Rights Institutions in the Promotion and Protection of the Rights of the Child.,” para 23.


\(^\text{176}\) Ibid., principle 23.

\(^\text{177}\) Wilson and Daar suggest that international co-operation extends to at least *respect* and *protect* Arthur Wilson and Abdallah S. Daar, "A Survey of International Legal Instruments to Examine Their Effectiveness in Improving Global Health and in Realizing Health Rights," *The Journal of Law, Medicine & Ethics* 41, no. 1 (2013), 91.

states’ obligations are subject to resources, this should not be interpreted so as to deprive obligations of any meaningful content. Further, the practice of the UN Committees affirms that some aspects of children’s rights are non-negotiable. Additionally, states with greater resources, such as those in the European region may have stricter obligations. Following the introduction of the Optional Protocols, socioeconomic rights’ practice may be increasingly guided by the concept of reasonableness when determining which actions to take. States’ obligations to ensure accountability should be achieved through continuous monitoring and evaluation, including through complaints’ procedures but not limited thereto. Finally, states not only have domestic obligations; they should pursue their children’s rights obligations through international co-operation and assistance.

The above analysis suggests that the scope of states’ obligations to children’s socioeconomic rights is no longer at the fledgling stage, but subject to detailed analysis and guidance. However, these building blocks require more detailed consideration in the context of a specific case in order to establish the extent and operability of states’ obligations. Further, as will be explored in the next sections, states’ obligations should not be approached in isolation, but in tandem with other duty bearers, especially parental responsibilities.

3.4 The Interplay between State and Parental Responsibilities

Following the children’s rights approach and the text of the CRC, states’ obligations must be interpreted with due respect for parental responsibilities. The family’s important role is already recognised in the preamble to the CRC, which refers to the family as “the fundamental group of society and the natural environment for the growth and wellbeing of all its members and particularly children”. Accordingly, under Article 18.1 CRC, parents and guardians have the “primary responsibility for the upbringing and development of the child”. The CRC Committee also recognises that parents play a crucial role in fulfilling children’s rights. Therefore, parental responsibilities limit states’ discretion, as when undertaking appropriate measures, states must take into account the rights and duties of parents, legal guardians, etc.

Further, states owe obligations not only to children, but also to families. This means empowering parents through information and advice, and putting the structures in place that support parents in fulfilling their obligations. This is clear from the text of the CRC, whereby states should provide the family with appropriate assistance, for example through the provision of information, as well as the development of “institutions, facilities and services for the care of the children”. This has been interpreted by the Committee to include a responsibility on the state to “provide an environment that facilitates the discharge of all duty bearers’ obligations and responsibilities... and a

179 Committee on the Rights of the Child, ‘General Comment No. 7: Implementing Child Rights in Early Childhood.’, para 15.
180 Article 3.2 CRC
181 Articles 18.2, 24(e) CRC.
regulatory framework”. Furthermore, parents should be empowered by providing training in the necessary skills, and parenting education and counselling. This education should include aspects on positive child-rearing for parents and caregivers; provision of accurate and accessible information on specific risks.

However, parental rights are conditional, and subject to limitations. Thus, the state must protect children from neglect and abuse, although children should only be separated from their parents where it is in their best interests. As the CRC enshrines children’s rights, parental responsibilities derive from their children’s superior rights. The deciding factor for the legitimacy of state action or inaction in regards to parental responsibilities should be the best interests of the child, in light of the object and purpose of the CRC. In light of this important role, the CRC Committee urges parents to recognise children as rights holders and listen to their views. However, while parents should carry out their responsibilities in the best interests of the child under Article 18 CRC, states are under legal obligations. Therefore, parents’ responsibilities under the CRC are moral in nature. Accordingly, the CRC Committee has admitted that it is not its role to “prescribe in detail how parents should relate to or guide their children”. Instead, the precise legal obligations of parents are left to domestic law, which is not analysed here.

Therefore, state and parental obligations should be viewed as interconnected, and where possible, support and reinforce each other. This follows the approach suggested by George Kent whereby, in relation to the right to nutrition, obligations should be seen as “nested rings of responsibility”. Under this model, “those who are more distant should try to work through and strengthen those who are closer to help them become more capable of fulfilling their responsibilities towards children”. Therefore, parents are primarily responsible for their children, while state obligations should focus on giving support at a structural level. Kent suggests that responsibilities to children can be seen as rings of responsibility that look like this:

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82 Committee on the Rights of the Child, “General Comment No. 15: The Right of the Child to the Enjoyment of the Highest Attainable Standard of Health.”, para 91.
83 “General Comment No. 7: Implementing Child Rights in Early Childhood.”, para 14(c).
84 Ibid., para 20 (c), para 31.
85 “General Comment No. 13: The Right of the Child to Freedom from All Forms of Violence.”, para 44 (c).
86 Articles 18, 5 CRC.
87 Articles 19, 9.1 CRC (see note 13).
88 Article 3 CRC.
90 Jonsson, “Special Issue on Food and Nutrition Rights.”, 374.
91 Committee on the Rights of the Child, “General Comment No. 8: The Right of the Child to Protection from Corporal Punishment and Other Cruel or Degrading Forms of Punishment “., para 46.
Kent's approach is slightly modified in this thesis as I do not address the duties of the various departments of government. Further, since Kent’s approach, non-state actors, in particular businesses are increasingly recognised as having responsibilities to children. Therefore, I focus on the following duty bearers/ rights holders, as although they are not solely responsible, they are the most important in terms of the research question:

*Figure III: Adapted Rings of Responsibility*
This approach accordingly, does not argue for marginalising or ignoring the role of parents. Instead, it acknowledges that parents (or caregivers) play a fundamental role in children’s health and wellbeing. Accordingly, states should support parents in providing for their children’s rights. Only where strictly necessary should the state interfere with parents’ duties. The interplay of state and parental obligations will be further discussed in 5.4.4 in relation to specific rights. Accordingly, it will be argued that, following the evidence presented in the previous chapter, parents are largely unable to mitigate the exposure and power of HFSS food marketing because children view this type of marketing in private. The primary focus will be on states’ obligations, not parental responsibilities. Further, following the responsibility to protect, states should limit actions of other actors, such as companies, that interfere with children’s rights. This approach is in keeping with the nature of the CRC and the work of its Committee.

3.4.1 Are Children Duty Bearers under the CRC?

As parents have duties towards their children, it can be asked, to what extent (if any) do children also have duties under the CRC? While international human rights, generally speaking, relates to states’ obligations, in a number of Conventions individuals also have duties. For example, in the preambles of both ICCPR and ICESCR, individuals are recognised to have duties to others and to their community. Furthermore, the African Charter on the Rights and Welfare of the Child imposes duties on the child, whereby “every child shall have responsibilities towards his family and society, the State and other legally recognized communities and the international community”.193 It has been suggested that this provision enables children to prepare themselves for life as adults.194 Therefore, the concept of duties of individuals is not completely alien to international human rights.

In spite of these provisions, the CRC does not speak of children’s duties – but only duties of parents and states. Even children’s right to freedom of expression is not subject to responsibilities, as in the case of the ECHR, which recognises duties and responsibilities.195 Further, the practice of the CRC Committee does not suggest that children have duties under the CRC. In fact, the opposite is emphasised; for instance, the CRC Committee explains: “expressing views is a choice for the child, not an obligation.”196 Therefore, while children are to be empowered by duty bearers, they are not obliged to act on this empowerment. Accordingly, those hoping that the CRC places an obligation on the child to act in her best interests, or to pursue a healthful life, will be disappointed. While the child should be enabled and supported in doing so, there is no obligation on her to do so.

195 Article 10 ECHR (Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5).
196 Committee on the Rights of the Child, "General Comment No. 12: The Right of the Child to Be Heard.", para 16.
Furthermore, as described in 1.10.1, European states’ obligations in relation to socioeconomic rights derive not only from the CRC – but also from the European Social Charter (ESC). The ESC is a separate regional treaty under the Council of Europe (CoE) with the aim of ensuring socioeconomic rights in Europe. However, it has been neglected; the ESC allows an a la carte system of rights monitoring: some states are subject to the 1961 ESC, others to the 1995, others have ratified the collective complaints procedure and some CoE states are party to none. This is in contrast to the European Convention on Human Rights (ECHR), which all CoE member states have ratified. Further, unlike in the case of the ECHR, states do not need to commit to all the articles of the ESC. Although the ESC has been supplemented and strengthened in recent years, it remains “the poor step-sister” of the ECHR. Therefore, socioeconomic rights under the ESC have not developed to the same extent as civil and political rights under the ECHR.

Despite these limitations, the European Committee of Social Rights (European Committee) has adopted a more legalistic approach than the UN Committees, with some clear obligations outlined which will be analysed in 4.3. As with the UN treaties, the mandatory state reporting system is the backbone of ESC monitoring. Like the UN Committees, the European Committee consists of 15 independent, elected experts that assess states’ conformity to the ESC on the basis of country reports. The European Committee, unlike UN Committees, assesses “from a legal standpoint the compliance of national law and practice with the obligations arising from the ESC.” It also issues conclusions assessing whether the state is in compliance with the ESC or whether it requires more information to make a determination. However, the conclusions remain declaratory; they call on states, in line with their good faith obligations, to take action to conform to recommendations which cannot be invoked in national law. The Committee of Ministers (the political wing of the CoE) can adopt a resolution by a two-thirds majority which may contain individual recommendations, for example requesting the state to bring its laws into conformity. This political body may choose not to issue recommendations. Schoukens argues that the Governmental Committee is “much more
restrictive in its interpretations” of the ESC than the European Committee, while the latter goes “rather far”\textsuperscript{207}. As with the UN system, the central function is to remind states of their obligations, not to make findings of violations.\textsuperscript{208}

Further, since 1995, the ESC includes a collective complaints’ mechanism through an Additional Protocol, although only 15 states are party to it.\textsuperscript{209} Brillat suggests that the European Committee has evolved towards acting as a judicial body; it adopts an increasingly judicial method in deciding collective complaints. Its decisions are reasoned and detailed, and follow a similar format to the European Court of Human Rights (ECtHR). They are adversarial in nature and there is provision for oral hearings. Furthermore, the European Committee outlines its reasoning in detail and examines the limitations on rights in the same manner as the ECtHR.\textsuperscript{210} This has been possible due to the collective complaints mechanism, absent until recently in the international system for the protection of socioeconomic rights. Therefore, in the analysis in the next chapter, the European Committee’s approach to states’ obligations under the ESC is expected to differ from the CRC Committee’s in light of its more judicial method.

### 3.6 Companies’ Responsibilities

Not only states and parents, but also food and beverage companies should have responsibilities to respect children’s right to freedom from HFSS food marketing. This is logical given that this form of marketing is bought by food and beverage companies to promote their products. Furthermore, companies promote HFSS products because processed food and sugar sweetened beverages offer the greatest profit margins.\textsuperscript{211} Therefore, companies are at the heart of the issue; meaning that imposing direct obligations on them could be the most efficient means of engineering change.

However, states parties remain the main duty bearers under international human rights law, meaning that companies are not directly responsible for ensuring human rights. Yet, since the 1970s academics, states’ representatives and civil society have discussed the potential of imposing obligations on companies (particularly transnational companies) under international law.\textsuperscript{212} Further, companies may already be regarded as duty bearers

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\textsuperscript{210} Brillat, “The Supervisory Machinery of the European Social Charter: Recent Developments and Their Impact.”, 34-36.

\textsuperscript{211} Stuckler et al., “Manufacturing Epidemics: The Role of Global Producers in Increased Consumption of Unhealthy Commodities Including Processed Foods, Alcohol, and Tobacco.”, 1.

\textsuperscript{212} The UN Economic and Social Council requested the Secretary General to set up a Group of Eminent Persons to study to the impact of multinational corporations on development and
under the Universal Declaration of Human Rights (UDHR). While normally states negotiate and ratify international treaties, and thereby consent to be bound by the norms contained within, one exception is the UDHR which addresses “every individual and every organ of society”.\(^{213}\) Also under the UDHR, everyone has duties to the community and no group should engage in activities or acts that seek to destroy any rights and freedoms found in the UDHR.\(^{214}\) Although the UDHR is a non-binding declaration, it is often considered to have become part of customary international law through consistent state practice and \textit{opinio juris}.\(^{215}\) However, the Universal Periodic Review is the only means by which the UDHR is monitored and this addresses state compliance only.\(^{216}\) Thus, even if companies have binding obligations under the UDHR, these are currently not monitored or enforceable at international level and should therefore be supplemented.

The central reasons for imposing human rights obligations on companies relate to the effects of globalisation, which has led to growth in companies’ transnational power, coupled with limits on individual states’ regulatory capacity. Transnational companies have an impact beyond their home states' borders, with injured parties denied a remedy where both the home and host state fail or refuse to regulate. Further, companies can move jurisdiction to avoid regulation, or pressure developing states to avoid enforcement of existing obligations.\(^{217}\) Their power and the absence of regulation has allowed some companies to violate human rights and human dignity, often without sanction,\(^{218}\) such as in the cases of Unocal,\(^{219}\) Nestlé,\(^{220}\) and Shell.\(^{221}\) At the same time, a blend of privatisation, liberalisation and deregulation is eroding the power and role of the state in regulating companies. This has accordingly led to governance gaps.\(^{222}\)

\(^{213}\) The Universal Declaration on Human Rights was proclaimed by the United Nations General Assembly in Paris on 10 December 1948 General Assembly resolution 217(III).
\(^{214}\) Articles 29 & 30 UDHR.
\(^{216}\) United Nations General Assembly resolution 60/251 Human Rights Council, A/RES/60/251.
\(^{219}\) US Court of Appeals for the Ninth Circuit, filed 18 September 2002, 14210.
While international law has the potential to address this legal fragmentation through imposing norms that apply regardless of jurisdiction, as noted in 2.5, classic state-led governance is being replaced with “new governance” which recognises multiple stakeholders.\footnote{John Gerard Ruggie, "Global Governance and "New Governance Theory": Lessons from Business and Human Rights,” Global Governance 20 (2014), 9.} States have thus far been reticent to impose binding human rights obligations on companies at international level. No intergovernmental body has negotiated soft or hard law on companies’ human rights obligations.\footnote{This is of significance due to the centrality of state consent.} Instead, companies play an increasing role in negotiating non-binding standards.\footnote{Surya Deva and eds. David Bilchitz, Human Rights Obligations of Business (Cambridge University Press, 2013), 7.} Further, the “invisibility” of companies in international law masks the reality of companies’ role in lobbying for standards that favour their interests.\footnote{Janet Dine, Relationship between Companies and Human Rights Law, Companies, International Trade and Human Rights (United Kingdom: Cambridge University Press, 2005), 168.}

Accordingly, global governance of companies’ human rights’ impact relies on non-binding responsibilities. A variety of voluntary principles have been drafted by expert bodies, which have met mixed reactions. Following this approach, a growing number of companies take on human rights responsibilities through voluntary pledges, or drafting their own human rights policies. Soft regulation will be discussed in 6.3.5, and many of the same considerations apply to human rights. It allows multiple stakeholders to take part in the process, which may help to internalise human rights norms.\footnote{Nolan, "Mapping the Movement: The Business and Human Rights Regulatory Framework." , 399.} Further, companies, especially large multinationals have access to data which states and the international community lack to effectively regulate. It is difficult for civil society to monitor companies without adequate disclosure and transparency regarding their rights’ impact. Further, as we will see, human rights standards are maturing and increasingly recognise that companies can affect all human rights and not merely a narrowly defined group of labour-rights. However, companies remain answerable to their shareholders and must mitigate the extra costs of human rights initiatives.

Further, companies also stand to benefit from acting in conformity with human rights. Decline in consumer confidence may require companies to demonstrate that they are limiting their negative societal impacts.\footnote{Humberto Cantu Rivera, "The United Nations Guiding Principles on Business and Human Rights in the European Union: From Regional Action to National Implementation," in The Business and Human Rights Landscape: Moving Forward, Looking Back, ed. Karen E. Bravo Jena Martin (United Kingdom: Cambridge University Press, 2015), 505.} They may be motivated to adopt a human rights strategy due to public pressure, to reduce the threat of litigation or the desire to

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\footnote{See further the discussion on hard and soft law in section 1.10.}
boost their reputation. As voluntary standards do not carry sanctions, companies that fail to meet the standards face only reputational sanctions or expulsion. Companies can thereby use UN associated standards to boost their profile, while not effectively addressing their human right impact (a phenomenon known as “blue wash”). Practice suggests that although many companies adopt human rights policies, the majority do not conform to the UNSG’s criteria. In these cases, voluntary standards fail to provide effective governance. Thus, standards should be normative, and guide and limit corporate conduct. Vague standards that allow companies to benefit reputationally from membership, while doing very little to change corporate practices, should be avoided.

The central human rights and business standards are the UN Global Compact and the United Nations Guiding Principles. Both are voluntary and without sanctions. They regard companies as having responsibilities to respect human rights based on social expectations – not binding obligations. The responsibilities placed on companies are not onerous; under the Global Compact, companies must make a leadership commitment to follow the principles, and produce an annual Communication on Progress (CoP). Companies make two simple commitments to human rights: to support and respect all human rights as recognised under the UDHR, and to not be complicit in rights abuses. Under the Guiding Principles, companies should respect human rights by avoiding infringements on rights and addressing adverse impacts. Companies should pursue due diligence including a human rights policy, including public monitoring. However,

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233 Deva and David Bilchitz, Human Rights Obligations of Business, 229.
236 See further: Global Compact, "UN Global Compact Policy on Communicating Progress " (2013).
237 Global, "United Nations Global Compact."principles 1, 2.
239 Ibid., paras 57, 58, 59.
240 Ibid., principle 21.
companies are essentially free to cherry pick “salient human rights issues” - meaning they choose which human rights impact to consider.

None of these standards amount to legally-binding obligations and are only guidelines.\textsuperscript{441} The UNGP are “not a governance or regulatory regime” but rather a “platform of guidelines by which stakeholders may define mechanisms using either compelling regulatory mechanisms or voluntary initiatives”.\textsuperscript{442} Weissbrodt says the term, Guiding Principles, “suggests international law obligations that could be strong one day, but are presently in the fledgling or emerging stage of development”.\textsuperscript{443} Therefore, their scope is subject to companies' commitment and the level of external pressure to go further than mere platitudes.

Inspired by the UN Guiding Principles, Save the Children, the Global Compact and UNICEF devised specific Children’s Rights and Business Principles to highlight the effect of business practices on children’s rights. The Children’s Principles consist of ten specific principles with which businesses "should" comply.\textsuperscript{444} The Children's Principles build on the UNGP from a child-centred outlook: companies should respect children’s rights through preventing harm, and support children’s rights through active engagement.\textsuperscript{445} This should include adopting a policy commitment backed by due diligence. Further, companies should address their businesses’ adverse impacts on children's rights,\textsuperscript{446} including through child-sensitive remediation.\textsuperscript{447} The Children's Principles thereby highlight the specific impact that companies can have on children's rights and seek to ensure that companies give discrete consideration to children’s rights. They are analysed in further detail in relation to HFSS food marketing in 5.6.

The current standards on human rights and business are vague, as they allow companies wide latitude in determining how and when to address their human rights impact. Companies’ responsibilities are not subject to monitoring or sanctions for non-enforcement. This is in stark contrast to companies' rights that have been strengthened through the establishment of the World Trade Organisation (WTO).\textsuperscript{448} The lack of governance means that companies remain free to decide “salient” issues and avoid exploring their wider rights’ impacts. Efforts to impose more taxing standards, such as the

\textsuperscript{441} Susan Ariel Aaronson, “"Re-Righting Business": John Ruggie and the Struggle to Develop International Human Rights Standards for Transnational Firms.”, 336.


\textsuperscript{445} Ibid., 3.

\textsuperscript{446} Ibid., 4.

\textsuperscript{447} Ibid., 16.

\textsuperscript{448} Agreement Establishing the World Trade Organization (Marrakesh Agreement) 1867 U.N.T.S. 154.
UN Norms have so far ended in failure.\textsuperscript{249} The Norms failed to achieve support among states and industry, leading to the then Human Rights Commission declaring that they had no legal standing.\textsuperscript{250} However, in 2014 the Human Rights Council established an open ended working group to explore a binding instrument on business and human rights.\textsuperscript{251} Its consultations remain ongoing.\textsuperscript{252} Therefore, while a global treaty may emerge in the future, at present companies’ responsibilities are limited to non-binding undertakings to respect children’s rights. In 5.6.1, a sample of multinational food and beverage companies’ commitments to human rights reports are analysed in light of freedom from HFSS food marketing.

3.7 Other Duty Bearers

Besides the duty bearers described above, there are other influential actors that play a role in children’s right to freedom from obesogenic food marketing. Although they are not accountable under the CRC, they have complementary obligations under other branches of international/regional law that must be considered in order to construct a coherent narrative of children’s rights. Therefore, the scope and limits of the obligations of WHO and the EU to children’s right to freedom from HFSS food marketing is now discussed in this final section.

3.7.1 The World Health Organisation

WHO is an intergovernmental organisation\textsuperscript{253} focused primarily on international health.\textsuperscript{254} Although the CRC and other human rights treaties place obligations on states, not intergovernmental organisations, there is a close connection between the aims of WHO and children’s right to health. The objective of WHO is “the attainment by all peoples of the highest possible level of health”.\textsuperscript{255} Further, many of the aims of WHO coincide with those of the CRC, such as inter alia, “to promote the improvement of nutrition, housing, sanitation, recreation, economic or working conditions and other aspects of environmental hygiene, promoting maternal and child health and welfare, and fostering the ability to live harmoniously in a changing environment”.\textsuperscript{256} Further aims, such as “to provide information, counsel and assistance in the field of health”, mean that

\textsuperscript{253} Article 3, WHO Constitution.
\textsuperscript{254} For a historical account of the establishment of WHO see, Lee, World Health Organization. Chapter 1.
\textsuperscript{255} Article 1 WHO Constitution.
\textsuperscript{256} Article 2(i),(k), (I) WHO Constitution.
WHO should guide Member States in their pursuit of the highest attainable standard of health.\textsuperscript{257} Therefore, there is scope for WHO and the CRC to pursue mutually enforcing purposes, including children's right to freedom from HFSS food marketing. However, as will be explored, WHO's role in terms of the right to health and global health law has been limited thus far.

In spite of these interconnected aims, WHO has classically been “relatively isolated” from and ambivalent about human rights.\textsuperscript{258} This has been attributed to “conservatism of the public health tradition, the suspicion that most health care workers have of lawyers, and a degree of caution and scepticism ...”\textsuperscript{259} In tracing the history of WHO and human rights, Meier argues that WHO avoided human rights in order to maintain its status as a technical organisation.\textsuperscript{260} At the birth of CESCR, Alston accused the Food and Agriculture Organisation (FAO) and WHO of a lack of interest in contributing to the implementation of the ICESCR.\textsuperscript{261} WHO had little engagement with human rights organisations, preferring to keep the closest ties with public health organisations.\textsuperscript{262} At the same time, there has been a certain amount of collaboration between WHO and human rights treaty bodies. For example, WHO participated in the general discussion on Article 12 ICESCR in 1992, which eventually led to a General Comment on the Right to Health.\textsuperscript{263} The World Health Assembly (WHA) has also repeatedly recognised health as a human right.\textsuperscript{264} Further, in recent years, WHO has begun to more actively mainstream human rights into its policies.\textsuperscript{265} While this began with HIV/AIDS treatment and prevention, it has since expanded to other policy areas.\textsuperscript{266} However, as Meier contends, this engagement came too late for WHO to become a leader in the interpretation of the right to health.\textsuperscript{267} Therefore, as WHO has not been active in shaping human rights standards, there is scope for greater interconnectedness between WHO and CRC/ICESCR, particularly through the process of mainstreaming.

WHO is furthermore an important organisation as it has normative powers that could advance children's rights to health, although again this potential is underexplored. WHO

\textsuperscript{257} Article 2(q) WHO Constitution.
\textsuperscript{259} Ibid., 21.
\textsuperscript{260} Meier, "Global Health Governance and the Contentious Politics of Human Rights: Mainstreaming the Right to Health for Public Health Advancement."
\textsuperscript{261} Alston, "Out of the Abyss: The Challenges Confronting the New U. N. Committee on Economic, Social and Cultural Rights."
\textsuperscript{263} Henrik Karl Nielsen, \textit{The World Health Organisation} (Copenhagen: Europublishers, 2001), 58
\textsuperscript{264} Resolutions WHA 23.41 May 1970, WHA 30.43 1977.
\textsuperscript{265} WHO, Factsheets, available at: www.who.int/mediacentre/factsheets/fs323/en/
can adopt (by a two-thirds vote) legally-binding conventions relating to its objectives.\textsuperscript{268} However, its resolve to do so has been limited thus far to adopting the Framework Convention on Tobacco Control (FCTC).\textsuperscript{269} Furthermore, WHO can also introduce binding regulations in relation to set concerns in line with the objectives of Article 21, as in the case of the International Health Regulations.\textsuperscript{270} The WHA can also make recommendations by a simple majority on any matter,\textsuperscript{271} as it has done in the case of the International Code of Marketing of Breast-Milk Substitutes.\textsuperscript{272} This Code marked the first time that Member States voted to control the actions of transnational companies.\textsuperscript{273} It was originally intended that the Code would be binding law but the outcome was a non-binding code as WHO is not free from politicisation and business interests.\textsuperscript{274} Finally, WHA can adopt non-binding resolutions. In spite of these powers, WHO does not have the power to force interventions in states, and all technical assistance is subject to state consent. Furthermore, its Constitution provides no means of sanction, although voting rights may be suspended.\textsuperscript{275} Even the FCTC relies on state reporting and state implementation, not international enforcement backed by sanctions.\textsuperscript{276}

Accordingly, WHO has responded to obesity with a soft law approach in the form of a non-binding Global Strategy on Diet Physical Activity and Health.\textsuperscript{277} Cockerham and Cockerham attribute WHO’s weak response in relation to “unhealthy” diets to insufficient political will, lack of recognition of the causal connection between diet and chronic disease, and the influence of the food (particularly sugar) industry.\textsuperscript{278} They highlight that the turning point for tobacco prevention was the lowering of industry’s reputation, the strong evidence of the impact of tobacco on health and public resources, and the support of civil society and governments.\textsuperscript{279} Gostin agrees that the global health response to NCDs has been “weak and fractured” with limited WHO funding allocated.\textsuperscript{280} WHO has further been reticent in using its law-making potential in relation to obesity as it lacks experience.

\textsuperscript{268} Article 19 WHO Constitution.
\textsuperscript{271} Article 23, WHO Constitution
\textsuperscript{272} World Health Organization, International Code of Marketing of Breast-milk Substitutes. (Geneva, 1981), The text recommended by the Executive Board was adopted by the Thirty-fourth World Health Assembly, on 21 May 1981, as resolution WHA 34.22.
\textsuperscript{273} Lee, World Health Organization., 89
\textsuperscript{274} Burci, World Health Organization., 144.
\textsuperscript{275} Article 7 WHO Constitution.
\textsuperscript{276} Article 23 FCTC.
\textsuperscript{277} In 2011 the UN General Assembly held a high level meeting on NCDs and issued a Political Declaration on the Prevention and Control of Non-communicable Diseases; In 2004, the WHA endorsed the WHO Global Strategy on Diet, Physical Activity and Health.
\textsuperscript{279} Ibid., 538.
\textsuperscript{280} Gostin, “Healthy Living Needs Global Governance ,”., 148.
and confidence in undertaking complex and expensive legal negotiations. It is aware of the overlap between international health law and other forms of international law, and the potential for these to restrict the effectiveness of any measures adopted.\(^{281}\) WHO’s discomfort with law can also be attributed to its over-medicalisation, it is made up largely of health ministers, not lawyers.\(^{282}\) Furthermore, the focus of global health governance has been primarily on contagious diseases.\(^{283}\) However, as already noted, WHA has endorsed non-binding recommendations on limiting HFSS food marketing to children, which will form the basis of the analysis of domestic approaches in Chapter Six. Therefore, although international health co-operation has long been recognised as necessary in light of the fact that “diseases do not respect borders”, the role of international law has been limited.\(^{284}\) Global health and even WHO have been marginalised and underfunded.\(^{285}\)

Finally, in light of the vacuum in international guidance, WHO appointed the Commission on Ending Childhood Obesity in 2014. The Commission released its Final Report in 2016 which makes a series of recommendations on addressing childhood obesity. The Commission relies on the “obesogenic environment” as a central cause of obesity.\(^{286}\) It highlights that governments’ primary responsibility is to address the obesogenic environment and provide guidance.\(^{287}\) The Commission suggests regulation (as opposed to policy) in some cases as it provides equal protection for all children and ensures equal responsibility for all companies.\(^{288}\) The central legal recommendations call on states to standardise labelling, implement a tax on sugar-sweetened beverages and implement WHO recommendations on marketing of unhealthy foods and breast milk substitutes.\(^{289}\) Therefore, the role of law is conceived as limited to individual incentives, food industry regulation and information provision. Broader measures to encourage individual behaviour are left to policy level.

3.7.2 **The European Union**

Finally, the EU is an interesting case on the interaction between economic aims and children’s rights. On the one hand, the EU has not ratified the CRC and is thereby not a duty bearer under the CRC. Further, it is not empowered to adopt binding measures solely to fulfil children’s rights. Indeed, until recently, children’s rights were of peripheral

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\(^{288}\) *Ibid.*, Recommendations, VIII, X.
concern to the EU. Instead, the European Community’s original raison d’être was to promote economic integration among Member States; it lacked an express public health mandate until the Maastricht Treaty 1993. On the other hand, through the introduction of the EU Charter and case law, children’s position has been promoted to one that affirms a spectrum of rights, including their best interests. Health and children’s rights are likely to be increasingly incorporated into EU policy and law, as under the terms of the Lisbon Treaty the EU Charter has the same legally-binding status as the other EU law treaties. EU treaties also recognise a number of values that are relevant to protecting children’s rights, such as human dignity, justice, solidarity and gender equality. Furthermore, human rights can further be considered general principles of EU law as all Member States have ratified ICESCR, CRC and ESC.

Article 24 EU Charter marks a significant shift in children’s position within the EU legal order, from marginalised to recognised rights holders. The provision is inspired by the CRC and includes both an obligation to take children’s welfare into account, but also listen to their views on matters concerning them. It asserts:

Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.

In all actions relating to children, whether taken by public authorities or private institutions, the child’s best interests must be a primary consideration.

Therefore, although Article 24 does not establish a new competence, the European Commission should mainstream children’s best interests when designing EU law and policy. The 2011 Commission Communication on the rights of the child advocates that

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296 Garde & Alemanno, 47.
in the future, EU policies that “directly or indirectly affect children should be designed, implemented, and monitored taking into account the principle of the best interests of the child enshrined in the EU Charter of Fundamental Rights and in the UNCRC.”

Mainstreaming within the EU requires that “a careful balancing exercise is carried out between competing interests at all stages of the policy-making process, from the first Commission proposal, to the adoption by the Council and the European Parliament of a given measure, to its application by all parties to which it is addressed, to its monitoring and evaluation.” Article 3 TEU supports this obligation through emphasising that protecting the rights of the child is an objective of the EU. Thus, although the EU is not bound by the CRC, some of its standards have made their way into EU law.

Further, under Article 35 EU Charter “a high level of human protection shall be ensured in the definition and implementation of all the Union’s policies and activities”. Article 168 TFEU replicates this “mainstreaming” obligation whereby the EU must ensure a high level of public health in its policies. Health is a mainstreaming obligation but no new competence or right is established. Instead, under Article 51(1), institutions and bodies of the EU, and Member States when implementing EU law, must “respect the rights, observe the principles and promote the application” of the EU Charter. This is a policy objective, not an enforceable right. This means that while the Commission cannot regulate on the basis of the right to health, in pursuing regulation on other legal bases it should have regard to human health. However, EU states' reluctance to recognise the justiciability of socioeconomic rights may limit the potential of Article 35 EU Charter in relation to EU regulation. Further, as will be explored in Chapter Seven, the EU enshrines competing rights that fit more clearly with its liberal economic ethos.

Thus, unlike WHO, the EU’s ability to regulate HFSS food marketing is institutionally limited. EU law does not enshrine a competence to adopt harmonising legislation on the basis of public health or children’s rights. Public health remains a supporting competence without a basis for the EU to introduce harmonising regulations. Legislation relating to NCDs has been introduced on the basis of the competence to regulate the internal

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299 European Commission, “Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, an EU Agenda for the Rights of the Child,” (Brussels2011).

301 Garde, “Regulating Lifestyles in Europe: How to Prevent and Control Non-Communicable Diseases Associated with Tobacco, Alcohol and Unhealthy Diets?,” 16.

304 Article 51(2) EU Charter.


Accordingly, should the EU decide to regulate HFSS food marketing, this must be adopted under a different legal basis.\(^{305}\) Further, the EU’s scope for harmonisation is curtailed by the principles of conferral, subsidiarity and proportionality. Firstly, the EU can only legislate where its treaties have provided a legal basis.\(^{306}\) Secondly, the EU may only take action where its intervention can achieve more than individual Member States (subsidiarity).\(^{307}\) Thirdly, the intervention must not go beyond what is necessary to achieve the objectives (proportionality).\(^{308}\) The CJEU has determined that Article 114 TFEU does not provide a general power to regulate the market as this would be incompatible with the responsibility of conferred powers. Instead, a measure adopted under Article 114(3) must have the genuine aim of improving the conditions for the establishment and functioning of the internal market.\(^{309}\)

Accordingly, the Commission cannot adopt regulations on HFSS food marketing under Article 114 TFEU without the genuine aim of improving the functioning of the internal market, although health can be a determinative factor in this decision.\(^{310}\) Following Tobacco Case I, mere disparities in national rules and an “abstract risk of obstacles to the exercise of fundamental freedoms or distortions of competition” are an insufficient basis for regulation.\(^{311}\) Article 114(3) can only be used to prevent the “emergence of obstacles” where this is likely and the measure is designed to prevent them.\(^{312}\) In this event, it is legitimate for public health protection to be a decisive factor.\(^{313}\) The Court held that “static” types of advertising of tobacco, such as billboards, parasols, ashtrays and sponsorship without cross border appeal were outside the EU’s powers to regulate, as they did not eliminate distortions in either the advertising or tobacco sectors.\(^{314}\)

However, Tobacco Case I remains the only to date where the CJEU has held that the EU acted *ultra vires*. The CJEU has since reaffirmed the EU’s legislature broad discretion; measures are illegitimate only if “manifestly inappropriate” in light of their aim.\(^{315}\)

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307 Article 5(1) TEU.

308 Article 5.3 TEU.


311 Ibid, para 77.

312 Ibid, para 84.

313 Ibid, para 86.

314 Ibid, para 88.

315 Ibid, para 114.

316 Tobacco Case II, para 145.
Accordingly, De Witte argues that the case was “a rather isolated pronouncement whose significance should not be exaggerated”.

De Witte contends that the EU has the competence to pursue non-market aims (such as health and fundamental rights protection) through the internal market. He highlights that Article 114 provides constitutional backing for the EU to incorporate health, safety and environmental concerns into harmonisation measures. Furthermore, he considers that rights mainstreaming now provides a basis for the protection and promotion of fundamental rights under the internal market. This is subject, however, to three requirements: the centre of gravity doctrine, the threshold requirement and the principle of subsidiarity. The first criterion requires that the measure rests on the most appropriate legal basis. The non-market basis does not need to be ancillary to the internal market but it must not be the only objective. The measure must also make some contribution to the internal market. De Witte highlights that non-market considerations are frequently employed when regulating under the internal market.

Therefore, it would seem that the EU has competence to act in relation to some aspects of HFSS food marketing, although it has declined to do so to date. Following Vodafone, Alemanno and Garde suggest that regulating services with cross-border implications is likely to be best achieved by EU action. Accordingly, as in the case of tobacco control, television, internet, radio and other forms of cross-border HFSS food marketing could be regulated by the EU, whereas static advertising, cinema advertising and sponsorship without cross-border appeal could not. As we will see in Chapter Six, although EU law imposes marketing standards, the EU has played a limited role in regulating HFSS food marketing to date.

3.8 Conclusion

In this chapter the role of the main actors with responsibility for children’s right to freedom from HFSS food marketing were introduced. The analysis reaffirms that states are the main duty bearers under the CRC. They should respect, protect and fulfil children’s rights though taking measures in good faith. Additionally, European states have interlinking obligations under the European Social Charter. Further, states should respect and support parents’ duties as children’s primary carers. Although children do not have obligations to act on this support. Further, companies should respect children’s

318 Ibid., 31.
319 Ibid., 32.
320 Ibid., 33.
321 Ibid., 35.
322 Ibid., 36.
323 Ibid., 37.
324 Case C-58/08, The Queen, on the application of Vodafone Ltd and Others v. Secretary of State for Business, Enterprise and Regulatory Reform, EU:C:2010:321, para 32.
325 Garde, "European Union.,” 265.
326 “Regulating Lifestyles in Europe: How to Prevent and Control Non-Communicable Diseases Associated with Tobacco, Alcohol and Unhealthy Diets?,” 67.
rights although they are not yet under a legal obligation to do so. Additionally, other actors not bound by the CRC have interlinking obligations. WHO should pursue the highest attainable standard of health, which includes measures to address HFSS food marketing. The EU also has the potential to advance children’s rights through market-based legal competencies. This chapter forms the basis for the analysis of the responsibilities of duty bearers for children’s right to freedom from obesogenic food marketing in subsequent chapters.
Chapter 4  
Children's Rights as a basis for Limiting HFSS Food Marketing

When the Convention on the Rights of the Child (CRC) was drafted, childhood obesity was not at the forefront of the delegates’ minds. Indeed, child hunger and communicable diseases were the concerns of those who drafted the provisions on the right to health and adequate food. However, in the years since, childhood obesity and its causal factors have become matters of concern in the developed and, increasingly, developing world. Is the CRC, on the one hand, sufficiently adaptable to embrace emerging concerns, while, on the other hand, capable of being interpreted with sufficient precision as to address specific causal factors? The CRC Committee suggests that the answer is in the affirmative, highlighting that the CRC is “a living instrument, whose interpretation develops over time.” However, as will be discussed, the CRC Committee struggles to provide specific, targeted recommendations which can be directly harnessed by states parties. Therefore, this chapter seeks to contribute to copper-fastening children’s rights and the ensuing responsibilities in the area under discussion.

The chapter analyses children’s rights with a view to establishing the extent to which a right to freedom from HFSS food marketing is currently provided for under the CRC. Following the discussion in Chapter Three, the scope of the rights and obligations under the CRC, in tandem with the ICESCR and the European Social Charter (ESC), are interpreted from a children’s rights perspective. State obligations under the right to health, adequate food, freedom from exploitation and privacy are studied because they have the strongest association with the concerns outlined in Chapter Two. These rights are additionally supported by the rights to life (Article 6) and the aims of education (Article 29), although they are not the focus of this study. In the next chapter these rights and obligations will be re-interpreted in light of children’s competing rights under the CRC, and in terms of the scope of states’, parents’ and companies’ responsibilities.

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2 Committee on the Rights of the Child, “General Comment No. 8: The Right of the Child to Protection from Corporal Punishment and Other Cruel or Degrading Forms of Punishment “., para 23.
### Table IV: Rights & HFSS Food Marketing

<table>
<thead>
<tr>
<th>Rights supportive of limitations</th>
<th>Rights opposing limitations</th>
<th>Rights that could support either approach</th>
</tr>
</thead>
<tbody>
<tr>
<td>Article 5 (parental guidance)</td>
<td>Article 13 (Freedom of expression)</td>
<td>Article 4 (protection of rights)</td>
</tr>
<tr>
<td>Article 18 (Parental responsibilities &amp; state support)</td>
<td>Article 15 (Freedom of association)</td>
<td>Article 12 (Respect for the views of the child)</td>
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<tr>
<td>Article 24 (Health &amp; health services)</td>
<td>Article 17 (Access to information; mass media)</td>
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<tr>
<td>Article 27 (Adequate standard of living)</td>
<td>Article 31 (leisure, play, culture)</td>
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<td>Article 6 (right to life &amp; development)</td>
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<td>Article 29 (Goals of education)</td>
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<td>Article 36 (Other forms of exploitation)</td>
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<td>Article 16 (Right to privacy)</td>
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### 4.1.1 Outline

The aim of this chapter is furthermore, to analyse the extent to which children’s rights require states to limit unhealthy food marketing, through interpreting the provisions of the CRC and advice from children’s rights bodies. Firstly, it is argued that states have obligations to pursue public health measures and protect children from threats to their health by fostering an environment that is enabling to the highest standard of attainable health. Secondly, under the ESC, obligations of empowerment are highlighted. Thirdly, the right to adequate food is analysed in relation to unhealthy food marketing, with a particular emphasis on the obligation to profile food, protect individuals to enable their empowerment and to protect the right to culturally adequate food. These obligations are selected as they relate most closely to the research question. Considered also is the extent to which the right to freedom from exploitation supports limitations on certain forms of marketing. The right to privacy is analysed in light of the CRC, ECHR and ICCPR. Following the discussion in Chapter Three, states’ obligations are interpreted with particular emphasis on the responsibility to protect and the concept of reasonableness. In the next chapter, states’ obligations are explored with specific reference to the role of children’s competing rights, the issue of state resources, parents’ duties and companies’ responsibilities.

### 4.2 The Right to Health & Unhealthy Food Marketing

In this section it will firstly be argued that states have an obligation to pursue the highest attainable standard of health, including through public health measures. These obligations are in keeping with the children’s rights approach which emphasises shaping an enabling environment, promoting empowerment and ensuring accountability. Secondly, it is submitted that states should protect children from factors which
undermine their right to health. Following the tripartite typology (see 3.3.1), children have a right to protection from dangers to their health, through regulatory measures where necessary. Finally, to achieve coherence, states should also have regard to their responsibilities under the WHO Constitution and the recommendations of the WHA.

Other authors have engaged in detailed exposition of children's right to health generally, which therefore will not be replicated here. Instead, this section contends that as states are obliged to take public health measures, including protecting children's right to health, in light of the WHO recommendations this may include an obligation to address HFSS food marketing given its threat to the right to health. As detailed in 1.1, childhood obesity impacts upon children's physical and mental health. Food marketing encourages children to consume food which promotes an unhealthful diet, leading to diet-related diseases. As unhealthy food marketing has been established as a contributory factor to childhood obesity, this should be limited where necessary. As we will see, this interpretation is in keeping with human rights bodies and academic commentary.

4.2.1 A RIGHT TO PUBLIC HEALTH?

The argument that children's rights place positive obligations on states to address public health challenges is a relatively recent discourse in human rights. Further, the notion of the right to health as a collective right to public health is controversial, in light of the traditional view of rights as individual entitlements to non-interference from the state. Accordingly, public health and human rights were until recently often seen to be at odds, as public health provides a ground for limiting individual rights. However, there is increasing recognition of the potential to pursue mutually enforcing aims.

Over the last 20 years, researchers, civil society and international governmental organisations have contributed to a movement that supports infusing public health policies and practices with rights' principles.

Accordingly, this chapter contends that children's right to health provides a basis for claiming public health entitlements to an enabling environment and empowerment.

Public health is defined broadly, following WHO, as: “the art and science of preventing

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8 See generally, for example: *Health and Human Rights Journal* https://www.hhrjournal.org/; *BMC International Health and Human Rights* www.biomedcentral.com/healthhumrights
disease, prolonging life and promoting health through the organised efforts of society”. It is submitted that the latter provides the scientific knowledge to combat ill health, while rights emphasise children’s inherent dignity and entitlements vis-a-vis the state. Accordingly, human rights have supported health policies and laws in relation to HIV/AIDS prevention, and to a lesser extent tobacco control. However, these approaches, it is argued, mostly address access to treatment or advocating infusing public health goals with rights principles, rather than rights providing a basis to demand public health entitlements, which is the position adopted in this thesis. Accordingly, it is argued that the right to health under international law must include collective public health entitlements in order to fulfil the UN Conventions’ objects and purposes. Although rights may be phrased as individual, they often include an “inherent group character”. This approach is supported by the WHO definition of health, the text of the CRC and ICESCR, the practice of their Committees and the collective nature of health.

Firstly, the definition of health employed by WHO underlines that “health” includes health-care, the underlying determinants of health and public health measures. In the preamble to the WHO Constitution, health is described as “a state of complete physical, mental and social wellbeing and not merely the absence of disease or infirmity”. Its drafting history suggests that it was intended that “health” should include both health-care and factors that affect health, such as poverty and food. The definition was


12 Health may also be considered an element of the right to development. See: Hayden, "The Human Right to Health and the Struggle for Recognition."


subsequently invoked in the Alma Ata Declaration\textsuperscript{16} and the Ottawa Charter,\textsuperscript{17} which suggests that it has acquired broad recognition at WHO level. Therefore, this widely regarded definition of health recognises public health measures as indivisible from the highest attainable standard of health.

However, as the definition's legal status has been subject to sustained academic criticism, its persuasiveness is threatened. Commentators argue that the definition is excessively broad and beyond an acceptable legal standard.\textsuperscript{18} It should therefore be approached with caution as it is unrealistic to equate health with human wellbeing,\textsuperscript{19} as this leads to rights inflation.\textsuperscript{20} Further, the definition is not legally binding as it only forms part of the preamble. Consistent state practice and \textit{opinio juris} could result in the definition forming part of customary international law, but this does not seem currently to be the case.\textsuperscript{21} Instead, it is often accepted that the definition is best applied without the parameters of “complete” and “well-being”.\textsuperscript{22}

Still, the definition should not be dismissed given that it is the nearest to a definition of health in international law, and the WHO Constitution has 194 states parties.\textsuperscript{23} Toebes points out that it was drafted by state representatives with experience in health who may not have been aware of the ensuing legal meaning and implications.\textsuperscript{24} Therefore, while the WHO definition should not be invoked as a binding legal standard, it underlines an understanding of health that encompasses social conditions, rather than an individual focused biomedical approach.\textsuperscript{25}


\textsuperscript{17} World Health Organization, Ottawa Charter for Health Promotion (Ottawa, ON: WHO, 1986).


\textsuperscript{19} Joseph M. Boyle, "The Concept of Health and the Right to Health Care," \textit{Social Thought} 3, no. 3 (1977), 5.


\textsuperscript{21} ICJ Statute, Article 38(1)(b).


\textsuperscript{24} Brigit Toebes, \textit{The Right to Health as a Human Right in International Law}, School of Human Rights Research (Antwerpen/ Groningen/ Oxford: Intersentia, 1999), 32.

\textsuperscript{25} For a more detailed exploration of the tension between these approaches at WHO see: Lee, \textit{World Health Organization}. 
Secondly, moving to the text of the CRC and ICESCR, both affirm health as a right that contains entitlements to public health measures. Under Article 24.1 CRC and Article 12.1 ICESCR:

states parties recognize the right of the child/everyone to the enjoyment of the highest attainable standard of health...

The CRC goes farther than the ICESCR, placing obligations on states to ensure:

facilities for the treatment of illness and rehabilitation of health. States parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.

Importantly, both UN Conventions outline a number of public health goals that states must realise to ensure the right to health. Under Article 24.2 CRC, these include:

a) To diminish infant and child mortality;

b) To ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care;

c) To combat disease and malnutrition, including within the framework of primary health care, through, *inter alia*, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution;

d) To ensure appropriate pre-natal and post-natal health care for mothers;

e) To ensure that all segments of society, in particular parents and children, are informed, have access to education and are supported in the use of basic knowledge of child health and nutrition, the advantages of breastfeeding, hygiene and environmental sanitation and the prevention of accidents;

f) To develop preventive health care, guidance for parents and family planning education and services.

Under Article 12.2 ICESCR, the state shall take steps including:

a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;

b) The improvement of all aspects of environmental and industrial hygiene;

c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;

d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

While, the drafters of the ICESCR, and subsequently CESCR, neither offered their own definition of health nor fully endorsed WHO’s definition, the practice of the UN

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26 On the underlying determinants of health, see: World Health Organisation, “Health Impact Assessment (Hia): The Determinants of Health”.

27
Committees accepts that the right to health encompasses broader environment based public health interventions. According to the UN Committees, health includes pursuing the “underlying determinants of health”, among others “an adequate supply of safe food”, “nutrition”, and healthy occupational and environmental conditions. At the same time, the UN Committees rightly emphasise that the state cannot ensure good health for all due to a myriad of factors outside its control, from individual genes to limited resources. Thus, CESC and the CRC Committee appear to have been influenced by the WHO definition in their exploration of the content of the right to health.

It is reasonable to assert that the UN Committees should avoid conflict with WHO treaties and pursue a complementary vision of international health, while emphasising the contribution of rights. In its General Comment on the Right to Health, the CRC Committee acknowledged that WHO’s definition underpins its approach to public health. Where possible, state obligations should be interpreted in harmony. Thus, Nielsen suggests that following Article 31(2)(c) VCLT, health under the ICESCR should be interpreted in conformity with WHO’s definition. Accordingly, although a basic shared concept underlines the right to health, rigid definitions have been avoided. This is necessary given that health is “a very broad and subjective concept influenced by a variety of factors, including geographic, cultural and socioeconomic ones”.

Therefore, following this broad approach to health, it is submitted that states have obligations to take public health measures to ensure individuals’ right to health. Yet, the specific public health measures that states should take to comply with their obligations are unclear. Thus, the aforementioned health goals are reconceptualised as requiring that states pursue the highest attainable standard of health through developing and supporting an environment that respects, protects and fulfils health, empowering rights holders and duty bearers, and ensuring accountability. An enabling environment should thereby support the right of the individual to pursue a healthy lifestyle free from interference. This requires states parties to pursue the “conditions necessary for the realization of the highest attainable standard of health”.

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28 Committee on Economic and Social and Cultural Rights, "General Comment No. 14, the Right to the Highest Attainable Standard of Health (Article 12).", paras 8 & 11; Committee on the Rights of the Child, "General Comment No. 15: The Right of the Child to the Enjoyment of the Highest Attainable Standard of Health.", para 23.

29 "General Comment No. 15: The Right of the Child to the Enjoyment of the Highest Attainable Standard of Health.", para 4.


32 Committee on Economic Social and Cultural Rights, "General Comment No. 14, the Right to the Highest Attainable Standard of Health (Article 12).", para 9.
Accordingly, the state must ensure the right of children to "grow and develop to their full potential and live in conditions that enable them to attain the highest standard of health through the implementation of programmes that address the underlying determinants of health". This encompasses a broader scope of obligations in the case of children as they have less control over their environment. At the same time the approach is not merely paternalistic, as children and duty bearers should be empowered to pursue their obligations in good faith and with children's best interests in mind. This interpretation is in keeping with WHO's view of the right to health as "a claim to a set of social arrangements - norms, institutions, laws, and an enabling environment - that can best secure the enjoyment of this right." Academic commentary also supports this approach. For instance, Thomas and Gostin suggest that "government's job is to make health the easier, or default, choice rather than, at present, the much more difficult choice". While individuals cannot expect a right to be healthy, the state should promote and protect the highest attainable standard of health. Further, the principles of accountability and participation are embodied in the right to health.

4.2.2 States' Obligations in the Context of Obesity

Accordingly, it is argued that states are obliged to take public health measures to prevent obesity. Under the CRC, states have obligations to combat disease, malnutrition, and epidemics including through the provision of adequate food and clean water, and to develop preventative health-care. As childhood obesity can be described as a disease or a cause of disease, states have obligations to intervene. Furthermore, the obligation to ensure that parents and children are informed on basic child health and nutrition is important, given that obesity is caused by unhealthy diet. Under the ICESCR, states parties must take steps inter alia, to promote the healthy development of the child, and the prevention, treatment and control of epidemic, endemic, occupational and other diseases. It is reasonable to view obesity as coming under these provisions.

These goals are flexible, meaning that states will need to lean on other sources to guide the exact measures they should take in pursuing the right to health. Although these goals have been criticised for providing too little guidance to states, the flexible character of the treaty goals, allows for new causes of ill-health to be captured, while imposing greater obligations on states with greater resources (see 3.3.2). It would have been unwise for

33 Ibid., para 2.
35 Thomas and Gostin, "Tackling the Global Ncd Crisis: Innovations in Law and Governance."
37 Toebes, "The Right to Health and Other Health-Related Rights."
39 Article 24.2(c) CRC.
40 Article 12 ICESCR.
states to set rigid objectives in international law, considering that health is an evolving field in terms of both the emergence of new health conditions and evidence on which health laws and policies are effective.\textsuperscript{41} Instead, it is submitted that in pursuing a coherent approach to health, states should consider their obligations in tandem with international health law. While in the case of obesity there are no binding agreements, states should take WHO guidance seriously. Following the WHO marketing recommendations, this requires individual states to assess whether HFSS food marketing is a threat to the health of children under their jurisdiction.

Accordingly, states' obligations to protect occupy particular significance in terms of the research question. Following the tripartite typology, the state should, inter alia, protect children's rights through monitoring the conduct of third parties, and preventing and punishing actions that may impact on children's rights.\textsuperscript{42} A government's failure to regulate where there is a threat to health may amount to a violation of the right to health.\textsuperscript{43} Wolff suggests that states must protect individuals from “standard threats to health” - threats that are serious and have a solution that is reasonably attainable due to the urgency of the threat or scientific progress.\textsuperscript{44} Therefore, this obligation places further impetus on states to implement the WHO marketing recommendations to ensure that they protect children, and enable them to pursue the highest attainable standard of health.

Finally, the nature of health supports the need for public health entitlements and protections in order achieve the highest attainable standard of health. Tobin observes:

> The history of public health had demonstrated that in the absence of collective action to deliver health services and protect health, the humanitarian, economic and political consequences were profoundly negative for both states and individuals.\textsuperscript{45}

Therefore, it is reasonable to infer that states have obligations to undertake public health measures to ensure an enabling environment for the right to health, particularly in the case of children who are dependent on adults for the underlying determinants of health. As obesity prevention requires population based measures, these must be pursued on a

\textsuperscript{41} David Fidler, \emph{International Law and Infectious Diseases} (Oxford: Clarendon Press Oxford, 1999), 14. On the other hand, Lougarre is quite rightly critical, arguing that the goals included in ICESCR are unprincipled as they fail to grasp that causes of mortality evolve over time: Claire Lougarre, “Clarifying the Right to Health through Supranational Monitoring: The Highest Standard of Health Attainable,” \emph{Public Health Ethics} (2015), 4.

\textsuperscript{42} Committee on Economic Social and Cultural Rights, “General Comment No. 14, the Right to the Highest Attainable Standard of Health (Article 12).”, para 33; Committee on the Rights of the Child, “General Comment No. 15: The Right of the Child to the Enjoyment of the Highest Attainable Standard of Health.”, para 71. UNHCHR, \emph{International Human Rights Law}. Available at http://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx

\textsuperscript{43} Fidler, "International Law and Global Public Health.", 44-45.

\textsuperscript{44} Wolff, "I—the Demands of the Human Right to Health."

\textsuperscript{45} Tobin, \emph{The Right to Health in International Law.}, 41.
collective scale. Non-communicable diseases cannot be prevented through access to medical care alone. However, following a rights approach, health should not focus on utilitarian consequences but instead invoke the dignity of the individual when promoting population health.

4.2.3 The CRC Committee’s Approach to HFSS Food Marketing

Following this analysis, to what extent does the CRC Committee consider HFSS food marketing as a right to health concern? The CRC Committee has addressed states' obligations to prevent childhood obesity in two General Comments (on the right to health and on businesses) and a small number of its Concluding Observations. These obligations are reinforced by the Human Rights Committee's General Comment on the right to life, which interprets the right to life to include positive steps to combat child mortality. On the one hand, the CRC Committee's approach is encouraging as it recognises the impact of obesity on children's health. On the other hand, it is suggested that the CRC Committee's position should be strengthened to offer more concrete and effective guidance.

Firstly, the CRC Committee's approach supports creating an enabling environment. This includes protecting children from harmful exposure but also pursuing measures to promote their access to the highest attainable standard of health. It recommends that states limit exposure to “fast foods” that are high in fat, sugar and salt as well as harmful drinks, while simultaneously promoting healthful choices. At the same time, the CRC Committee calls on states to ensure access to appropriate and safe food, promote breastfeeding and ensure access to clean drinking water. Unhealthy food marketing should be regulated and its availability in schools and child specific places restricted. It notes that the “marketing to children of products such as cigarettes and alcohol as well as

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46 However, access to NCD treatment remains unacceptably low: Hans V. Hogerzeil et al., "Promotion of Access to Essential Medicines for Non-Communicable Diseases: Practical Implications of the UN Political Declaration," The Lancet 381, no. 9867.
48 Committee on the Rights of the Child, "General Comment No. 15: The Right of the Child to the Enjoyment of the Highest Attainable Standard of Health."; "General Comment No. 16, State Obligations Regarding the Impact of the Business Sector on Children's Rights." The CRC Committee also mentioned obesity in "General Comment No. 7: Implementing Child Rights in Early Childhood.", para 27.
49 Human Rights Committee, General Comment No. 6: Article 6 (Right to life) Sixteenth session (1982), para 5.
50 Committee on the Rights of the Child, "General Comment No. 15: The Right of the Child to the Enjoyment of the Highest Attainable Standard of Health.", paras 43-4.
51 Ibid., para 48.
52 Ibid., para 47.
foods and drinks high in saturated fats, trans-fatty acids, sugar, salt or additives can have a long-term impact on their health.\textsuperscript{53}

Secondly, the CRC Committee focuses on states’ obligations to protect children from businesses’ harmful impacts. States should regulate so that marketing does not negatively affect children’s rights. States should also encourage businesses to adopt codes.\textsuperscript{54} The CRC Committee interprets states’ obligations to protect to mean that “states must take all necessary, appropriate and reasonable measures to prevent business enterprises from causing or contributing to abuses of children’s rights”. This includes passing laws and regulations, monitoring and enforcement, and adopting a policy to guide businesses.\textsuperscript{55} States should also encourage a business culture that understands and respects children’s rights.\textsuperscript{56} This includes undertaking child rights due diligence, effective monitoring\textsuperscript{57} and child rights impact assessments. \textsuperscript{58} Furthermore, it calls on states to engage with mass media to promote healthy lifestyles.\textsuperscript{59} These obligations are empowering and enabling – not limitations on private and family life. While the CRC Committee acknowledges responsibilities of parents and industry, the central obligation to ensure the realisation of children’s rights lies with states. These obligations are discussed further in the next chapter.

Thirdly, as suggested in the last section, states are advised to enforce WHO standards, such as the International Code on Marketing of Breast Milk Substitutes and the Framework Convention on Tobacco Control (FCTC).\textsuperscript{60} While the CRC Committee has not focused on WHO HFSS food marketing recommendations, this is assumed to be an oversight. Thus, the General Comments show that the CRC Committee is concerned with the impact of obesity on children’s health, and interprets the right to health and life to encompass emerging health concerns.

Disappointingly, the CRC Committee’s recommendations found in its General Comments are not applied in the majority of its Concluding Observations relating to childhood obesity. While the CRC Committee has made recommendations to states parties in relation to childhood obesity in a number of cases, its Concluding Observations tend to be general. Obesity is typically mentioned alongside other “lifestyle” vices, such as tobacco or alcohol use.\textsuperscript{61} It may be unhelpful to link these concerns when they require varied solutions. The CRC Committee usually calls on states to “manage,” “take measures” or to strengthen efforts to address obesity in children:

\textsuperscript{53} “General Comment No. 16, State Obligations Regarding the Impact of the Business Sector on Children’s Rights,” para 19.
\textsuperscript{54} Ibid., para 59.
\textsuperscript{55} Ibid., para 28.
\textsuperscript{56} Ibid., para 73.
\textsuperscript{57} Ibid., para 62.
\textsuperscript{58} Ibid., para 21.
\textsuperscript{59} Ibid., para 58.
\textsuperscript{60} Ibid., para 57.
\textsuperscript{61} Concluding Observations to Austria CRC/C/AUT/CO/3-4; San Marino CRC/C/15/ADD.214, section 5; Palau CRC/C/15/ADD.149, para 47.
the committee recommends that the state party increase its efforts to address the needs of children from dysfunctional families and take measures to minimize the psychological effect of such family situations, and strengthen care and rehabilitation programmes for children suffering from alcohol, tobacco, cannabis and other illicit substance addiction, depression and obesity...  

continue and strengthen efforts to combat drug and substance among adolescents and manage overweight and obesity among children, as well as pay close attention to child and adolescent health, taking account the committee’s general comment no. 4 (2003) on adolescent health and development in the context of the convention.

In other cases, the CRC Committee provides guidance, calling on states to “promote healthy lifestyle among children and their parents”, including through public education. The CRC Committee recommended that Sweden “strengthen measures to, inter alia, “address overweight and obesity, and promote a healthy lifestyle among adolescents, including physical activity.” In regard to Denmark, the CRC Committee was more precise, recommending the state strengthen access to health advice, healthy food and opportunities to take part in physical activity. It also recommended state engagement with the media and food industry. Still, none of these recommendations meet all the criteria suggested by O’Flaherty in the last chapter - SMART: specific, measurable, attainable, realistic and time bound. While some measures are specific, such as the recommendations to Denmark, none are time bound. The limited scope of these recommendations may be due to lack of civil society and public engagement with childhood obesity. Further, as the Committee adopts a “constructive dialogue” approach, it may be slow to impose “SMART” recommendations for fear of alienating states from the process.

The CRC Committee commented specifically on unhealthy food marketing in only seven Concluding Observations, where it raised concerns under the right to health. This limited interaction with HFSS food marketing is not proportionate, in light of the WHO recommendations and evidence on the impact of food marketing on children’s rights. In the case of Switzerland, it recommended that it:

62 Concluding Observations to Austria CRC/C/AUT/CO/3-4 (CRC, 2012), para 51.
63 Concluding Observations to Belgium CRC/C/BEL/CO/3-4 (CRC, 2010), para 61.
64 Concluding Observations to Saudi Arabia CRC/C/SAU/CO/2 (CRC, 2006), para 56.
65 Concluding Observations to Iceland CRC/C/ISL/CO/3-4 (CRC, 2012), para 37.
66 Concluding Observations to Sweden CRC/C/SWE/CO/4 (CRC, 2009), para 45(b).
strengthen measures to address overweight children and obesity, promote a healthy lifestyle among adolescents, including physical activity, and take the necessary measures to reduce food marketing pressure on children with regard to food high in fat, sugar.⁶⁹

At a more general level, the CRC Committee, citing the right to freedom of expression, recommended guidelines to protect children from harmful information, materials and marketing.⁷⁰

These recommendations could be strengthened through linking Concluding Observations to states with the recommendations under the General Comments. This should include greater regard for WHO standards, especially the WHO Marketing Recommendations. The CRC Committee could thereby strengthen not only the normativity of its Concluding Observations but also the WHO Recommendations, which although non-binding reflect a measure of state agreement on best practice.

Furthermore, the CRC Committee has been more active in relation to other forms of marketing regulation, which suggests that the treaty body system has the potential to better engage with unhealthy food marketing. This further suggests that there is no reasoned basis for the CRC Committee’s limited engagement with the WHO Recommendations, and there is potential for greater interaction. It has issued 105 recommendations addressing tobacco and alcohol consumption, recommending, *inter alia*, that states provide information on the dangers of tobacco consumption, raise awareness through campaigns, design programmes and measures, conduct health assessments on the effects, and establish the prohibition of sale and age restrictions. The CRC Committee has recommended to a number of states that they prohibit alcohol⁷¹ and tobacco⁷² advertising to children. Furthermore, the CRC Committee has widely invoked the marketing of breastmilk substitutes’ code. In many cases (70 countries), the CRC Committee recommended that states observe or offer greater protection against the marketing of breast milk substitutes, including through fully implementing the WHO Code.

What is the reason for the CRC Committee’s limited engagement with HFSS food when compared to action regarding alcohol, tobacco and breast-milk substitutes? As noted in 1.6, there has been limited mobilisation and engagement with human rights standards in

⁶⁹ Switzerland CRC/C/CHE/CO/2-4 (CRC, 2015).
⁷⁰ Finland CRC/C/FIN/CO/4 (CRC, 2011).
⁷¹ See *inter alia*: Concluding Observations to Ireland CRC/C/IRL/CO/2 (CRC, 2006), para 49; Seychelles CRC/C/SYC/CO/2-4 (CRC, 2012), para 57; Cyprus CRC/C/CYP/CO/3-4 (CRC, 2012), para 41; Italy CRC/C/ITA/CO/3-4 (CRC, 2011), para 53; Sao Tome and Principe CRC/C/15/ADD.235 (CRC, 2004); the Cook Islands CRC/C/COK/CO/1 (CRC, 2012), para 52(f); Bosnia and Herzegovina CRC/C/BIH/CO/2-4 (CRC, 2012), para 58.
⁷² See *inter alia*: Concluding Observations to India CRC/C/15/ADD.115 (CRC, 2000); Portugal CRC/C/PRT/CO/3-4 (CRC, 2014); Bosnia and Herzegovina CRC/C/BIH/CO/2-4 (CRC, 2012), para 54; Armenia CRC/C/ARM/CO/3-4 (CRC, 2013), para 42(b) and Malta CRC/C/MLT/CO/2 (CRC, 2013), para 53.
relation to obesity compared to the other concerns. The fact that South Korea and Finland have since strengthened their regulations is not necessarily demonstrative of the CRC Committee’s influence; rather it suggests there was sufficient civil society mobilisation in those states to bring the issue to the CRC Committee’s attention. On the other hand, the Committee’s Concluding Observations underline states’ obligations and provide a tool for civil society to demand reform. The CRC Committee’s engagement with breast-milk substitutes and alcohol suggests that its decision is not simply down to the measures’ status under international law (the FCTC is the only binding WHO instrument on marketing). As the Breastmilk Substitutes Code was created in response to civil society mobilisation, it is likely that this same mobilisation is behind the CRC Committee’s commitment. Further, the right to health is increasingly employed by tobacco control advocates as a means of hardening states’ obligations under the FCTC. It is suggested that, through awareness and engagement with civil society, the CRC Committee is open to engaging with non-binding WHO recommendations and exerting pressure on states to fulfil the right to health.

4.2.4 OTHER UNITED NATIONS BODIES

The CRC Committee’s interpretations of the right to health are complemented by other UN bodies’ reports that highlight obesity as a right to health concern and, accordingly emphasise states’ obligations to limit unhealthy food marketing. These bodies address all UN Member States' human rights obligations, and not only states parties' obligations under specific conventions. They demonstrate further recognition of the impact of obesity on children’s rights to health and affirm that states have obligations to promote access to the determinants of health, provide education and health promotion, and regulate industry.

Firstly, in 2012, following a request to prepare a report on the right of the child to health, the UN High Commissioner drew attention to over-nutrition. The High Commissioner focused on children’s access to adequate nutrition and physical exercise, and recommended parental education, regulating advertising and promoting healthful foods as strategies to limit exposure to unhealthful foods. The High Commissioner’s approach reflected existing initiatives which focus on information provision and did not propose

76 Although in the case of the CRC, only the USA is not a State Party.
78 Ibid, para 44.
imaginative, children's rights initiatives, such as, interpreting states’ obligations in light of children's best interests and their right to play. While the report made recommendations to the media, it did not explore the role of the state in guiding or regulating the media, or the balance between protecting children and freedom of expression.

Secondly, the former Special Rapporteur on the right to health - Annad Grover - adopted a more proactive and nuanced approach to obesity, highlighting the tension between different rights and responsibilities as well as states’ obligations to go beyond information provision.79 In a 2014 report to the Human Rights Council, Grover emphasised states’ obligation to ensure available and accessible food in the necessary quantity and quality.80 He recognised that while states must respect individuals’ rights to make informed decisions about their health, this must not be used to justify a “disengaged approach” to regulating the food industry.81 This significant assertion highlights the potential for human rights norms to bridge the gap between action and inertia.

Although not a child-centred report, the Special Rapporteur highlighted the vulnerabilities of children and low-income groups.82 Using direct language, the Special Rapporteur urged states to “implement their obligations regarding children’s right to health” through measures such as “effective health education and awareness” aimed at children, provision of healthful food in child-centred institutions, limiting access to fast food and sodas, and regulating advertising and marketing of “unhealthy food and beverages”.83 The Special Rapporteur recommended statutory regulation to address marketing of unhealthy foods.84 Unlike the CRC Committee's more diplomatic approach, he expressly dismissed self-regulation:

Owing to the inherent problems associated with self-regulation and public–private partnerships, there is a need for States to adopt laws that prevent companies from using insidious marketing strategies. The responsibility to protect the enjoyment of the right to health warrants State intervention in situations when third parties, such as food companies, use their position to influence dietary habits by directly or indirectly encouraging unhealthy diets, which negatively affect people’s health. Therefore, States have a positive duty to regulate unhealthy food advertising and the promotion strategies of food companies. Under the right to health, States are especially required to protect vulnerable groups such as children from violations of their right to health.85

80 Ibid., para 12.
81 Ibid., para 14.
82 Ibid., para 33.
83 Ibid., para 38.
84 Ibid., paras 22-5.
85 Ibid., paras 25.
As with the CRC Committee’s General Comments, the Special Rapporteur stated that the food industry also has a responsibility to respect the right to health in conjunction with the state’s primary obligation. Although the Special Rapporteur’s recommendations are not legally binding, the Human Rights Council calls on states to give consideration to them.\textsuperscript{86} The Special Rapporteur’s more forceful approach may be due to the fact that he has more scope than the UN Committees for dialogue and co-operation with stakeholders, including through country visits.\textsuperscript{87}

### 4.3 The Right to Health under the European Social Charter

Having explored the right to health under the CRC, the right to health under the European Social Charter (ESC) is now analysed. While the right has the potential to support an obligation to limit unhealthy food marketing, to date the European Committee of Social Rights (European Committee) has not engaged with unhealthy food marketing. However, as will be discussed, the practice of the European Committee highlights empowerment and suggests that limitations alone are insufficient without population education. It vigorously promotes education and information as obligations under the right to health. In this vein, it particularly emphasises the role of schools. In the case of unhealthy food marketing, this could mean an obligation on schools to provide media literacy to empower children to understand the persuasive intent of advertising. Accordingly, there is scope for greater engagement in light of states’ obligations to take action regarding epidemics, and to ensure a healthy environment that fosters children’s development.

Although the ESC is not a children’s rights treaty, it does have specific child-focused provisions, such as Article 17 of the Revised ESC, whereby children have a right “to grow up in an environment which encourages the full development of their personality and of their physical and mental capacities”. As with the ICESCR, ICCPR and CRC, the family is considered a fundamental unit of society (Article 16 ESC). Accordingly, states undertake to support and protect children, while respecting parental rights and duties. Further, the European Committee considers itself bound by the provisions of the CRC.\textsuperscript{88} To date when examining states’ commitment to Article 17 ESC, the European Committee focuses on the status of the child, education, children in public care, protection from ill-treatment and abuse and young offenders. However, aside from specific child rights, all rights under the ESC are held by children, although it is argued that they should be reinterpreted in light of children’s rights principles.

\textsuperscript{86} Right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Human Rights Council Res. A/HRC/RES/15/22, para 4(a).


Under the Article 11 ESC, the right to health is broadly phrased, whereby under “everyone has the right to benefit from any measures enabling him to enjoy the highest possible standard of health attainable”. States parties undertake to take appropriate measures *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.

As with the international system of protection of human rights, the state alone is not responsible for good health. Instead, “the whole of society has a responsibility for and an impact on public health”.90 Under Article 11.2 ESC the state has an obligation to promote personal responsibility and empower individuals to make health-promoting decisions through information and advice. Therefore, individuals should be supported in pursuing the highest attainable standard of health. The recognition of individual responsibility for health should not be used to deny that states have obligations, however. This rhetoric is far too prominent in discussions on obesity prevention.91 Instead, states should empower individuals to pursue good health through providing information on a healthy lifestyle. State intervention is not limited to Article 11.2 ESC and must include positive measures to prevent ill-health and disease.

Further, the European Committee emphasises that health education must be effective. The states’ obligations under Article 11.2 have been explored in a number of complaints decided by the European Committee. In *ERRC v. Bulgaria*, a civil society organisation argued, inter alia, that Bulgarian health insurance discriminated against the Roma community and that government policies did not adequately address the health risks experienced by the community.92 The European Committee underlined that the right to health imposes “a range of positive obligations to ensure the effective exercise of the right to health.”93 The state party had, inter alia, failed to ensure “systematic, long-term government measures to promote health awareness”.94

Further, in its individual recommendations to states, the European Committee considers that the state must adopt “concrete measures” to implement a public health policy directed at the population at large, as well as particular groups. The state has duties to prevent activities damaging to health such as smoking, alcohol and drugs abuse, and to promote health, for example, through fostering a sense of individual responsibility in

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90 Conclusions 2013 - Sweden - Article 11-2 2013/def/SWE/11/2/EN.
91 For more on obesity and “free” will, see David A. Levitsky and Carly R. Pacanowski, “Free Will and the Obesity Epidemic,” *Public Health Nutrition* 15, no. 1 (2/2012).
92 *European Roma Rights Centre (ERRC) v. Bulgaria* (Complaint No 46/ 2007), 3 December 2008, S
5.  
93 *Ibid*, s 45.  
areas such as healthy eating, sex education and the environment. States discharge these duties by providing accessible information and through campaigns and other advice opportunities. The European Committee has requested further information on public health campaigns on nutrition, healthy eating, sexuality and the environment. Accordingly, a number of states mention measures to promote physical activity and healthy eating in their reports. It is not sufficient for a state to claim that health education takes place; the European Committee requests information on specific campaigns. Therefore, the European Committee measures states against more specific standards than the CRC Committee, and expects detailed information from the states parties.

Furthermore, the European Committee highlights the role of schools in health education, considering schools secondary only to the family. In *Interrights v. Croatia*, the European Committee recommended that health education in schools should include information on smoking, excessive alcohol consumption and the use of drugs, and encourage the development of a sense of individual responsibility in respect of matters such as healthy diet, sexual and reproductive health and the environment. This education should enable children to develop their capacity and make responsible decisions.

Therefore, the European Committee strongly endorses children's empowerment. Individual responsibility should not be used by states to evade their responsibilities, however, but instead form a basis for strengthening protection. At the same time, states and other duty bearers' obligations must respect parents' special role in child fulfilment. The European Committee holds that the duties imposed under Article 11.2 ESC do not affect the rights of parents to enlighten, advise, educate and guide their children, in line with their religious or philosophical beliefs. Therefore, as with the CRC, a reasonable balance between empowerment and respect for parents must be pursued. It is suggested that the balance should be reached through regard for children's best interests.

The European Committee has also shown a willingness to engage with the causes of non-communicable diseases. Under Article 11.3 ESC, disease prevention is not limited to

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95 Conclusions XX-2 - Germany - Article 11-2 XX-2/def/DEU/11/2/EN.
97 Conclusions 2013 - Cyprus - Article 11-2 2013/def/CYP/11/2/EN.
98 For example, Conclusions XX-2 - Luxembourg - Article 11-2XX-2/def/LUX/11/2/EN.
99 Conclusions 2013 - Montenegro - Article 11-2 2013/def/MNE/11/2/EN.
100 *Interrights v. Croatia* (Complaint No. 45/2007), 30 March 2009, s 43.
101 Ibid, s 46.
102 Ibid, s 53.
communicable diseases. The European Committee has accordingly emphasised state responsibilities to ensure a healthy environment, through addressing air pollution, noise pollution, water and food safety, and asbestos risks.\textsuperscript{103} It has focused particularly on tobacco control\textsuperscript{104} and requests information, for example, on the extent to which the FCTC is implemented.\textsuperscript{105} The European Committee has found a number of states not in conformity with the ESC for failing to take adequate measures to prevent smoking.\textsuperscript{106} In holding Moldova non-compliant, the European Committee asked for information on whether there were laws on smoke free environments, health warnings on packages and bans on advertising, whether there was legislation prohibiting sale of tobacco to young people, and whether smoking in public places and advertising were prohibited. Furthermore, it sought information on minimum age for alcohol sales and regulation of advertising of alcohol.\textsuperscript{107} The European Committee is also concerned about alcohol and drug abuse\textsuperscript{108} and requires states to provide information on relevant legislation and trends.\textsuperscript{109} Therefore, the European Committee has shown a propensity to engage with public health policies and laws to a specificity not seen in relation to the CRC Committee. It could be argued that the European Committee already adopts SMART recommendations, as advocated by O’Flaherty (see 3.1.1).

However, while many of the ESC recommendations mention governments’ efforts to combat obesity among other diseases, to date this has focused mainly on obligations to provide information and education under Article 11.2.\textsuperscript{110} Under the prism of food safety, Denmark informed the European Committee that its Food Administration Agency helps to promote and advise consumers on nutrition and healthy eating, including through marketing schemes.\textsuperscript{111} Furthermore, Greece reports that it has taken action through information and awareness raising campaigns to promote healthy food standards because of a significant problem of childhood obesity.\textsuperscript{112} The European Committee asks for additional information on preventative measures where it is not satisfied that the causes of mortality are being addressed.\textsuperscript{113} However, it has not made recommendations regarding food marketing to children. Therefore, the European Committee should extend its analysis by drawing on WHO Europe recommendations to a greater extent. WHO

\textsuperscript{103} For example, Conclusions 2013 - Portugal - Article 11-3 2013/def/PRT/11/3/EN.
\textsuperscript{104} Mikkola, Social Human Rights of Europe., 424. Examples: Conclusions XX-2 - Croatia - Article 11-3 XX-2/def/HRV/11/3/EN.
\textsuperscript{105} Conclusions 2013 - Azerbaijan - Article 11-3 2013/def/AZE/11/3/EN.
\textsuperscript{106} Conclusions 2013 - Andorra - Article 11-3 2013/def/AND/11/3/EN.
\textsuperscript{107} Conclusions 2013 - Moldova - Article 11-3 2013/def/MDA/11/3/EN.
\textsuperscript{108} For example, Conclusions 2013 - Portugal - Article 11-3 2013/def/PRT/11/3/EN.
\textsuperscript{109} Conclusions XX-2 - Luxembourg - Article 11-3 XX-2/def/LUX/11/3/EN, Conclusions XX-2 - Czech Republic - Article 11-3 XX-2/def/CZE/11/3/EN.
\textsuperscript{110} Conclusions 2013 - Malta - Article 11-1 2013/def/MLT/11/1/EN.
\textsuperscript{111} Conclusions XX-2 - Denmark - Article 11-3 XX-2/def/DNK/11/3/EN.
\textsuperscript{112} Conclusions XX-2 - Greece - Article 11-3 XX-2/def/GRC/11/3/EN.
\textsuperscript{113} Conclusions 2013 - Portugal - Article 11-1 2013/def/PRT/11/1/EN.
Europe is extremely active in amassing data on childhood obesity, and has released a number of policy documents that could guide the European Committee.¹¹⁴ Finally, the European Committee adopts a precautionary approach. States must respond to avoidable health risks i.e. ones that can be controlled by human action, and guarantee the best results in line with available knowledge.¹¹⁵ They must take appropriate measures to prevent activities, as far as possible, which are detrimental to health (diseases and accidents). Furthermore, where there are threats of “serious damage to human health, lack of full scientific certainty should not be used as a reason for postponing appropriate measures.”¹¹⁶ Accordingly, if preliminary scientific evaluation suggests reasonable grounds for concern regarding potentially dangerous effects on health, the State must take precautionary measures “consistent with the high level of protection under Article 11”.¹¹⁷ The European Committee could apply this approach to HFSS food marketing in light of the lack of certainty surrounding the causal effects.

4.3.1 CONCLUSION ON THE EUROPEAN CHARTER

The European Committee has pursued limited engagement with obesity prevention and ignored food marketing to children to date. On the one hand, it undertakes a more systematic analysis of the right to health than the CRC Committee.¹¹⁸ Further, it appears to more consistently draw on data from WHO.¹¹⁹ On the other hand, the specificity of its approach highlights a short-coming of the ESC, whereby its method “tends to freeze the legal content of the right to health into a set list of issues”.¹²⁰ Therefore, the European Committee is much slower than the CRC Committee to engage with evolving health concerns. However, in time, the European Committee may reorient its approach to childhood obesity in light of the high rates in many European states. Its emphasis on tobacco prevention is encouraging in this regard. Additionally, its stress on the precautionary principle may help to guide states in pursuing reasonable laws and policies to address childhood obesity. Until then, the work of the European Committee remains important as it emphasises states’ and schools’ obligations to provide health education and support empowerment. Furthermore, the European Committee’ adjudication of the

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¹¹⁵ International Federation for Human Rights (FIDH) v. Greece (Complaint No. 72/2011), 23 January 2013, 144 quoting Conclusions XV-2 Denmark.

¹¹⁶ FIDH 2011, para 145.

¹¹⁷ FIDH 2011, para 150.


¹¹⁹ See for example, Conclusions 2015 - Georgia - Article 11-1 2015/def/GEO/11/1/EN; Conclusions 2013 - Portugal - Article 11-1 2013/def/PRT/11/1/EN.

right to health through complaints highlights its legal content, and provides guidance for the CRC Committee to emulate.

4.4 **THE RIGHT TO ADEQUATE FOOD**

This section evaluates states’ obligations under the right to adequate food in the context of childhood obesity, specifically HFSS food marketing to children. It analyses the right to adequate food as outlined by international human rights law through treaties, treaty body interpretations, academic contributions, the FAO Voluntary Guidelines and the Special Rapporteur on the right to adequate food. Oliver de Schutter, former Special Rapporteur on the right to adequate food observes that the right is not “to be fed; it is the right to feed oneself in dignity.”

However, as will be explored, the right to adequate food also includes a protective dimension, meaning that states should protect individuals’ right to adequate food from intrusions by third parties. Accordingly, HFSS food marketing has become a right to adequate food issue as it impacts on children’s knowledge of a healthy diet, food preferences and purchases, and eating behaviour. Just as the right to health does not include a right to be healthy, the right to adequate food does not expect states to provide food for each individual. Accordingly, academic commentary stresses that the right to adequate food is primarily an individual responsibility, with state obligations subsidiary and subject to resource constraints. Thus, the state’s role is to “supplement personal efforts whenever needed”.

4.4.1 **BACKGROUND**

The right to adequate food has been consistently affirmed under international law. The Universal Declaration on Human Rights (UDHR) introduced the right to adequate food as an element of the right to an adequate standard of living. The UDHR, although not legally binding, “served to underscore future human rights approaches.” This moral duty was elaborated as a legal obligation under Article 11 ICESCR. However, the right has been undermined by a lack of clarity regarding the scope of the rights and duties. Critically, the right to adequate food does not have a strong constitutional tradition, with its inclusion attributed to Latin American socioeconomic rights, as well as FD Roosevelt’s famous Four Freedoms speech in 1941 (Freedom of speech, Freedom of worship, Freedom from want, Freedom from fear).

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124 Article 25 UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III) (UDHR).
and Freedom from Fear). As discussed in 3.3, there is not a rich history of jurisprudence to rely on when interpreting the right to adequate food.

The right to adequate food is further hampered by the fact that its terms are unclear. "Adequate" food is open to interpretation. Adequacy has been interpreted as "enough food to facilitate a normal, active existence rather than a minimum calorific package which does no more than prevent death by starvation". Amartya Sen points out that "there is difficulty in drawing a line somewhere, and the so-called 'minimum nutritional requirements' have an inherent arbitrariness". Similarly, Tomasevski regarded the provision as a "relatively confused and by no means all-embracing mixture of means and ends", which she attributed to hasty drafting. According to her, an individual's entitlements will depend on his/her circumstances and geographical location. This standard will vary, for example, nutritional requirements differ radically among cultures and regions. On the one hand, as with the right to health, a flexible text allows for different standards for states experiencing varied conditions. However, if states do not take progressive realisation seriously, the imprecision of the text, coupled with weak enforcement allows for complacency.

The right to adequate food is also protected by the CRC. As in the UDHR, the right to adequate food is recognised as part of the adequate standard of living. Under Article 27(1) CRC, "states parties recognise the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development". Further as already noted, under the right to health states have obligations to ensure the provision of "adequate nutritious foods" (Article 24.3 (c) CRC). The standards for a child should not be limited to mere survival but "facilitate [the child's] development into a fully capable and well-functioning adult person." The nature of the steps to be taken is left open to the states parties. The Covenant requires that states "will take appropriate steps" to progressively ensure full realisation to the maximum extent of available resources, including through international co-operation. In the case of the CRC, as already discussed, the obligation is to "respect and ensure" subject to "available resources" and in tandem with the rights and responsibilities of parents.

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126 Ibid., 192; Wenche Barth Eide Arne Oshaug, Asbjørn Eide, "Human Rights: A Normative Basis for Food and Nutrition-Relevant Policies" Food Policy 19, no. 6 (1994), 491. Tobin opposes this position and argues that socioeconomic rights are attributable to Catholic teachings on dignity and social justice: Tobin, The Right to Health in International Law, 22.
129 Alston and Tomaševski, The Right to Food, 34.
130 Ibid., 35.
131 Ibid., 36.
133 Articles 11.1, 2.1 ICESCR.
In light of the misunderstandings regarding states' obligations, initiatives at international and national level have sought to clarify the normative content of the right and the obligations on duty bearers. In 1996, heads of state and government reaffirmed the "right of everyone to have access to safe and nutritious food, consistent with the right to adequate food and the fundamental right of everyone to be free from hunger". In 1999, in response to a request at the 1996 World Food Summit, CESCR drafted General Comment No. 12 on the Right to Adequate Food. In 2004, an intergovernmental working group under the FAO drafted Voluntary Guidelines on the right to adequate food. Although the Guidelines are non-binding, the fact that they were drafted by states is important in terms of their legal significance. Further, the Human Rights Council developed a mandate for a Special Rapporteur on the right to adequate food, who visits countries and successively issues reports that help to shape the content of the right to adequate food. Moreover, FAO has been active in advising states on implementing the Voluntary Guidelines. While these interpretations are soft law, they are significant as the right to adequate food is not underpinned by a rich volume of jurisprudence. Furthermore, these initiatives have increased civil society engagement.

4.4.2 ANALYSIS OF THE RIGHT TO ADEQUATE FOOD AND CHILDHOOD OBESITY

In this section it is argued that the right to adequate food encompasses not only the provision of food, but also protection from harmful and inadequate food, and the promotion of adequate food. In light of the estimated 800 million people without adequate nutrition, the right to adequate food is generally interpreted as freedom from hunger, not overweightedness and obesity. However, the rise of non-communicable diseases and, in particular, the double burden of disease in developing countries requires a re-examination of the scope of the right. This is underlined by the reality that

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malnutrition can result from an unhealthy diet, not only underfeeding. Therefore, the right to adequate food has been interpreted to include a right to adequate nutrition. While all states have a duty to ensure freedom from hunger, those with sufficient resources must take progressive steps beyond the eradication of hunger.

With obesity levels rising worldwide, UN bodies have begun to consider obesity as a right to adequate food issue. In 2006, the UN Standing Committee on Nutrition issued a non-binding recommendation calling on UN agencies to develop a code of conduct concerning ethical marketing in light of children’s rights to adequate food and health. Further, in 2012, the then Special Rapporteur on the right to adequate food, Olivier de Schutter, submitted a ground-breaking report to the Human Rights Council in which he highlighted the “systemic” challenge of overweightedness and obesity. He outlined five priority actions: taxing unhealthy products, regulating foods high in saturated fats, salt and sugar, and their advertising, overhauling agricultural subsidies and supporting local food production. The Rapporteur emphasised the need for accountability, potentially through independent monitoring mechanisms that would allow complaints in the case of failure to realise the national strategy on the realisation of the right to adequate food. The current Special Rapporteur on the right to food, Hilal Elver, submitted a report to the General Assembly in 2016 where she called on states to use international law to uphold the right to nutrition. She recommended that states adopt, inter alia, international regulations to limit junk food, re-evaluate international trade and investment agreements, and manage conflicts of interest in public-private partnership. Therefore, momentum to address obesity under the right to adequate food is growing.

While CESC’s General Comment on the right to food does not address obesity, this is not surprising given that it was adopted before obesity was recognised as a global issue. Still, the General Comment recognises that states parties should provide an enabling

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143 Alston and Tomaševski, The Right to Food. 32-3.
144 See for example, Diller, “Combating Obesity with a Right to Nutrition.”
environment that promotes fulfilment of the right to adequate food.\textsuperscript{148} It imposes a normative framework that goes beyond access to minimum subsistence; food should be acceptable, available, accessible and adequate.\textsuperscript{149} Further, CESCR suggests that states should adopt a right to food strategy that includes all aspects of food production, including marketing.\textsuperscript{93} Therefore, there is scope for the right to adequate food as interpreted under the General Comment to include obesity prevention.

However, obesity and the right to adequate food have been largely neglected in the UN Committee's Concluding Observations. Existing recommendations come under two broad headings: recommendations urging states to fulfil the right to adequate food in light of malnutrition\textsuperscript{150} and to accordingly make the right justiciable;\textsuperscript{151} and admonitions to high-income states to respect the right to adequate food in their trade and agricultural policies.\textsuperscript{152} CESCR has also recommended that a state party ensure that “activities of the private business sector are in conformity” with the right to adequate food.\textsuperscript{94} CESCR linked the right with obesity in only one observation:\textsuperscript{95} 

While welcoming the priority given by the State party to increasing food quality, which includes the promotion of organic farming and locally made products, the Committee expresses its concern that a substantial part of the population is obese, particularly women (art. 11).

The Committee encourages the State party to continue and to strengthen its efforts to promote healthy, balanced and environmentally sustainable eating habits among all segments of the population, and to establish a monitoring mechanism to assess the impact of such measures on reducing the obesity rate, taking into account the Committee’s general comment No. 12 (1999) on the right to adequate food.

Following the SMART framework, this recommendation, although more specific than those we observed in relation to the right to health, still fails in terms of specificity. CESCR could have drawn on the Special Rapporteur’s Report to make more concrete recommendations. However, it is positive from a rights’ perspective that CESCR advocated monitoring mechanisms and drew on its General Comment.

Further, the FAO Voluntary Guidelines highlight the progressive nature of the right, offering guidance to all states, not only those primarily battling hunger. They stipulate, following the 1996 Summit, that “food security exists when all people, at all times, have

\textsuperscript{149} Ibid., para 7.
\textsuperscript{93} Ibid. para 25.
\textsuperscript{94} Concluding Observations to China, E/C.12/CHN/CO/2 (CESCR, 2014).
\textsuperscript{95} Concluding Observations to Guatemala, CRC/C/GTM/CO/3-4 (CRC, 2010).
\textsuperscript{150} Concluding Observations to Germany, E/C.12/DEU/CO/5 (CESCR, 2011).
\textsuperscript{151} Concluding Observations to Indonesia, E/C.12/IDN/CO/1 (CESCR, 2014).
\textsuperscript{152} Concluding Observations to Lithuania, E/C.12/LTU/CO/2 (CESCR, 2014), para 19.
physical and economic access to sufficient, safe and nutritious food to meet their dietary needs and food preferences for an active and healthy life”.

States are encouraged to adopt a national human rights strategy for the progressive realisation of the right to adequate food, addressing the food system at large “including the production, processing, distribution, marketing and consumption of safe food”.

Such strategies have since been supported by CESCR and the Special Rapporteur. The FAO toolbox also calls on states to incorporate the right to adequate food and to review legislation for its compatibility. This includes reviewing marketing laws and consumer protection. Thus, FAO is active in concretising legal standards and promoting implementation of the right to adequate food. This supports the analysis of marketing regulations in light of the right to adequate food in 6.6.3.

Accordingly, the right to adequate food has the potential to encompass freedom from HFSS food marketing. However, the obligations are not adequately developed because of the UN Committees’ reticence and limited pressure to do so. In view of the limited analysis of right to food obligations in connection with obesity to date, and the evidence on how food is marketed presented in Chapter Two, the next sections focus on three suggested obligations: the obligation to protect the right to adequate food through devising adequate nutrient profiles and ensuring that individuals are able to pursue access to adequate food free from interference, and the right to access adequate food that is culturally acceptable. These fall under the state duty to protect children from incursions by third parties, and the duty to promote access to adequate food.

4.4.2.1 Nutrient Profiling Models

It is submitted that states have a gatekeeper role in ensuring that corporate interests do not dictate children’s understanding of adequate food. As highlighted by the children’s rights approach and the European Committee, children and their families must be empowered to pursue a healthy diet. Accordingly, the state also has positive duties to ensure that food companies do not manipulate individuals’ perceptions of adequate food in the manner we have seen in Chapter Two. This is particularly necessary in the case of young children, whose parents should be supported in fulfilling their responsibilities following Article 18 CRC.

Accordingly, it is submitted that states are under an obligation to ensure that the adequacy of food is profiled depending on its quality and nutritional content. States

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parties should develop (or monitor other actors that do so) a coherent means of categorising food as adequate, in order to guide individuals in their pursuit of an adequate, nutritious diet. As already noted, there is no binding international classification, meaning that a myriad of profiles may confuse children and their families as to the content of adequate food. However, European states could be guided by WHO Europe’s nutrient profile (as described in 1.8). As we will see in 6.6.3, the design of nutrient profiles has an important effect on children’s freedom from unhealthy food marketing.

4.4.2.2 Promoting empowerment through protection

Given that food marketing promotes and encourages children to request and eat unhealthy food (see 2.1), states are under an obligation to protect children from this type of interference. However, this form of protection should be designed to empower children and their families to pursue access to adequate food. As with the right to health, the right to adequate food requires that states parties strive to create an environment in which the right can be realised.60

As with all rights, the right to adequate food imposes an obligation on states parties to protect individuals from incursions on their access to adequate food.61 In some instances, where incursions are intrusive, regulatory action is reasonable to protect children and families from market forces that inhibit their abilities to pursue a healthful diet. Although self-regulation is still the preferred mode of limiting HFSS food marketing in most states, there is increasing recognition that companies are not the best positioned to impose limitations on themselves. In her recent report, the Special Rapporteur on the right to adequate food described self-regulation as “ineffective” and called on states to impose “strong regulatory systems to ensure that the food industry does not violate human rights to adequate food and nutrition”.62 This is supported by the FAO Guidelines that advise states to protect consumers through regulatory means, particularly from misinformation and unsafe food, and deception and misrepresentation in the packaging, labelling, advertising and sale of food.63

Therefore, the right to adequate food should be conceived as requiring states to promote individuals’ freedom to access adequate food. Food must be physically and economically accessible so that individuals, including vulnerable groups, can adequately feed

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61 Committee on Economic Social and Cultural Rights, "General Comment No. 12: The Right to Adequate Food (Art. 11 of the Covenant)", para 15.
62 Special Rapporteur on the right to adequate food, "Interim Report of the Special Rapporteur on the Right to Food.", para 97.
63 Food and Agriculture Organization, "Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security.", 4, 15.2, 15.6.
themselves. Tomasevki argued that the right to adequate food must be interpreted in light of political freedoms:

The notion of basic human needs often was misinterpreted in the sense of advocating a "delivery system" for meeting human needs, but its proper meaning has been successfully defined by the [International Labour Organisation] ILO: ‘[I]n no circumstances should [the concept of basic needs] be taken to mean merely the minimum necessary for subsistence; it should be placed within a context of national independence, the dignity of individual[s] and peoples and their freedom to chart their destiny without hindrance.”

Thus, protection should not be designed to remove choices but instead to empower individuals (including families) to pursue a healthy diet. Limiting unhealthy food marketing should therefore seek to ensure that individuals have freedom over their food choices, not to impose dietary normativity. It recognises that consumer “choice” does not happen in a vacuum and is influenced by a variety of factors including marketing. The state should intervene as individuals do not have the power to control legal and political structures. As will be explored in subsequent chapters, the scope and nature of limitations should be assessed in light of children’s best interests.

4.4.2.3 Protecting the right to culturally adequate food

Finally, the right to adequate food should be interpreted in light of the right to participate in one’s culture. This includes a right of access to culturally acceptable food under the right to food, and a right to acceptable food under the right to cultural life. This section details the scope of these rights and the potential for food marketing to traverse them, with regard to the approaches of CESCR, the CRC Committee, the Special Rapporteur on the right to cultural life and the FAO Guidelines. The right to culturally appropriate food occupies particular importance in the context of indigenous peoples’ rights to food. Children’s best interests should guide the appropriate balance between promotion of adequate food and cultural rights.

Firstly, in General Comment No. 12, CESCR advocated that the right to adequate food should not be interpreted restrictively in a way “which equates it with a minimum package of calories, proteins and other specific nutrients”. Instead, according to CESCR, adequate food should be culturally and socially acceptable which requires taking non-nutrient values into account. Therefore, while food should meet the populations’ dietary needs, states parties should engage with the values which inform consumer

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167 Ibid., para 11.
168 Ibid., para 9.
choice that go beyond nutrition, including culture.\textsuperscript{69} The FAO Guidelines also encourage states to promote dietary diversity and healthy eating, while at the same time avoiding negatively impacting on current food habits.\textsuperscript{70}

Secondly, while rights are universal, the traditional diet of indigenous people is a particularly important part of their cultural identity and should be respected.\textsuperscript{71} Indigenous children’s cultural rights are protected under the CRC, whereby Article 32 CRC ensures that children should not be denied the right to enjoy their own culture. Damman et al. observe:

The ‘perceived non-nutrient-based values’ linked to cultural acceptability takes on particular importance in the indigenous context. Traditional food habits express and reinforce cultural identity, which is without doubt an important ‘non-nutrient-based value’ of food. Indigenous peoples’ food cultures are therefore an integral part of their right to adequate food, to be respected and protected by the state. The state not only has an obligation to respect and fulfil this right, but also an obligation to take positive steps to facilitate and promote traditional food cultures.\textsuperscript{72}

Accordingly, it is submitted that food marketing can impair cultural rights in two ways. Firstly, food culture may be undermined by widespread proliferation of processed food. Where unhealthy food marketing is prevalent, individuals’ perceptions of adequate food may shift from their traditional diets towards unhealthy food. This type of food can become normalised to the detriment of local culture, particularly for children who lack critical skills to evaluate advertising, leading to a potentially inaccurate perception of a healthy diet. Secondly, the state’s ability to inform the population on adequate, culturally acceptable food is impaired where the majority of food marketing is for unhealthy food. Söllner suggests that food accessibility encompasses a right to information whereby individuals should know the nutritional substance of food.\textsuperscript{73} Damman argues that the state should contribute to individuals’ interest in indigenous food through promoting positive images and regulating marketing in light of children’s best interests.\textsuperscript{74} However, the state is not in a position to compete with multinationals’ marketing budgets and,

\begin{itemize}
  \item [\textsuperscript{69}] Söllner, “The ”Breakthrough“ of the Right to Food: The Meaning of General Comment No. 12 and the Voluntary Guidelines for the Interpretation of the Human Right to Food “., 399.
  \item [\textsuperscript{70}] Food and Agriculture Organization, “Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security.”, 10.6.
  \item [\textsuperscript{71}] Siri Damman, “The Right to Food of Indigenous Peoples,” in Food and Human Rights in Development: Legal and Institutional Dimensions and Selected Topics, ed. Wenche Barth Eide and Uwe Kracht (Antwerp: Intersentia, 2005)., 308.
  \item [\textsuperscript{72}] Wenche Barth Eide Siri Damman, Harriet V. Kuhnlein, ‘Indigenous Peoples’ Nutrition Transition in a Right to Food Perspective,’ Food Policy 33 (2008)., 141.
  \item [\textsuperscript{73}] Söllner, “The “Breakthrough” of the Right to Food: The Meaning of General Comment No. 12 and the Voluntary Guidelines for the Interpretation of the Human Right to Food “., 401.
  \item [\textsuperscript{74}] Damman, “The Right to Food of Indigenous Peoples.”, 313–15.
\end{itemize}
moreover it may not be economically efficient to do so. This information may prove fruitless where it is drowned out by widespread advertising of HFSS food.

The propensity for marketing to interfere with cultural rights has been highlighted. In the CRC Committee's General Comment on the Right to Play, it expressed concern in relation to the effect of media on children's cultural rights:

Much of the media, particularly mainstream television, fail to reflect the language, cultural values and creativity of the diversity of cultures that exist across society. Not only does such monocultural viewing limit opportunities for all children to benefit from the potential breadth of cultural activity available, but it can also serve to affirm a lower value on non-mainstream.175

Accordingly, the CRC Committee concluded that “global marketing can also serve to weaken children’s participation in the traditional cultural and artistic life of their community”.176 This approach is echoed and supported in a report by the Special Rapporteur in the field of Cultural Rights.177 In her report, the Special Rapporteur outlines the impact of ubiquitous commercial advertising on individuals’ cultural rights. She remarks:

Commercial advertising and marketing practices have an increasing impact on the cultural and symbolic landscapes we inhabit and more widely on our cultural diversity. Always aiming to sell, this commercial messaging has the potential to deeply influence the philosophical beliefs of people and their aspirations, as well as cultural values and practices, from food consumption models to burial rituals, including tastes and beauty canons.178

While recognising that commercial advertising is protected under the right to freedom of expression, the Special Rapporteur highlights that other rights, such as thought, privacy, family life, children’s rights, rights to food, health and education, must also be taken into consideration.179 The Special Rapporteur drew particular attention to the promotion of unhealthy food as a means of altering eating and cooking habits.180 According to the Special Rapporteur, health warnings on advertisements are insufficient and ineffective at

175 Committee on the Rights of the Child, “General Comment No. 17, the Right of the Child to Rest, Leisure, Play, Recreational Activities, Cultural Life and the Arts “., 46.
176 Ibid., 47.
178 Ibid., para 3.
179 Ibid., para 8.
180 Ibid., para 50.
mitigating this effect.\textsuperscript{88} The Special Rapporteur gave particular consideration to children's rights and vulnerabilities, including to advertising in schools.\textsuperscript{89} In her recommendations, she suggested that states adopt legislation and companies adopt codes that are subject to state and public oversight.\textsuperscript{89} Finally, the Special Rapporteur recommended that advertising to children under age 12 (or possibly up to 16 years) should be prohibited.\textsuperscript{89} At the same time she suggested increased media and health literacy at schools.\textsuperscript{89}

The Special Rapporteur's decision to highlight the impact of advertising on cultural rights is welcomed. The report can serve as a basis for advocacy, particularly in developing countries where organisations and individuals seek to battle the promulgation of widespread advertising.\textsuperscript{89} The Special Rapporteur's approach towards children is also positive, although greater discussion of the child's best interests as a tool for balancing competing interests would have been worthwhile. Furthermore, her suggestion regarding prohibiting advertising to children under 12 years is subject to creative interpretation by companies. As we will see, if this standard only applies to advertising narrowly considered "directed" towards children, it may be unsuccessful in reducing children's actual exposure to marketing.

Accordingly, it is submitted that states should protect the right to culturally adequate food through imposing limitations on food marketing.\textsuperscript{89} States should ensure that companies do not erode food culture through only promulgating cheap and nutritionally empty food. This requires mapping the local food cultures, and assessing whether marketing shows adequate respect for this cultural right in terms of its quantity and content. At the same time, it should be recognised that culture is not absolute or always positive, therefore, the nutritional adequacy of the traditional diet should also be assessed. The decision on the appropriate position of cultural food should be decided with reference to children's best interests. Furthermore, while under the right to adequate food, states should promote of food, as will be discussed in Chapter Seven, the state's latitude to promote domestic goods is limited by EU law.

\textbf{4.4.3 \quad Summation of the Right to Health & Right to Adequate Food}

The rights to health and adequate food were analysed through the prism of the children's rights approach that focuses on an enabling environment, empowerment and accountability. The right to health suggests that states should ensure the highest attainable standard of health through adopting public health measures. The right to adequate food has been interpreted as imposing an obligation on the state to pursue an

\textsuperscript{88} Ibid., para 51.
\textsuperscript{89} Ibid., paras 56-70.
\textsuperscript{89} Ibid., para 103.
\textsuperscript{89} Ibid., para 104(g).
\textsuperscript{89} Ibid., para 105(a)(b).
\textsuperscript{89} See Moubarac, "Ultra-Processed Food and Drink Products in Latin America: Trends, Impact on Obesity, Policy Implications."
\textsuperscript{89} Committee on Economic Social and Cultural Rights, "General Comment No. 12: The Right to Adequate Food (Art. 11 of the Covenant)", para 15.
adequate food environment, where individuals have the opportunity to feed themselves and their families with dignity. Both rights impose an obligation to protect which requires states to regulate aspects that are outside the individual’s control, such as the conduct of the food industry. If the food industry adequately respects individual rights, the state need not intervene and can focus on promoting access to healthy food. However, the current over-saturation of unhealthy food marketing shows that multinational food companies promote an inadequate and unhealthy diet. This approach offers the greatest profit margins for companies. It can shift children’s perceptions in favour of unhealthy food and skew their view of a healthy diet. This may interfere with children’s cultural rights and health prospects. Therefore, it is submitted that states should act to limit these incursions. Furthermore, this interpretation can be strengthened through greater regard to the right to freedom from exploitation.

4.5 Freedom from exploitation

While the CRC Committee has approached marketing to children chiefly under the rubric of the right to health, the initial analysis in 2.6 suggested that unhealthy food marketing should be regulated to protect children from exploitation. Firstly, as children struggle to identify marketing, companies’ techniques may exploit their lack of critical awareness. Companies’ use of “child-like” sounds, colours, celebrities and characters may exploit children’s susceptibilities, so that they do not make informed decisions regarding food preferences and choices. This has also been documented in digital media through the use of personalised, interactive environments where children play perhaps without noticing or fully appreciating the intent of the brands to which they are exposed. In this way, companies use branding to develop a potentially life-long relationship between children and their unhealthful brand, thus closing avenues for children’s future development and experiences with food. Companies increasingly explore techniques that help them to better map children’s responses to food marketing. Secondly, children are sometimes targeted by marketing in areas of learning and play, like schools and sports settings. These places may be where children feel at ease and trust the marketing to which they are exposed.

Under Article 36 CRC, children are afforded wide protection from commercial exploitation. Naturally, analyses of child exploitation focus primarily on child labour and sexual exploitation. However, exploitation theory suggests that advertising could amount to exploitation when it is unfair. Unfair marketing is prohibited under EU law.


However, this legal standard does not seem to approach practices from children's perspective. Looking more broadly at the concept of exploitation, the Stanford Encyclopaedia differentiates between harmful exploitation and mutually advantageous exploitation.191

Food companies and advertisers may argue that marketing to children is mutually advantageous as it provides children with information, allows them to access the market and enables them to choose from a range of products. Following the children’s rights approach discussed in 3.2, it is submitted that the best interests of the child should be applied as a mediating principle in balancing these concerns. Therefore, the weight of the relevant issues at stake must be balanced in light of what serves the child best. As will be discussed, unhealthy food marketing cannot be in children’s best interests as it limits their right to an open future and has a detrimental impact on their rights to health and adequate food. As highlighted in 1.11.1, rights cannot negate each other, meaning that exploitation that violates children’s rights to health and adequate food cannot be justified as in their best interests. This form of marketing only serves to benefit the interests of food companies in the long term in light of the economic and health impacts of high rates of obesity and non-communicable diseases related to unhealthy diets. Therefore, comprehensive freedom from exploitation suggests that where children do not understand the intent and effect of food marketing, it is unfair and therefore contrary to their rights.

4.6 The Right to Privacy

Further, in 2.3 it was suggested that certain techniques used to market food to children online may run counter to their rights to privacy. It was noted that companies gather children’s data through marketing techniques. Children (like adults) may unwittingly part with their data without understanding the consequences for their privacy and its value for companies. Therefore, the right to privacy as protected by the CRC, ICCPR and ECHR, may support children’s right to freedom from HFSS food marketing.

Privacy is widely regarded as difficult to define, with no precise definition forthcoming.192 Accordingly, Solove conceptualises privacy in terms of six concerns:

(i) the right to be let alone-Samuel Warren and Louis Brandeis’s famous formulation for the right to privacy; (2) limited access to the self - the ability to shield oneself from unwanted access by others; (3) secrecy - the concealment of certain matters from others; (4) control over personal information - the ability to exercise control over information about oneself; (5) personhood-the protection of one’s personality, individuality,

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and dignity; and (6) intimacy - control over, or limited access to, one's intimate relationships or aspects of life.  

Control over personal information is of particular importance for our purposes, including the right to know what personal information is collected by companies. Nissenbaum highlights the paradox of the online world as one where one accesses information in the “privacy” of the home, while at the same time exposed to “unprecedented monitoring and tracking”. Further problems include uncertainties regarding what is done with this information and for how long it is stored. This is of particular concern in relation to children as they may be unaware that advertisers intend that they provide personal information in exchange for content. As we will see, human rights bodies are increasingly concerned about the effect of the digital world on rights, although a coherent approach has not yet emerged.

Turning firstly to the CRC, under Article 16:

No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, or correspondence, nor to unlawful attacks on his or her honour and reputation.

In spite of this provision, it is considered that the CRC Committee has not paid adequate attention to the right to privacy. The right has not been subject to a standalone General Comment or detailed consideration in other General Comments. Instead, the CRC Committee has confined itself to opaque comments such as (in relation to Article 17 CRC) that the mass media should ensure “the privacy and confidentiality of children and adolescents”. Furthermore, a review of the CRC’s Concluding Observations to states parties shows little regard for children’s privacy in the digital world. One outlier was found, however, in relation to Australia:

The committee notes as positive that the office of the Australian information commissioner has issued guidelines on the application of the Australian privacy act on handling the personal information of children. However, the committee is concerned that the state party does not have comprehensive legislation protecting the right to privacy of children. Furthermore, while noting that the office of the Australian information commissioner is empowered to hear complaints about breaches of

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97 Committee on the Rights of the Child, “General Comment No. 15: The Right of the Child to the Enjoyment of the Highest Attainable Standard of Health.”, 84.
privacy rights under the privacy act 1998, it is concerned that there are no child-specific and child-friendly mechanisms and that those available are limited to complaints made against government agencies and officers and large private organizations...¹⁹⁸

This statement meets almost all the concerns of SMART as it is specific, measurable, attainable and reasonable. The major weakness is that it is not time bound. However, this Concluding Observation is an anomaly; others are general recommendations to:

- take necessary measures to ensure that media fully respect right to privacy of children and provide concrete and detailed information (examples, good practices) in the next report on implementation of articles 13-17 CRC in family, social institutions, schools and places of detentions⁹⁹⁹

However, the CRC Committee also recognised the right to privacy in connection with the digital world in its Day of Discussion on Digital Media. It recommended in connection with the collection of children’s data by ICT companies that:

- States ensure that all children have meaningful and child-friendly information about how their data is being gathered, stored, used and potentially shared with others. In this regard, States should ensure that age-appropriate privacy settings, with clear information and warnings, are available for children using digital media and ICTs.¹⁰⁰

Accordingly, this important recommendation suggests an emerging obligation on states to ensure that companies respect children’s rights through the provision of information that they understand. It suggests that under their responsibility to protect, states should ensure that companies develop privacy policies that are comprehensible to children. Therefore, the right to privacy may include state obligations to protect children from the processing and retention of their data online without active consent. The process of ensuring child-friendly information requires that children are consulted and their views gathered. Further, it suggests that data of children who cannot understand privacy policies should not be collected.

The right to privacy in the digital context has been subject to greater consideration in relation to the adult-centred system of rights protection. The Human Rights Committee has issued a General Comment on the corresponding provision of the ICCPR. Although now dated and brief by the standards of current General Comments, it highlights states’ positive obligations to protect the right to privacy through ensuring that third parties do

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¹⁹⁸ Concluding Observations, Australia, CRC/C/AUS/CO/4 (CRC, 2012), 43. See also Dominican Republic, CRC/C/DOM/CO/3-5 (CRC, 2015).

⁹⁹⁹ Croatia, CRC/C/15/ADD.243 (CRC, 2004). See also Thailand, CRC/C/MDV/CO/3 (CRC, 2007).

not violate the right. The General Comment emphasises that gathering and holding of personal data online should be regulated by law.

Furthermore, at Charter body level, human rights organs have begun to devote greater time and resources to the question of privacy rights in the digital era. The General Assembly decided, in a non-binding resolution, that individuals have the same rights online as offline, including the right to privacy. The Office of the High Commissioner accordingly issued a report outlining concerns related to digital privacy. The Report emphasised, inter alia, that the gathering of personal data by companies can be an interference with the right to privacy. However, this interference may be justifiable as long as it is not arbitrary or unlawful. Any interference must also be proportional in terms of the end sought and the necessity of the measure. Furthermore, effective remedies must be provided for breaches of privacy. Additionally, a mandate for a Special Rapporteur on the Right to Privacy was established in 2015. At this stage the Special Rapporteur has released only a preliminary report and therefore his greater engagement with the topic is awaited. Thus, the international system for protecting human rights is becoming active in analysing the impact of companies’ online activities on individuals’ rights, although primarily from an adult-centred position.

Finally, as noted above, children’s right to privacy is also recognised under Article 8 ECHR. The ECtHR has recognised children’s rights online, although it has been reluctant to invoke Article 16 CRC in doing so. This could be as a result of the CRC Committee’s failure to adequately outline states’ duties. It has further been argued that the ECtHR’s approach focuses on certain types of harm, but has not addressed the potential harm caused by wider violations of children’s privacy, including gathering of their data online.

Therefore, in the future we may see the ECtHR called upon to define the obligations of

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201 Human Rights Committee, "General Comment No. 16 Article 17 (the Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation)," (Geneva 8 April 1988), 9.
202 Ibid., 10.
205 Ibid., para 20.
206 Ibid., para 21.
207 Ibid., para 40.
208 Human Rights Council resolution 28/16, The right to privacy in the digital age.
states to ensure that companies do not misuse children's information or gather it without real consent. In the meantime, the CRC Committee should develop a more coherent account of the scope of states' obligations to protect children from this form of privacy infringement.

4.7 CONCLUSION

In this chapter, children's right to freedom from HFSS food marketing was mapped in terms of the rights to health, adequate food, freedom from exploitation and privacy. Firstly, it was argued that the right to health requires states to adopt public health measures in order to ensure the highest attainable standard of health. This includes a duty to have regard to WHO standards, which may thereby include a responsibility to limit HFSS food marketing.

Secondly, the right to adequate food was interpreted in light of states' obligations to protect and promote. In the context of HFSS food marketing, it was asserted that this requires states to profile food and protect children from HFSS food marketing so that they can achieve empowerment. Furthermore, the right to adequate food supports cultural rights, meaning that states should also protect and promote food culture, particularly in the case of indigenous people. As discussed, causality in obesity is difficult to establish, as is evidence that an absence of marketing will lower obesity rates. Therefore, the right to adequate food can strengthen states' obligations, as it does not rely on a connection between food marketing and ill health in the same manner as the right to health. Limiting unhealthy food marketing is, therefore, recommended as an attempt to rebalance access to adequate food through shaping an enabling environment.

Thirdly, the right to freedom from exploitation suggests that children should be protected from marketing that exploits their inherent vulnerabilities. However, more engagement with this right is required. Finally, the right to privacy suggests that states should ensure that companies design child-friendly privacy policies online. Children also have the right to an accessible remedy where their rights are breached.
Chapter 5
Obligations in Context

In the previous chapter it was argued that children have a right to freedom from HFSS food marketing. In this chapter, in light of the principle of coherency, children’s competing rights to information and play are explored to ensure that the interpretation of their socioeconomic rights is in keeping with the full spectrum of rights under the CRC. Firstly, the scope of children’s right to information and states’ corresponding duties are analysed. Secondly, the right to play is explored. Although these rights recognise that states have a duty to protect children, limitations on their participatory rights should not be excessive.

Having mapped the scope of the right to freedom from HFSS food marketing, the extent of states’ corresponding obligations is clarified. States’ obligations are interpreted with regard to the parameters outlined in 3.3: progressive realisation, accountability, and international co-operation. Further, the interplay between states’ obligations and parental responsibilities is analysed. Subsequently, suggestions are made for greater engagement from the CRC Committee. The scope of food and beverage companies’ responsibilities are then explored through a review of existing international standards (outlined in 3.6) and a selection of human rights policies.

5.1 The Right to Receive Information

The rights analysed in the previous chapter suggest that food marketing should be limited where it impacts on children’s socioeconomic rights. At the same time, children also have rights to information as recognised under the Convention on the Rights of the Child (CRC), the International Covenant on Civil and Political Rights (ICCPR) and European Convention on Human Rights (ECHR). The child’s right to information has three potential implications for the right to freedom from HFSS food marketing. Firstly, states are under an obligation to respect, i.e. to not interfere with children’s right to receive information. Secondly, under the CRC, states have a positive obligation to protect children from harmful information. Finally, as discussed in the previous chapter, states should empower children through the provision of information to help them to gain skills to lead a healthful life. Accordingly, there is tension between rights to receive information free from impediment and rights to be protected from harmful information, which should, it is argued, be resolved with reference to the child’s best interests.

1 Article 19.2 ICCPR; Article 13.1 CRC.
Firstly, the ECHR, ICCPR and CRC enshrine a right to receive information as a corollary of the right to freedom of expression. The jurisprudence of the European Court on Human Rights (ECtHR) suggests that states should not arbitrarily restrict individuals' right to receive information. In Leander v. Sweden, the Court held that the government should not restrict "a person from receiving information that others wish or may be willing to impart to him". Thus, this encompasses a negative obligation that cannot be "construed as imposing on a state ... positive obligations to collect and disseminate information of its own motion". Further, this right is not absolute and can be limited. Following the text of the CRC, the right can be limited where provided by law and where necessary, inter alia, for respect of the rights of others; or the protection of public health (Article 13.2 CRC). However, the CRC Committee has not engaged in detail with the circumstances under which the right to receive information can be limited.

Still, the text of the CRC and the CRC Committee recognise that the right to receive information should be limited where necessary to ensure children's well-being. Under Article 17 CRC, states parties should also “encourage the development of appropriate guidelines for the protection of the child from information and material injurious to his or her well-being, bearing in mind the provisions of Articles 13 and 18” [freedom of expression and association.] This is further supported by Article 19 CRC which requires states parties to protect children from all types of violence, injury or abuse. In its Concluding Observations, the CRC Committee recommends that states parties develop appropriate guidelines where they are not already in place. For example, while expressing concern at the lack of access to information in Mozambique, it recommended that the State “develop legislation or administrative guidelines to protect children from information which may be harmful to them”. However, the CRC Committee is critical of protective approaches towards children's access to information and recommends that information is only limited by objective criteria. For instance, it encouraged Turkey to ensure that internet filters do not have a negative impact on the right to information. Therefore, an appropriate balance between protection from harm and participation should be pursued.

Secondly, the CRC goes further than the adult-centred instruments, recognising a positive right to access information through the media under Article 17 CRC. The right to access information under the ICCPR and ECHR only relates to information held by public

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3 Sirbu v. Moldova, Application Nos. 73562/01, 73565/01, 73712/01, 73744/01, 73972/01 and 73973/01 (15 June 2004), para 18.
6 For example: Concluding Observations to: Greece CRC/C/GRC/CO/2-3 (CRC, 2012), para 39; Bolivia CRC/C/BOL/CO/4 (CRC, 2009); Romania CRC/C/ROM/CO/4 (CRC, 2009), para 42.
7 Concluding Observations, Mozambique CRC/C/15/Add.172 (CRC, 2002), paras 36-37.
10 Concluding Observations, Turkey, CRC/C/TUR/CO/2-3 (CRC, 2012), para 41.
bodies, such as information on birth families." Under the CRC, however, states parties must respect and ensure to recognise the function of the mass media, including children’s rights to access information, "especially information aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health". States parties must also encourage the media to disseminate information of benefit to children and the aims of education, as well as encourage international co-operation, production and dissemination of books and regard to linguistic needs of minority children. Article 17 CRC further suggests that states parties should encourage broadcasters to produce children’s programmes to foster their development. However, children’s programmes need funding in order to be produced and broadcasters struggle to fund children’s programming without advertising. Therefore, it has been suggested that the CRC also places a positive duty on states to provide adequate funding for radio, television and books. In the debates on the CRC, an early draft focused on protecting children from the media’s potentially harmful influence. This was eventually replaced with a perspective that sees the media as primarily positive in relation to children’s rights. Thus, the CRC recognises the potentially beneficial impacts of media on children’s wellbeing.

Further, as seen in Chapter Four, the CRC and its Committee encourage not only the media but also states to provide children and adults with beneficial information. In its General Comment on the Right to Health, the CRC Committee highlighted that under Article 24(2)(e), states parties must ensure that parents and adults are informed on health and nutrition. Accordingly, children should be educated on matters related to health and nutrition in order to enable them to pursue informed lifestyle choices. The CRC Committee’s General Comments recommend broader societal measures which, following the children’s rights approach, should empower children and their guardians. The CRC Committee interprets Article 24(2)(d) as, inter alia, requiring health behaviour education for mothers, thus underscoring the vital role of mothers in the health of their children.

At the same time, states should provide education on health to empower children to

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12 Furthermore, under the United Nations Guidelines for the Prevention of Juvenile Delinquency, the Riyadh Guidelines, “the mass media should be encouraged to ensure that young persons have access to information and material from a diversity of national and international sources.” (Adopted and proclaimed by General Assembly resolution 45/112 of 14 December 1990), para 42.


16 Committee on the Rights of the Child, "General Comment No. 15: The Right of the Child to the Enjoyment of the Highest Attainable Standard of Health.", para 59.

17 Ibid, para 54.
make choices through “accessible, understandable and appropriate” information. The state’s health obligations are complemented by the aims of education, which the CRC Committee has asserted should aid children in developing “life skills”, including the ability to make “well-balanced decisions” and “develop a healthy lifestyle”. This obligation is echoed in Concluding Observations, which stress the importance of access to beneficial information that can “enhance their development and knowledge”. Finally, the CRC Committee has also recommended advisory campaigns for parents and teachers to protect children from harmful information.

Accordingly, there is a potential conflict between these obligations of empowerment and the right to receive information. The CRC Committee has been slow to provide guidance on navigating this balance. However, in its Report of the Day of Discussion on Digital Media, the CRC Committee acknowledged that digital media provides opportunities but also risks, which must be balanced. Following input from experts, the CRC Committee concluded with a number of recommendations which reflected a balanced approach. It avoided an exclusively protective approach and did not recommend prohibiting advertising to children (as suggested by the Special Rapporteur on Cultural Life, see 4.4.2.3). The CRC Committee instead recommended training and support for children to empower them to use the internet and protect themselves from harm. It reiterated that children should be consulted when drafting any proposed law or policy. Although the CRC Committee recommended inter alia that states strengthen programmes, ensure reparations and support to parents, it avoided advising a regulatory approach. Instead, it recommended that human rights institutions adopt a key role in monitoring children’s rights in relation to digital media.

The report echoes many of the dimensions that I have identified in a children’s rights approach: best interests, participation, accountability, and empowerment. However, while useful, the report’s normative status report remains unclear. The recommendations’ importance could be bolstered by adopting a general comment. Further, the CRC Committee should integrate these rights-based recommendations into its Concluding Observations. Langlaude critiques the CRC Committee’s limited guidance to date and recommends greater regard for parents’ role and children’s evolving

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8. Ibid., para 59.
9. Ibid., para 58.
10. ”General Comment No. 1: The Aims of Education.”, para 9.
15. Ibid., para 99.
16. Ibid., para 105.
17. Ibid., para 106.
18. Ibid., para 107.
19. Ibid., para 92.
capacities whereby children’s ability to exercise freedom of expression expands with age and maturity.31

Finally, the Special Rapporteur on the right to freedom of expression, Frank La Rue, also issued a report on children’s right to freedom of expression. In his report, La Rue emphasised children’s empowerment and the need to balance risks and opportunities. For instance, he advised that while parents have responsibilities to protect their children,32 the right to freedom of expression should be “exercised progressively as the child matures”.33 The Rapporteur further recommended that guidelines be reviewed regularly to avoid “disproportionate or arbitrary restrictions that curtail the rights of both adults and children”. Further, he argued against using the risk of harm and parental responsibilities to justify drastic restrictions on children’s freedom of expression.34 He added that internet filters based on broad definitions of harm should not suppress children’s access to empowering information.35 Therefore, protection should recognise children’s evolving capacities and not use arbitrary measures that may impact on children and adults’ rights.36 The Rapporteur instead recommended empowering children through training parents and adults to support children in using the internet and to assist their development through the school curriculum.37

While the report advocated a child-centred approach, not all its recommendations were principled. The Rapporteur interpreted Article 17(e) CRC as placing a duty on states to develop appropriate guidelines for protection of children’s wellbeing.38 However, it is submitted that this interpretation goes beyond the text of the CRC, as a plain reading of Article 17 only extends to encouraging the media to create guidelines, thereby supporting self-regulation in order to avoid intrusions on freedom of expression. Although states have powers and duties to regulate outside forces that may cause harm under the responsibility to protect, Article 17(e) does not provide a clear basis for this.

5.2 THE RIGHT TO PLAY AND LEISURE

The right to play and leisure is a further participatory right which requires that restrictions are not excessive or disproportionate. The CRC uniquely recognises children’s right to play and leisure under Article 31. Although the right has been rather neglected over the short life of the CRC,39 it recently received more attention in the form of a

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33 Ibid., 3.
34 Ibid., 12.
35 Ibid., 17.
36 Ibid., 18.
37 Ibid., 9.
General Comment and a Human Rights Council resolution. Play and leisure are rights in themselves, but also means by which children’s health, development and education can be secured. However, as with the right to information, the balance between protecting children from harm while providing sufficient opportunities to enjoy self-directed play lies at the heart of the right to play and leisure. This section will focus on advergames (as introduced in 2.3) and not deal with children’s rights in relation to physical activity as this is outside the scope of the central research question.

Like the right to information, the right to play enshrines children’s access to play while imposing obligations on states to put limits in place to protect children from harm. On the one hand, children should be supported in engaging in unstructured and self-directed play. According to the CRC Committee, this requires support from the state, parents, teachers and society at large to put appropriate structures and safeguards in place. Younger children in particular require that parents provide an enabling environment where they can access play and leisure. As play should be self-directed, overly protective approaches may hamper and interfere with its very nature. On the other hand, children’s guardians and the state should protect children from play and activities that are harmful and contrary to their best interests.

In the context of regulating unhealthy food marketing, advergames are games that companies use to market to children. Advergames offer children access and opportunities for “free” and potentially fun games. Therefore, it could be argued that restrictions on advergames should be avoided as they may interfere with rights to play. However, states should also protect children from third parties that seek to exploit their natural instincts and desire to play. Accordingly, the International Play Association (an international NGO) highlights in its guidelines the “increasing commercial exploitation of children and the deterioration of cultural traditions”.

Therefore, while states parties should respect and recognise the right to play, they should also protect children from outside forces that seek to exploit their natural desire to play for corporate gain. This is also supported by the right to freedom from exploitation as discussed in 4.5. However, measures should not be disproportionate such as, for instance, banning all types of internet games due to a vague threat of harm. In light of children’s

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40 Committee on the Rights of the Child, “General Comment No. 17, the Right of the Child to Rest, Leisure, Play, Recreational Activities, Cultural Life and the Arts”, para 9.
42 Ibid., para 5.
43 Ibid., para 5.
evolving capacities, controls for younger children may be more protective, whereas older children should be recognised as possessing increasing autonomy. Parents should not arbitrarily substitute their views of “beneficial” or safe play for those of children. For example, parents may deem physical activity and outdoor play are in their children’s best interests; however the CRC does not provide a basis for imposing their conception of play. Instead, play should only be limited where it is contrary to their best interests, with children’s views acknowledged in the assessment. It is submitted that advergames are contrary to children’s best interests because of their impact on children’s health, right to freedom from exploitation and adequate food.

5.3 **BALANCE BETWEEN CHILDREN’S RIGHTS TO PROVISION AND PROTECTION**

In the introduction it was posited that children’s rights must be interpreted in context, as rights are indivisible and interdependent. As underscored in the introduction, the first step should be to pursue harmonisation. Accordingly, this section argues that children’s protective and participatory rights can and should be interpreted in harmony. The rights to information and play do not prohibit states from limiting HFSS food marketing.

Firstly, children’s civil and political rights cannot be assumed superior to their socioeconomic rights, given that rights have been affirmed as indivisible. Instead, they must be in interpreted in harmony. While states are required to “respect and ensure” the right to freedom of information without limits due to resources, this distinction does not render socioeconomic rights inferior. It is submitted that “progressive realisation” does not speak to the content of the right, but instead the scope of the state’s obligation, such as whether the obligation is immediate or progressive, or whether the obligation applies to all states or only those with greater resources (discussed below). Accordingly, the practice of the CRC Committee notes that children’s autonomy-based rights must be balanced with their rights to protection from harm.

Secondly, although children have a right to receive and access information and to self-directed play, these rights are not absolute. Instead, states’ obligations also encompass protective duties to defend children from harm and commercial exploitation. States and other duty bearers should ensure that children are protected from information and play where it conflicts with their rights. Protecting children’s rights and public health are both legitimate aims. In light of the evidence of the impact on their rights and health, regulating food marketing is necessary to protect children’s rights and not disproportionate to their right to receive information. At the same time, restrictions on information should not arbitrarily limit children’s access to information, but be based on objective criteria. Therefore, it is submitted that it remains legitimate for states to limit HFSS food marketing on the basis of children’s socioeconomic rights where it avoids excessive incursions. Limitations should therefore focus on regulating harmful commercial conduct, while avoiding interfering with children’s rights to receive information on pursuing a healthy lifestyle.
It is submitted that children’s rights to access information cannot be interpreted to include a right to receive HFSS food marketing, in light of the aims and objectives of the CRC and our understanding of the right to information. Firstly, rights cannot be interpreted in such a manner as to negate each other. Following established principles of international law, one right cannot be used to justify the destruction of another right.\textsuperscript{45} If children have a right to receive information on HFSS food marketing, this will undermine the essence of the rights to health, adequate food and freedom from exploitation. It goes against the object and purpose of the CRC to suggest that this type of information can delimit their socioeconomic rights.

Further, it is submitted that children do not have an unlimited right to access media, but instead a right to access beneficial media. Therefore, when examining the right to information, the interpreter should consider the informative value that should be attached to access to HFSS food marketing. To what extent does HFSS food marketing fall under this category? It is submitted that the weight attached to marketing may relate to a society’s conception of childhood. For example, a liberal outlook suggests that commercial information prepares children for a future as a consumer in a market economy. Shielding children from commercial life may be considered to leave them ill-prepared for adulthood or undermine their position as consumers with spending power. Fortin posits that children will be unable to successfully make the transition to adulthood unless given opportunities to practice their decision making abilities.\textsuperscript{46} Alternatively, a consequentialist approach suggests that restricting unhealthy advertising will affect children’s access to media due to a loss of revenue for broadcasters, which thereby limits their programming budget.\textsuperscript{47} However, harm to children should not be justified by economic arguments.

Instead, the CRC Committee asserts that the appropriate balance between protection and participation should be achieved through a two-step test to determine children’s best interests. In the first instance, the individual or body making the assessment identifies the relevant elements and assigns weight to the different interests.\textsuperscript{48} Suggested elements to be considered include: the child’s views,\textsuperscript{49} the specific characteristics of the child (e.g.

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\textsuperscript{45} Article 5 ICESCR, ICCPR: Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights or freedoms recognized herein, or at their limitation to a greater extent than is provided for in the present Covenant.


\textsuperscript{48} Committee on the Rights of the Child, "General Comment No. 14: The Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration .", para 46(a).

\textsuperscript{49} Ibid., para 53.
\end{flushleft}
gender, religion and national origin), the preservation of the family environment, care, protection and safety of the child, situation of vulnerability, right to health and right to education. Most weight should be attached to what serves the child best.

Accordingly, it would seem that the CRC Committee's approach focuses on protective elements. However, this is balanced as the state must also consult with a “representative sample of children” and give due consideration to their opinions. Following Article 12 CRC children should be consulted and their views should be given due weight in line with their age and maturity. Children's views do not necessarily decide the outcome but should be taken into account when reaching decisions, along with other principles, such as the best interests of the child.

Assessments in the UK and Ireland show that children and parents support limitations on unhealthy food marketing (see Chapter Six). One Australian study found that children do not consider food advertising helpful and instead feel that it causes conflict between them and their parents. Swedish children expressed ambivalent or negative views on online advertising. Although these assessments are limited by their sample size, they suggest that children are in favour of limitations on HFSS food advertising. While not absolute, children's opinions should be given due weight. The balance between participatory and protective approaches is then reshaped with these opinions in mind.

Accordingly, children's right to information does not provide a compelling case against limits on HFSS food marketing. Access to HFSS food marketing cannot be in children's best interests as it conflicts with their rights to health and food. However, children's participatory rights to information and play impose some conditions on the manner in which states enforce limitations. The CRC Committee warns against blanket bans and wide restrictions on children's access to information. Human rights bodies emphasise children’s evolving capacities, meaning that restrictions should not be arbitrary or overly protective depending on children's age and maturity. Accordingly, it should be emphasised that the goal of restrictions is to limit companies' actions, not children's rights. However, it is considered that the CRC Committee has not adequately emphasised states' obligations to protect children and is too quick to rely on voluntary initiatives. It

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50 Ibid., para 55.
51 Ibid., para 58.
52 Ibid., para 71.
53 Ibid., para 75.
54 Ibid., para 77.
55 Ibid., para 79.
56 Ibid., para 39.
57 "General Comment No. 17, the Right of the Child to Rest, Leisure, Play, Recreational Activities, Cultural Life and the Arts","., para 39.
58 "General Comment No. 12: The Right of the Child to Be Heard.", para 122.
should underline the state’s fundamental duty to uphold children’s best interests through protecting them from commercial exploitation.

5.4 The Scope of States’ Obligations

Having established that children have a right to freedom from HFSS food marketing that is not outweighed by their competing rights, the scope of states’ obligations must be assessed. Therefore, the state’s obligation to pursue freedom from HFSS food marketing is analysed in light of progressive realisation, accountability and international co-operation.

5.4.1 Progressive Realisation

In line with the principles of progressive realisation, the manner in which states implement socioeconomic rights is flexible and encompasses a margin of appreciation. The rights to health and adequate food are notably “vague” and lack conceptual clarity.\(^61\) There are good reasons for keeping definitions vague, as conditions emerge over time and obligations vary depending on a state’s resources.\(^62\) However, this can render the steps that states should take unclear. Therefore, in light of the concept of reasonableness, a number of approaches is suggested.

Firstly, states should pursue the “highest reasonably attainable” standards within available resources.\(^63\) In order to do so, reasonable measures should be adopted in line with children’s best interests. Threats to health should be limited through regulating the conduct of third parties where this would not impose an unreasonable burden.\(^64\) This requires a technical assessment of the impact of rights and an assessment of the impact of proposed laws and policies on children’s rights and other considerations. Secondly, lack of resources is not a compelling argument against restrictions. The imposition of regulations relating to unhealthy food marketing arguably has a limited impact on state resources.\(^65\) Regulating unhealthy food marketing appears to be a cost effective public health intervention.\(^66\) Further, states with limited resources should seek technical assistance from WHO or other states, or even pursue self-regulation thereby transferring the cost to the industry.

Thirdly, while both UN Committees consider that states have a margin of discretion, the right to health and adequate food involves core obligations. The CRC Committee considers “providing an adequate response to the underlying determinants of children’s health” is a core obligation.\(^67\) CESCR agrees that providing minimum essentials such as

\(^{62}\) De Búrca, “The Future of Social Rights Protection in Europe.”
\(^{63}\) Wolff, “I— the Demands of the Human Right to Health.”
\(^{64}\) Marks, “Emergence and Scope of the Right to Health.”, 9.
\(^{65}\) Smith, “Human Rights and Bioethics: Formulating a Universal Right to Health, Health Care, or Health Protection?.”
\(^{66}\) A. Magnus et al., “The Cost-Effectiveness of Removing Television Advertising of High-Fat and/or High-Sugar Food and Beverages to Australian Children,” Int J Obes (Lond) 33, no. 13 (2009).
\(^{67}\) Committee on the Rights of the Child, “General Comment No. 15: The Right of the Child to the Enjoyment of the Highest Attainable Standard of Health.”, para 73(c).
food, housing, water and drugs amount to state obligations. CESCR also lists “obligations of comparable priority” including, *inter alia*, provision of immunisation, taking measures to “prevent, treat and control epidemic and endemic diseases” and providing education and information on the main health problems in the community.\(^{68}\) States must provide a healthful environment through realising the underlying determinants of health.\(^{69}\) As with the right to health, CESCR considers the right to adequate food requires that all states guarantee:

The availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture;

The accessibility of such food in ways that are sustainable and that do not interfere with the enjoyment of other human rights.

Considering that the FAO estimates that 805 million people remain chronically undernourished, many states continue to be unable or unwilling to meet their core obligations.\(^{70}\) According to CESCR’s General Comment, these states may violate the Covenant if the failure is due to unwillingness, as opposed to inability to ensure freedom from hunger. The burden is on the state to establish that the circumstances are beyond its control and that it has unsuccessfully sought international support.\(^{71}\) The CRC Committee’s approach is more flexible in that, while highlighting political and legal accountability as well as remedies,\(^{72}\) it does not focus on violations to the same extent as CESCR. The latter body considers non-compliance with core obligations and unwillingness to use available resources to the maximum as violations. This claim has been criticised as impractical, given that many states struggle to meet these “minimum levels” (see 3.3.2).

In light thereof and of the discussion in Chapter Three, I argue that a more reasonable approach is for core obligations to be seen to vary across states.\(^{73}\) The minimum core seems misplaced where the bar is set so high that the minimum threshold is unattainable for some states, and for other states so low that inaction is sufficient. While regulating unhealthy food is not a core obligation in a state with low levels of advertising and obesity, it may amount to a core obligation in a state with high levels of obesity, advertising to children and resources. This determination will rely on an analysis of the

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\(^{68}\) Committee on Economic Social and Cultural Rights, “General Comment No. 14, the Right to the Highest Attainable Standard of Health (Article 12),”, para 44.

\(^{69}\) Ibid., para 53.


\(^{71}\) Committee on Economic Social and Cultural Rights, "General Comment No. 12: The Right to Adequate Food (Art. 11 of the Covenant)", para 17.

\(^{72}\) Committee on the Rights of the Child, "General Comment No. 15: The Right of the Child to the Enjoyment of the Highest Attainable Standard of Health.", para 59.

issues affecting the right. However, criticism of the core obligation doctrine suggests that it may lack the necessary support to be a persuasive interpretation. Therefore, it could be more reasonable to argue instead that regulating marketing does not *per se* involve state resources. Where the state’s resources are severely limited, states could mandate industry regulation thereby moving the costs to the companies.

5.4.2 **ACCOUNTABILITY**

Accountability cannot only be a role of the courts but must be copper-fastened into political structures. In pursuing accountability, states should gather disaggregated data on children’s health, obesity levels and food marketing. Greater disaggregation would provide better data on which children are affected and whether other rights violations are occurring, such as structural discrimination. It means that the state has comprehensive data on obesity levels and can compare this to social deprivation. This data can also be used to justify legal and policy approaches. For example, in the UK, children’s weight is comprehensively monitored and measured in schools.\(^{74}\) Furthermore, children’s views on the issues affecting their rights and appropriate strategies to address impacts should be systematically gathered.

5.4.3 **Pursuing Rights’ Fulfilment in the Spirit of International Co-operation**

Freedom from obesogenic marketing includes obligations to co-operate with other states to fulfil children’s socioeconomic rights. Firstly, under the responsibility to *protect*, states should limit extra-territorial actions of domestic companies that interfere with rights in other territories. Under the Maastricht Principles, states are obliged to regulate domestic companies’ extra-territorial conduct to ensure that they do not infringe children’s rights in third states.\(^{75}\) States should also seek to “influence the conduct of non-State actors” that they cannot regulate.\(^{76}\) The CRC Committee has followed this approach and calls on states to regulate the actions of companies domiciled or registered in their jurisdiction.\(^{77}\) Therefore, when imposing advertising limitations on companies, states should seek to apply the obligations with extra-territorial effect. In line with their human rights obligations, states should offer support, including technical guidance, to those unable to implement marketing restrictions due to resource constraints. They should also avail of technical guidance provided by WHO. If states were to take their human rights obligations seriously, soft law health commitments could provide a blueprint for achieving global minimum standards in HFSS food marketing. However, as was discussed in 3.3.5, states are reluctant to recognise international co-operation as an obligation.


\(^{76}\) ETO Consortium, principle 26.

\(^{77}\) Committee on the Rights of the Child, “General Comment No. 16, State Obligations Regarding the Impact of the Business Sector on Children’s Rights.,” para 43.
Further, as will be explored in Chapter Seven, EU Member States’ abilities to do so in relation to advertising are curtailed by EU law.

5.4.4 **States’ obligations in light of parental responsibilities**

Following 3.4, it is submitted that states’ obligations to limit unhealthy food marketing should be seen as supportive of parental responsibilities. The research presented in Chapter Two suggests that children often access media alone. Although this requires greater education and awareness on the part of parents, the level of unhealthy food marketing may have a detrimental impact on even informed parents’ abilities to mitigate its effects. Firstly, the potentially exploitative impact of some of the techniques can overwhelm parental guidance. Secondly, the use of techniques such as pester power may have a negative impact on the relationship between parents and children. Thirdly, even where marketing to children is limited, companies can target parents largely free from regulation, which may also interfere with parents’ abilities to uphold their children’s rights.

Therefore, instead of viewing limitations on marketing as a conflict with parents’ rights, it is more reasonable to see prevalent unhealthy food advertising as interfering with parents’ abilities to guide their children in pursuing a healthy diet; regulating marketing supports the rights of parents and children. In this manner, states can shape an environment that enables children’s health and empowers both parents and children. Mason and Labbok, in analysing the right to breastfeeding, reconceptualise the child and mother’s rights as a collective. Instead of focusing on the supposed conflict between the woman’s right to choose not to breastfeed and the child’s right to be breastfed, they hold that, on the contrary, their interests coincide. In the case of food marketing, both parents and children have an interest in children’s good health and wellbeing. Regulating marketing does not impose obligations on parents or restrict parental autonomy to direct their child, but instead alters the balance that influence children’s relationship with unhealthful food to a position that respects their rights to health and food.

Regulating food marketing is thereby not an invasive form of intervention, such as, for instance, prohibiting parents from buying HFSS products for their children would be. Furthermore, should parents be opposed to regulation for other reasons, such as distaste for measures they see as paternalistic, it is not reasonable that such a position limits children’s right to freedom from obesogenic marketing. Should a parent argue that they wish for their child to have access to commercials to prepare them for their future, limiting child-directed advertising would reduce but not eliminate this exposure. Limitations do not restrict parents’ choices, but would instead allow for broader choices through exposure to more variety, and support for parental autonomy through limiting the power of multinational food companies.

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Furthermore, it has been suggested that calling on parents’ to fulfil regulatory roles that states refuse to occupy may be detrimental to parent and child relations. Livingstone observes that demanding that parents patrol children’s internet use may infringe on their privacy and damage trust in their parents. Accordingly, if parents are expected to hover behind children’s shoulders while they access the internet or watch television, this is neither feasible nor conducive to children’s privacy and relationship with their parents. However, this may be what is necessary or expected of parents if states refuse to carry out their duty to protect children from marketers. Furthermore, restricting children’s access to media may deprive them of educational and leisure opportunities. Finally, it is not within parents’ sphere of influence to fully neutralise this factor. Parental oversight is certainly important but is largely insufficient in light of the ubiquitous nature of unhealthy food marketing.

Thus, in the case of food marketing regulation, neither parents nor states are capable of upholding children’s rights alone; instead each has separate but interconnected responsibilities. States are responsible for “shap[ing] environments in ways that enable families to create living conditions that support their children.” Following the environmental approach, it is reasonable to interpret limiting unhealthy food marketing as a state obligation that does not encroach on parental rights. Unhealthy food marketing restrictions do not interfere with the “natural” state, but can rebalance the market to a position whereby children’s understanding of health and nutrition is not dictated by companies with the largest advertising budget. Furthermore, parents and children seem unlikely to oppose limitations on food marketing. Therefore, it is more likely that parents would mobilise in favour of limitations than against, even if it means that children are exposed to less media content. Finally, states should (in tandem with limitations) invest in media literacy and support for parents and teachers. Children should not only be protected but empowered, given that even where there are restrictions on advertising, children will remain exposed to some advertising.

5.5 THE ROLE OF THE CRC COMMITTEE

The CRC Committee should play a role in guiding states on their responsibilities in relation to unhealthy food marketing. However, the CRC Committee and the UN human rights system have to date been limited. Accordingly, the CRC Committee’s approach should be strengthened. For instance, to date it has neglected the rights to adequate food and freedom from exploitation. Concluding Observations on these rights are subject to virtually no engagement with obesity. This may be due to lack of state and civil society engagement or the vagueness of the standards. In light of the Special Rapporteurs’ reports there is room for greater engagement with these normative standards.

79 Livingstone, “Children’s Privacy Online Experimenting with Boundaries within and Beyond the Family.”, 140.
Although there are more Concluding Observations on the right to health, as already argued, they cannot be considered SMART. Existing Concluding Observations are narrow or generally-worded observations expressing "concern" or recommending unspecified action. As suggested by O’Flaherty, while states parties should give these non-prescriptive recommendations consideration, they cannot be considered strictly bound to take particular actions without a clearer and more analytical investigation. As the interpretations are soft law, they require greater rigour to guide states, bearing in mind that states have a wide margin of appreciation in areas of policy. The higher the quality of the recommendations, the more regard and scrutiny they may receive. Further, the states in question should give active consideration to these recommendations in light of their responsibility to apply treaty obligations in good faith and it is in the state’s interest to tackle childhood obesity. According to Kaelin,

the principle of good faith suggests that states, at a minimum, take note of recommendations on policies and strategies to enhance human rights implementation, examine whether they want to implement them and provide the treaty body with some kind of reasoning during the follow-up procedure or the next reporting cycle if they decide not to do so.

At the same time, while the advice offered in Chapter Four is in general weak, obesity is a complex issue. The CRC Committee is limited by time and its budget, and deals with a wide range of rights spanning both civil and political, and socioeconomic rights. It is not focused solely on the right to health or childhood obesity. UN Committee members lack the expertise to recommend health measures without guidance and depend on receiving information from the state, UN agencies and civil society to make detailed recommendations. Civil society’s limited engagement with obesity from a rights perspective has meant that human rights treaty bodies lack technical advice to make precise recommendations. WHO’s reticence to take part in the treaty body process limits the CRC Committee’s access to accurate and up-to-date information on obesity prevention.

Greater engagement from WHO could fill this knowledge vacuum. In this regard, it is encouraging that WHO Europe increasingly uses rights language in its reports and recommendations. Furthermore, there is scope for UNICEF to become more involved in

83 Sepúlveda Carmona, Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights, 18, 91.
86 World Health Organisation (Europe), "Tackling Food Marketing to Children in a Digital World: Trans-Disciplinary Perspectives."
collaborating with WHO. The CRC Committee could look to the European Committee’s more targeted and systematic approach, and reliance on WHO data. The CRC Committee could assist in this process of knowledge sharing through employing the WHO Marketing Recommendations, as has been done in relation to the FCTC and Code on Breast Milk Substitutes. The CRC Committee can ask states for information on the extent to which the Recommendations have been implemented, which would provide another level of monitoring. Similarly, the WHO Commission on Ending Childhood Obesity has recently made a series of recommendations to states on suitable measures to address childhood obesity.\(^7\) The CRC Committee could use this report in its dialogue with states and strengthen subsequent Concluding Observations. The CRC Committee could also engage with the Special Rapporteurs on the right to health and food to strengthen implementation of their reports. Fundamentally, while it is not expected to be an expert on technical measures – it is expected to map the content of rights through a children’s rights lens. Therefore, the CRC Committee should develop a more coherent understanding of the rights at issue and highlight further the child specific principles, such as best interests.

5.6 FOOD & BEVERAGE COMPANIES’ RESPONSIBILITIES

In 3.6., it was posited that while companies do not have obligations under the CRC, emerging non-binding standards emphasise companies’ responsibilities to respect children’s rights. In this section I will explore the relationship between companies’ responsibilities to children’s rights and HFSS food marketing. Although the CRC Committee considers companies duty bearers, it primarily addresses states and has not given detailed consideration to companies’ responsibilities in regards to obesity. However, the Special Rapporteurs on the rights to health and food have suggested duties that apply to companies in relation to HFSS food. This approach goes further than the existing voluntary standards, such as the United Nations Guiding Principles and the Children’s Rights Principles. Furthermore, in 5.6.1 a review of a selection of food and beverage companies’ human rights policies shows that they have avoided engaging with the rights to health and adequate food to date.

Firstly, while the CRC Committee concentrates on states’ obligations to protect children from businesses, it acknowledges the responsibilities of all businesses to respect children’s rights and not undermine states’ abilities to meet obligations.\(^8\) The CRC Committee goes further than CESCR, stating that the private sector has due diligence obligations in respect of children’s rights.\(^9\) It calls on all actors involved with children to carry out their operations in compliance with children’s rights.\(^9\) The CRC Committee has called on the private sector to refrain from advertising, marketing and selling tobacco,

\(^7\) World Health Organization, “Report of the Commission on Ending Childhood Obesity.”
\(^8\) Committee on the Rights of the Child, “General Comment No. 16, State Obligations Regarding the Impact of the Business Sector on Children’s Rights.”, para 8.
\(^9\) “General Comment No. 15: The Right of the Child to the Enjoyment of the Highest Attainable Standard of Health.”, para 89.
\(^9\) Ibid., para 75.
alcohol and other toxic substances to children. However, it is considered that at times, the CRC Committee's interpretation of companies' obligations is not principled, in that current international practice recognises companies as only having responsibilities – not obligations.

Secondly, the Special Rapporteurs on the right to health and food have made specific recommendations to companies in relation to HFSS food marketing. In his report, the former Special Rapporteur on the Right to Food recommended that companies:

- comply with WHO recommendations
- avoid nutrition based interventions where diets are sustainable and prioritise local solutions with the objective of sustainable diets
- ensure fair wages for employees
- move away from HFSS food towards healthier foods.

While these recommendations are not binding, they offer a first look at potential indicators to measure food and beverage companies' commitment to the right to adequate food.

The Special Rapporteur on the right to health reiterated a number of these recommendations in his 2014 Report from a right to health perspective, calling on companies to:

- Adopt adequate nutritional labelling and comply with national guidelines,
- Avoid marketing, promoting and advertising HFSS foods (especially to children)
- Improve nutritional content of foods
- Increase transparency on nutritional information and avoid misleading claims
- Avoid undermining public health efforts.

So, there is some recognition that food and beverage companies have an impact upon the rights to health and adequate food which they should address. However, these remain non-binding recommendations which are not legally enforceable. Further, they require greater analysis and specificity.

Thus, in light of this governance gap, as discussed in 3.6, voluntary principles such as the Children's Rights and Business Principles have been developed. Under Principle Six, companies are called on to ensure that their advertising and marketing to children respects and supports children's rights. Principle Six does not deem advertising to children as contrary to rights per se, but instead requires companies to ensure that their marketing practices do not have an adverse impact on children's rights in light of their increased susceptibility to violations. Furthermore, the Principles argue that companies should comply with WHO recommendations on marketing including the

\[91 \text{Ibid.}, \text{para 81.}\]
\[92 \text{De Schutter, "Report Submitted by the Special Rapporteur on the Right to Food."}, \text{paras 51(a)-(d).}\]
\[93 \text{UN Human Rights Council, "Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health."}, \text{paras 66(a)-(e).}\]
Recommendations on Food Marketing.\textsuperscript{94} Therefore, there is some cohesion between WHO and children’s rights standards. Further, the child impact assessment guidelines suggest a number of non-binding indicators to guide companies in mapping their rights impact:

- Does the company have a global responsible marketing and advertising policy in place that prohibits harmful and unethical advertising related to children?
- Does the company set clear standards for privacy and the collection of personal data on or from children?
- Is there a process in place to identify, assess and monitor risks to and impacts on children’s rights related to content and visuals used in the company’s advertising?
- Has the company established guidelines for the use of children in advertising and marketing?
- Does the company follow evolving best practices with regard to marketing and advertising, including participation in voluntary marketing codes and standards?
- Does the company support and promote positive and healthy behaviour among children through marketing, advertising and communication channels?
- Is there a formal mechanism in place for receiving, processing, investigating and responding to complaints from customers and the general public, including children, about content and visuals relating to children?\textsuperscript{95}

Therefore, a number of limitations on companies’ freedoms to market HFSS food to children are suggested. The impact assessment guidelines offer further standards to guide companies in limiting marketing without advocating a one size fits all approach. Companies should be proactive in adopting guidelines where national law is weak.\textsuperscript{96} Age groups should be devised for when marketing is suitable and which types.\textsuperscript{97} Indeed, the impact assessment identifies a number of techniques that are potentially harmful and inappropriate from a children’s rights perspective. For example, “direct” marketing should not occur in child-centred institutions such as schools and day care. Companies should encourage children to ask parents for permission to use websites.\textsuperscript{98} Children should not be hired as “brand” ambassadors.\textsuperscript{99} With specific reference to healthy food, suggestions are made for placing healthy food accessibly in supermarkets. Further, unhealthy food marketing should not take place in schools and “child-friendly” sporting events.\textsuperscript{100}

\textsuperscript{96} Ibid, 37.
\textsuperscript{97} Ibid, 37.
\textsuperscript{98} Ibid, 38.
\textsuperscript{99} Ibid, 39.
\textsuperscript{100} Ibid, 38.
If effectively implemented, the Children’s Rights and Business Principles could support children’s right to freedom from obesogenic food marketing. They offer more specificity in terms of children’s rights than the UN Guiding Principles (see 3.6). However, the suggested indicators are limited in that they fail to define key terms, meaning that companies may interpret standards to promote their own interests. However, the recommendation for child friendly complaints mechanisms is of particular interest, meaning that children should be in a position to make complaints regarding companies’ impact on their rights.

More generally, companies are called on to respect and support children’s rights, which under the CRC includes the rights to health, adequate food and freedom from exploitation.101 Hence, companies should conduct due diligence and, inter alia, assess the impact of their marketing practices on these rights.102 In light of the evidence presented on the impact of HFSS food marketing on children’s rights, companies should refrain from marketing HFSS food directly to children. Equally, in light of the UNGP, food and beverage companies should also consider the impact of their marketing policies and activities on adults’ rights to adequate food and health. The Special Rapporteurs’ recommendations could be taken as a first step to mapping this impact.

In light of this potential, in the next section I analyse a selection of companies’ human rights policies to establish whether major food and non-alcoholic beverage companies consider their potential impacts on the rights to adequate food, health and freedom from exploitation in relation to obesity and unhealthy food marketing. I am guided by Bilchitz’s “functional objection” which suggests that companies’ obligations should “track the nature and function that the entity has in our society”.103 Therefore, companies should not be completely free to determine “salient issues” and instead have responsibilities commensurate to their role and function in society. Thus, as the role of food companies is to provide individuals with access to food, it is reasonable to expect that companies should analyse their impact on the rights to adequate food and health as a corollary. My hypothesis is that companies will be slow to engage with the effect of their products on the rights to health and adequate food, as they will not wish to acknowledge the connection between their products and childhood obesity. Instead, companies are more likely to focus on the production process.

5.6.1 Companies’ Human Rights Policies

The review reveals that none of the companies reviewed consider the rights to health and adequate food as “salient human rights”. Instead, the companies surveyed focus on empowerment-centred rights and obligations, such as prohibition of child labour, land

102 Ibid.
It is surprising that food and beverages companies do not consider the direct link between producing and selling food, and individuals’ rights to adequate food and health. It seems unreasonable for large food companies to fail to acknowledge that the right to adequate food is a human right central to their impact. For instance, Mondelez International announces on its website: “Our dream is to create delicious moments of joy.” Therefore, it is submitted that there is a logical correlation between the companies’ professed aims and the right to adequate food. Further, given the link between unhealthful diet and obesity, and other non-communicable diseases, it is reasonable to expect that companies should consider the impact of their products on individuals’ and communities’ rights to health. Instead, the existing approach supports a consumer-focused paradigm, whereby consumers are primarily responsible for their health and food choices.

However, this is not to say that “big food” companies do not acknowledge obesity as a concern that relates to their business. Coca-Cola recognises obesity as a threat that may lead consumers to change purchasing habits, and legislatures to regulate labelling and marketing. Similarly, PepsiCo concedes that a public impression that it is not meeting its targets in advertising and reformulation could have an adverse effect on its business. It further recognises that it has a responsibility to address obesity and thereby supports active lifestyle initiatives. General Mills draws specific attention to the challenge of overweightedness and obesity, and claims to reformulate its products to support consumers. Therefore, companies recognise obesity as an economic, but not a human rights, concern.

Accordingly, a closer look shows that food and beverage companies do not avoid engagement with the nutritional aspects of food as well as health, but instead approach these characteristics from a non-human rights perspective. In the case of General Mills, it recognises “responsible” marketing as a product responsibility. Healthy and affordable food is considered to relate to food security, health and nutrition wellness, but not human rights. Accordingly, it reports that it has reduced the amount of salt and sugar in

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110 General Mills are more discrete but do mention that customer’s perceptions of nutritional content of the food poses a risk Mc Donald’s Corporation, “Annual Report,” (Washington DC: Mc Donald’s Corporation, 2015).
its products and supports community efforts to live a healthful life. Similarly, although Coca-Cola does not seem to consider the effect of its products as right to health or food issues, it does detail product reformulation in its separate “Sustainability” Report. “Well-being”, which is separated from human rights, includes taking measures to offer low calorie options, nutrition information, support physical activity and avoiding marketing directed at children under 12 years. PepsiCo also reports on product reformulation and portion size reduction in its Sustainability Report. As with its competitors, Mondelez International reports on “well-being” separately from human rights. It details efforts to introduce new (self-defined) “better for you” products and claims that 25 per cent of its sales come from “better for you” products. McDonald’s invests in and supports “making physical activity fun” by promoting physical activity through sponsorship of events at local and global level. Mars recognises obesity as a concern and pursues information provision, food reformulation and community outreach, such as cooking lessons.

Therefore, companies seem to be aware of their obligations to ensure adequate food and respect individuals’ right to health, although they do not phrase it as such. Instead, obesity has been reframed as a public relations exercise and thereby a marketing opportunity.

Nestlé recognises broader human rights concerns, having commissioned the Danish Institute for Human Rights to conduct an analysis of its human rights impact in eight distinct areas, including marketing practices. Nestlé defines the following, inter alia, as salient human rights issues: data protection and privacy; child labour; forced labour; land acquisition; access to water and sanitation; access to grievance mechanisms. Product safety (although not nutrition) is recognised as a human rights concern, suggesting that there could be scope for expanding this to include nutrition standards. The company further recognises employee health and well-being as a human rights responsibility – which could be expanded to consider consumers’ health to a further extent. Finally, Nestlé recognises water as a basic human right. As the right to water and the right to adequate food are closely connected, this suggests that recognising the right to adequate food is not beyond the realms of possibility with proper mapping of rights. This strong

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94 Coca-Cola, "2014/2015 Sustainability Report."
95 Ibid, 6.
96 PepsiCo, "Sustainability Report 2014 Performance with Purpose."
98 Ibid. Mc Donald’s, "The Good Business Report."
101 Ibid. 227.
102 Ibid. 250-3.
103 Ibid. 269.
104 Ibid. 138.
105 See further: General Assembly, Resolution adopted by the General Assembly on 28 July 2010, 64/292, The human right to water and sanitation. A/RES/64/292 3 August 2010; UN Committee on
commitment to human rights is a response to the criticism Nestlé received for aggressively marketing infant formula and interfering with the right to water through buying water permits. Therefore, businesses’ engagement with human rights is promoted by external pressure.

**Marketing Commitments**

The companies reviewed also make marketing commitments that are largely self-monitored. As mentioned in 2.5.2, the major food and beverage companies have agreed to a set of self-regulatory principles under the prism of the International Food and Beverage Alliance. Companies commit to only advertise products that meet nutritional criteria to children under 12 (meaning an audience profile of over 35 per cent children). This is independently monitored annually by Accenture. The Alliance has limitations as it only relates to children under 12 years, the audience threshold for advertising to be directed at children is high, and the companies set the nutritional criteria. Furthermore, compliance and effective monitoring is a concern. The 2015 compliance report claims 97 per cent television compliance – meaning over 14,000 examples of non-compliance were found. But 100 per cent print compliance was reported, although this was only in print directly targeting children under 12 – not print that they may actually read, such as teenage magazines. Only two instances of non-compliance on internet were found. However, the system of monitoring internet communications only relates to a sample of sites directly targeting children, meaning that a lot of advertising that children are exposed to is not included. If monitoring is difficult due to challenges of determining how targeting is defined, there are undoubtedly challenges with determining where advertising can be placed.

Furthermore, the companies have made their own more detailed commitments to food marketing to children. PepsiCo only advertises products that conform to its nutritional criteria to children under 12 years on television (programmes with an advertising profile of more than 35 per cent children), print and internet. Since 2012, Mondelez does not advertise directly to children aged under 12 years (audience profile of 35 per cent children). Instead, it advertises to parents and adults. Mars adopts the same strategy,

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The member companies are The Coca-Cola Company, Ferrero, General Mills, Grupo Bimbo, Kellogg’s, Mars, McDonald’s, Mondelez International, Nestlé, PepsiCo and Unilever. (www.ifballiance.org/about/members/)


Ibid, 4.


and advertises only to “gatekeepers” and individuals over 12. Coca-Cola also pledges not to advertise directly to children aged under 12, including avoiding using characters or celebrities “whose primary appeal” is to children under 12 years. It further claims to “respect and support” the role of parents and caregivers. General Mills only markets to children under 12 years where the products meet their own nutrition standards. McDonald’s also makes a number of marketing commitments including featuring only water, milk and juice as a drink in “Happy Meal” menu boards. Therefore, companies highlight the role of parents and claim to avoid direct advertising to children under 12 years. Yet, while proclaiming not to market to children, as we saw in 2.3, companies market indirectly and directly through sponsorship and other promotional exercises.

There are also companies that adopt more detailed principles in relation to human rights and food marketing to children. Nestlé does not direct marketing to children under six years, and only markets to children aged 6-12 years where products meet nutritional criteria. Since 2015, Nestlé applies EU Pledge nutritional criteria where available. Licensed characters and endorsements can only be used for products meeting the nutritional criteria. Mars does not use celebrities or licensed characters in marketing aimed at children, instead they are directed at gatekeepers. Further, it applies an audience profile of 25 per cent to communications directed at under twelves - making it more strict than other pledges. On the one hand, companies recognise children’s increased susceptibility to unhealthy food marketing and voluntarily limit their marketing activities. On the other hand, companies’ commitments must be transparent and effective. Otherwise companies can highlight their “responsible” behaviour and thereby benefit reputationally, without actually limiting their activities. For example, an independent assessment of Nestlé’s nutrient profiling system shows that it is more lenient than government approved standards. Similarly, the Access to Nutrition Index (a non-profit organisation) reports that Mars’ nutrient profiling only applies to its non-confectionary products, which make up a mere 5 per cent of its product portfolio. Furthermore, a 35 per cent target audience is an unreasonably high threshold as it allows a lot of advertising that does not specifically target children. Therefore, these

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129 Mars, "Global Marketing Code for Food, Chocolate, Confections and Gum."
133 Mc Donald’s, “The Good Business Report.”, 12.
135 Ibid., 2.
137 Ibid. 8.
commitments suggest that unless standards are imposed, companies will adopt weak commitments that they can use to promote their “responsible” conduct. This risks instrumentalising rights, which is expressly prohibited by the UNGP.\textsuperscript{140}

Companies’ failure to address rights that are central to their business model suggests an effectiveness gap in international human rights law. Although a number of companies restrict voluntarily their marketing, they design their own criteria, including nutrient profiles, leading to varied standards. Similarly, while companies claim to reformulate products, the nutritional value of processed foods remains an open question. Companies seem slow to address the wider impact of their business on the community and consumer’s health. Furthermore, the companies do not appear to engage fully with the Children’s Rights Principles. Although many have made global responsible marketing pledges, these do not ensure accessible child specific complaints mechanisms.

Failing to recognise the rights most central to the business is insufficient from a responsibility standpoint. Companies’ neglect of the rights to health and adequate food could be due partly to the less prominent status of socioeconomic rights as discussed in 3.3. Further, it may relate to the vagueness of the standards and the limited engagement of civil society with human rights. On the other hand, it may also be reluctance on the part of companies to acknowledge the potential conflicts between their products and human rights. These impacts may not be easy for companies that predominately sell HFSS food to address. It is significant, I submit, that companies see health and nutrition as corporate social responsibility, not a responsibility to respect the rights that are central to the impact of their products. This allows corporate actors to address their impact through beneficence, not fulfilment of responsibilities to their consumers defined in consultation with stakeholders.

\textbf{5.6.2 Conclusions on Companies’ Responsibilities}

While states remain the primary duty bearers under international human rights law, current standards suggest that companies should respect and support children’s rights. It is submitted that in order to ensure that companies effectively respect children’s rights, states and civil society need to take a more active role in underscoring companies’ responsibilities towards children’s rights to adequate food, health and freedom from exploitation. However, states such as the US which do not fully recognise socioeconomic rights are unlikely to take an active role in doing so.\textsuperscript{141} Furthermore, it requires greater interaction between the public health and human rights communities which encourages knowledge sharing. Although standards are emerging, the bridge between states and companies’ obligations/responsibilities in relation to marketing to children is ill-defined.

\textsuperscript{140} Business enterprises may undertake other commitments or activities to support and promote human rights, which may contribute to the enjoyment of rights. But this does not offset a failure to respect human rights throughout their operations. United Nations and Office of the High Commissioner for Human Rights, "Guiding Principles on Business and Human Rights : Implementing the United Nations "Protect, Respect and Remedy" Framework.", II.A.n.

\textsuperscript{141} Susan Ariel Aaronson, “"Re-Righting Business": John Ruggie and the Struggle to Develop International Human Rights Standards for Transnational Firms.”, 340.
Instead, as is currently the case, companies remain indirectly responsible, with states under obligations to regulate and limit companies’ actions that undermine rights. In the advent of globalisation, this has led to a fragmented legal landscape with different standards from state to state. While companies have non-binding responsibilities to all human rights, there is no effective monitoring or sanctions. A review of companies’ human rights pledges suggests that the leading food and beverage companies do not see the rights to health and food as “salient” human rights, although they go to the core of their products (and profits). Companies are more willing to reflect on labour conditions than their broader impact on their consumers.

Companies’ human rights impacts could be addressed by direct or indirect obligations. Direct obligations avoid dependency on individual nation states and the inevitable race to the bottom. However, direct obligations would require a new treaty or the emergence of customary international norms to bind companies to, at the minimum, respect human rights. This would mean establishing a new international body or court to oversee implementation and adjudicate complaints. At present there appears to be limited political will and resolve to shift from non-binding responsibilities. Although a number of initiatives seek to hold companies directly “responsible” for individual rights, these standards are liable to abuse where companies have a conflict of interest. It should be remembered that the UNGP ruled that companies cannot offset their negative human rights impacts through supporting other rights.

5.6.3 WHAT ROLE FOR FOOD COMPANIES IN OBESITY PREVENTION?

Is the food industry a valuable partner in obesity prevention or a powerful force that undermines regulation? In 2004, when Professor Kelly Brownell asked this question in his book, *Food Fight*, the food industry was still widely relied upon to address obesity. Brownell warned against the clear conflict of interest involving the food industry’s close relationship with government bodies that set nutrition guidelines. Over ten years later, Dr Marion Nestle states in relation to soda companies:

Their strategies are astonishingly comprehensive. No community group is too inconsequential to receive a grant from Coke or Pepsi corporate foundations. No city contemplating a soda tax is too small or too poor to be the target of a massive and lavishly funded counteroffensive.

Nestle argues that soda companies’ tactics are akin to those of tobacco companies: they profess devotion to health and well-being, divert attention to physical activity, promote

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better for you products and create coalitions to reframe their message. Accordingly, increasing scepticism and concern has emerged regarding the appropriate role of the food industry in preventing obesity.

At the same time, international bodies view the industry as partners. WHO encourages partnerships with the private sector “where appropriate”. The WHA Resolution adopting the Global Strategy recommends co-operation with the private sector “while ensuring avoidance of potential conflicts of interest”. The European Charter on Counteracting Obesity advocates that “public/private partnerships with a public health rationale and shared specified public health objectives should be encouraged”. The WHO Global Co-ordination mechanism is headed by states but seeks to include businesses; so far it has failed to adopt a strategy on mitigating and balancing conflicts of interest. The European Commission also encourages public/private partnerships in addressing obesity. The absence of clear guidance on how to manage conflicts of interest between the food industry and public health objectives is of concern.

Accordingly, a more coherent approach to managing conflicts of interest between companies that profit from selling unhealthy food, and states which should seek to ensure the public good is necessary. There are multiple views as it stands. Hawkes recommends that the partnerships with the food industry are most likely to be effective where both parties stand to gain, and where the partnership does not obstruct the broader strategy. She suggests that PPP should address a clear goal, map the parties’ interests and be monitored. Stuckler and Nestle, on the other hand, argue that there is an inherent conflict of interest as any partnership must create a profit for the food industry and unhealthy products are more profitable. Therefore there is little incentive for companies to shift product category by choice. This approach would mirror the FCTC which prohibits tobacco companies’ involvement as a partner in tobacco control. In a sea of neo-liberal policies, where researchers and international institutions see their budgets being cut, they are likely to rely more and more on industry for funding. Therefore, it is necessary for appropriate rules of engagement to be developed.

146 Ibid., 107-113.
148 WHA57.17 Global strategy on diet, physical activity and health 5(6).
149 World Health Organisation Europe, “European Charter on Counteracting Obesity.”, 2.4.3.
153 Ibid., 21-2.
A Role for Human Rights?

Given the increasingly documented role of the food lobby it seems logical that if companies want a seat at the table in negotiations, they must also be willing to undertake real obligations. This could be achieved through effectively incorporating children’s rights in self-regulation. As states remain the primary duty bearers, they must adopt a central role in shaping and overseeing this process. States can adopt national action plans on implementing the UNGP and identify areas where legislation will be necessary to ensure compliance, such as where conflict of interests between companies and the public may render self-regulation inappropriate. For example, Rivera suggests that the EU should encourage states to harmonise their laws with the UNGP and to impose an obligation on companies to respect human rights in all jurisdictions.155

While existing norms remain legally unenforceable without domestic incorporation, they could be harnessed by civil society and intergovernmental organisations to provide normative guidance. Further, as the legal norms are currently malleable and unfixed, states remain central. Accordingly, there is a need for clear and coherent indicators on food and beverage companies’ responsibilities in relation to HFSS food marketing. Indicators are an important means of accountability: structural indicators assess the legal guarantees afforded to the right, process indicators establish to what extent action has been taken, and outcome indicators focus on the results achieved.156 Riedel, a former CESC member, recommends the IBSA process: indicators, nationally set benchmarks, scoping and assessments by CESC.157 Benchmarks enable states to prioritise, with supervision, to avoid overly lax standards.158 Compliance could be monitored through examining the extent to which states meet indicators in relation to different types of resources such as human, technological, information, natural and financial.159

There are some emerging practices that could provide guidance. For example, in relation to the right to water, it has been asserted that companies must not over-consume or deplete community water. They should ensure that individuals have access to “safe, sufficient, acceptable, accessible and affordable water”.160 As already pointed out, Nestlé considers its impact on the right to water in its human rights policy. PepsiCo also recognises the right to water, including communities’ rights to physical acceptability and

158 Riedel, Giacca, and Golay, “The Development of Economic, Social, and Cultural Rights in International Law.”, 27.
affordability. Therefore, these standards suggest that companies should consider their impact on the communities within which they operate.

Another emerging example is the dairy company Arla, which evaluates its potential impact on new markets. Following complaints, Arla decided to engage in human rights impact assessments in Nigeria and Senegal to establish the extent to which supplying powdered milk in those markets would affect local farmers. The report centred on the company’s impact on farmers’ rights to an adequate standard of living, not the public’s right to food. However, it shows potential for greater consideration of companies’ broader impact on communities. Accordingly, a good faith attempt on the part of companies to respect the rights to food and health could require them to assess communities’ rights and current nutritional needs before entering new markets. The entry of processed food into developing countries can result in the collapse of local food sellers.

Could human rights provide a forum for resolving these conflicts? Human rights are inalienable, universal norms. Ideally, states should regulate companies to ensure that the rights to health and adequate food are protected. Companies should respect human rights and avoid negative impacts on rights to health and adequate food. However, our world underlines the chasm between aspiration and implementation. The reality of states’ limited engagement with socioeconomic rights and companies’ soft responsibilities means that human rights has been limited in mitigating these conflicts. In the case of companies, norms are voluntary, suggesting that rights inalienability is undermined. However, some momentum has emerged - the Special Rapporteur on the Right to Adequate Food called recently for internationally agreed guidelines on public/private partnership and independent monitoring of accountability.

5.7 Conclusion

This Chapter firstly established the scope of children’s rights to information and play in relation to HFSS food marketing. It asserted that these rights do not prohibit states from regulating HFSS food marketing. Instead, they impose limits on the scope of the state’s discretion. Accordingly, states should not arbitrarily limit children’s access to media and beneficial information. Still, states have obligations to implement limitations on companies’ abilities to market HFSS food to children in order to protect their rights. Accordingly, it was asserted that states should pursue the highest attainable standards of rights-fulfilment within available resources. However, limited resources do not justify states reneging on their obligations to ensure children’s rights to freedom from

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163 Stuckler et al., "Manufacturing Epidemics: The Role of Global Producers in Increased Consumption of Unhealthy Commodities Including Processed Foods, Alcohol, and Tobacco.", 2.
164 Special Rapporteur on the right to adequate food, "Interim Report of the Special Rapporteur on the Right to Food.", para 99(e).
obesogenic marketing, given that limited resources are incurred. Further, the need for both legal and political accountability was underscored. It was also suggested that states should apply marketing rules with extra-territorial effect. States’ obligations do not conflict with parental responsibilities and instead support parents in guiding their children. Furthermore, greater engagement by the CRC Committee with WHO standards was recommended in order to support children’s right to freedom from obesogenic marketing.

Finally, it was assessed that food and beverage companies do not currently consider children’s rights to health and adequate food as their responsibilities. Instead, companies focus on autonomy centred-rights. Food and beverage companies’ appropriate role in addressing obesity remains in need of better definition to avoid conflicts of interests. This could be pursued through greater analysis and engagement with their human rights responsibilities, including through indicators.
Chapter 6
Statutory and Industry Responses to HFSS Marketing

The previous chapters have argued that states have obligations to limit HFSS food marketing to children, while companies should respect children’s rights. However, that analysis does not reveal the extent to which states give effect to their obligations in practice, including by pursuing an enabling environment and empowerment. It is submitted that unless children’s rights are internalised and reflected in domestic law, their impact will be limited.

Therefore, this chapter explores regulations of HFSS food marketing in the UK, Ireland, Denmark and Sweden. The extent to which these domestic limitations comply with WHO recommendations and the children’s rights approach is evaluated. These regulations were selected as they have been regarded as among the most stringent in the past. However, international studies have shown that no state or company has fully implemented the WHO Recommendations. Although some states have adopted regulations that limit marketing to children generally, a minority specifically regulate unhealthy food. The majority of states have taken no action, with self-regulation by industry the main approach. Accordingly, some have suggested that children’s rights provide a justification for adopting legislation (or in certain cases stronger legislation), which can encourage states to limit HFSS food marketing. However, analyses of domestic systems in light of children’s rights are limited.

6.1 Outline
The aim of this chapter is to evaluate selected domestic regulations in light of WHO and CRC standards. The framework for evaluation is firstly outlined with regard to the WHO recommendations and the children’s rights approach discussed in the previous two chapters. Subsequently, an introduction to “better” regulation is provided. As this is a prevalent regulatory ethos in the case study countries, it may limit the potential for transformative children’s rights-centred regulations. It is suggested, following emerging

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1 The justification for choosing these case studies is outlined in 1.10.3.
3 Vivica I Kraak, “Progress Achieved in Restricting the Marketing of High-Fat, Sugary and Salty Food and Beverage Products to Children.”
6 Handsley et al., “A Children’s Rights Perspective on Food Advertising to Children.”
practice, that regulatory strategies for children should be reinterpreted to include children's rights indicators. Three regulatory strategies that reflect the central methods employed in the case studies are also introduced: command and control, disclosure and self-regulation. Furthermore, an introduction to the challenges and distinctions between regulating broadcast and non-broadcast media is provided to support the forthcoming analysis. The overarching legal and regulatory frameworks in the EU, the UK, Ireland, Denmark and Sweden are then discussed. These rules are subsequently analysed in light of the WHO recommendations and children's rights.

6.2 FRAMEWORK FOR EVALUATING DOMESTIC LIMITATIONS

The WHO recommendations and children's rights can serve as a mutually enforcing framework to ensure the common aim of children’s right to freedom from HFSS food marketing. Both the WHO recommendations and children's rights highlight that certain techniques are inappropriate due to their power over children and their potential for exploitation. Accordingly, although WHO recommendations were not drafted with children's rights specifically in mind, a number of basic principles have emerged from the analysis presented in this thesis.

Firstly, states’ obligations under the right to health and adequate food mean that states should take a leadership role in implementing, monitoring and enforcing limitations on HFSS food marketing. Similarly, WHO recommendations require states to set clear definitions and act as key stakeholders in policy development, implementation, monitoring and evaluation. Through limiting the impact of HFSS food marketing, states can create an enabling environment for rights’ fulfilment. The analysis in 5.4.4 asserted that children and their families should be protected and supported through information and awareness raising, along with imposing limitations on corporate conduct. Therefore, while state regulation is not mandated, both approaches highlight that states have obligations even where self-regulation is adopted for political, resource or constitutional reasons.

Secondly, states’ obligations to ensure socioeconomic rights extend beyond domestic borders and include extra-territorial obligations to assist states with limited resources and limit companies’ conduct extra-territorially. Equally, WHO recommendations encourage Member States to co-operate on reducing the impact of cross-border marketing. Thirdly, children’s rights highlight accountability, through monitoring and evaluating the enjoyment of rights, the effectiveness of measures to ensure rights, and facilitating accessible complaints. WHO recommendations also suggest that policies must include monitoring systems to ensure compliance, and evaluate the impact and

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8 Ibid, Recommendation 8.
effectiveness of the policy. Accordingly, children should be aware of their rights and duty bearers should be informed of their obligations in order to promote empowerment.

Further, the children’s rights approach additionally suggests that other aspects should be considered, including whether the rules aim to fulfil children’s rights. The right to adequate food indicates that nutrient profiles should distinguish between healthy and unhealthy food to empower the population to pursue a healthful diet. It further implies that states should protect individuals’ rights to culturally adequate food. The extent to which children’s rights principles are reflected in the texts of the rules and the manner in which complaints are handled should be also considered. In light of the analysis in the previous chapters, I suggest the following as non-exhaustive indicators for evaluating the extent to which children’s rights are respected in rules and regulations:

*Table V: Proposed Children’s Rights Indicators*

<table>
<thead>
<tr>
<th>Rights basis</th>
<th>Indicator</th>
</tr>
</thead>
<tbody>
<tr>
<td>Health/ Food</td>
<td>Is the state a stakeholder in the drafting of the rules/ monitoring &amp; enforcement of complaints?</td>
</tr>
<tr>
<td>Health/ Food</td>
<td>Do states pursue their obligations in the spirit of international cooperation?</td>
</tr>
<tr>
<td>Participation</td>
<td>Were children consulted during the drafting stage/ monitoring?</td>
</tr>
<tr>
<td>Accountability</td>
<td>Is there a child friendly complaints mechanism available? Are children provided with information and advice? Are children aware of their rights/ complaints? Are sanctions offered for breaches of children’s rights?</td>
</tr>
<tr>
<td>Food</td>
<td>Are the rules accompanied by an adequate nutrition profile?</td>
</tr>
<tr>
<td>Food</td>
<td>To what extent is food diversity in marketing pursued?</td>
</tr>
<tr>
<td>Information/ Health</td>
<td>Is there provision for media literacy?</td>
</tr>
<tr>
<td>Best interests</td>
<td>Is regard had for children’s best interests when drafting &amp; deciding complaints?</td>
</tr>
<tr>
<td>Gender</td>
<td>Is there consideration of media’s differential effect on girls/ boys?</td>
</tr>
<tr>
<td>Dignity</td>
<td>Are children recognised as rights holders?</td>
</tr>
<tr>
<td>Vulnerability</td>
<td>Are children’s particular needs considered?</td>
</tr>
<tr>
<td>Family unity</td>
<td>Are parents/ families supported by the rules?</td>
</tr>
</tbody>
</table>

While children’s rights offer broader principles and standards, WHO recommendations bring specificity. As we have seen in 2.5.1, they advise that the policy aim of the rules should be to reduce the impact of HFSS food marketing on children, while the objective should be to reduce both children’s exposure to and the power of HFSS food marketing. The WHO Implementing Framework further highlights a number of pertinent

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9 Ibid, Recommendation 10, 11.
10 Ibid, Recommendations 1, 2.
dimensions when drafting legislation to address these aims, in light of which I analyse limitations: (1) the age used to define children, (2) how the rules determine that advertising targets children, (3) how food is defined as healthy/unhealthy, (4) the media covered: broadcast and non-broadcast (5) and the techniques employed: “pester power”, licensed or brand characters, celebrities, product placement, health/nutrition claims, gifts and discounts, sponsorship, social media and advergames.

6.3 **Regulatory strategies**

There are multiple means of regulating corporate behaviour. This section is not intended to be exhaustive but to introduce the main regulatory concepts adopted in food marketing restrictions in Europe. Further, regulatory strategies in the relevant states should be understood in light of the “Better Regulation” agenda that shapes how these states consider, draft and review regulation. The main strategies applied by states to regulate HFSS food marketing are then introduced through the lens of children’s rights.

6.3.1 **“Better” regulation**

Better regulation has become a dominant concept in European regulation, meaning that states’ regulatory decisions should be interpreted in light of this broader agenda. Better regulation is a US transplant that aims at increasing regulatory efficiency and competitiveness. In contrast to the “deregulatory” agenda, better regulation pursues more effective regulation through testing regulation against various tools. According to the European Commission “better regulation will ensure that measures are evidence-based, well designed and deliver tangible and sustainable benefits for citizens, business and society as a whole”. Therefore, better regulation does not seek to avoid regulation, but mandates that decisions to regulate must be transparent, balanced and justified, and

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b Ibid, How is Marketing to Children Defined?, section 2.1.

c Ibid, Which foods to include or exclude?, section 3.4.3.

d Ibid, Communication channels and marketing techniques, section 3.4.2.

e As mentioned in the introduction, there are a number of other grounds upon which a state could regulate unhealthy food marketing, but these will be neglected in this discussion: see further: Robert Baldwin, Cave, Martin and Lodge, Martin, “Why Regulate?,” in Understanding Regulation: Theory, Strategy, and Practice, ed. Robert Baldwin, Cave, Martin and Lodge, Martin (UK: Oxford, 2011).


g Radaelli, 459.


i European Commission, “Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Better Regulation for Better Results - an Eu Agenda,” (Strasbourg: European Commission, 2015).
regulation should be evidence based and legitimate.\textsuperscript{20} Better regulation is often pursued through combining regulatory impact assessments, consultation, considering regulatory alternatives, administrative simplification and evaluations of existing policies and laws.\textsuperscript{21}

The case study countries scrutinised below have all endorsed better regulation, although the manner in which regulation is adopted varies among states.\textsuperscript{22} In the EU, better regulation seeks to be more open and transparent, include citizen consultation, ensure that EU interventions are evidence based, consequences are understood, and regulatory burdens are minimal.\textsuperscript{23} When legislating, the European Commission undertakes impact assessments whereby the relevant Directorate General gathers information, consults with stakeholders, and engages in a cost-benefit, cost effectiveness or multi-criteria analysis.\textsuperscript{24} The United Kingdom is a central proponent of better regulation and has supported the EU in pursuing this approach.\textsuperscript{25} In the UK, regulatory principles are enshrined in law: regulation should be transparent, accountable, proportionate and consistent, and targeted to where regulation is needed.\textsuperscript{26} Ireland has actively engaged with better regulation since 2014, and recommends six principles in regulation: necessity, transparency, constituency, accountability, effectiveness and proportionality.\textsuperscript{27} Sweden also subscribes to the better regulation agenda, including through establishing a Better Regulation Council (Regelrådet). However, the focus of better regulation in Sweden is economic in nature: the council seeks to ease the regulatory burden on businesses\textsuperscript{28} and regulatory impact assessment focuses on economic costs, not broader social impacts.\textsuperscript{29} Finally, Denmark endorses better regulation, including \textit{ex-ante} impact assessments and consultations.\textsuperscript{30} All the states pursue forms of regulatory impact assessments and consultation, although these vary in their scope and legal status. This introduction gives a sense of how political decisions to regulate HFSS food marketing are influenced by specific requirements and an “efficiency ethos”.

However, while better regulation is endorsed at regional and state level, the quality of the tools of better regulation, i.e. consultation and regulatory impact assessments, are not free from criticism. Impact assessments may overstate the costs of regulation and the

\textsuperscript{20} Radaelli, "Better Regulation in Europe: Between Public Management and Regulatory Reform.", 639.
\textsuperscript{21} Robert Baldwin, "Is Better Regulation Smarter Regulation?," \textit{Public Law Autumn} (2005), 489.
\textsuperscript{22} Radaelli, "Better Regulation in Europe: Between Public Management and Regulatory Reform.", 642.
\textsuperscript{23} European Commission, "Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Better Regulation for Better Results - an Eu Agenda."
\textsuperscript{25} OECD, "Better Regulation in Europe: United Kingdom," (OECD, 2010), 14.
\textsuperscript{26} Legislative and Regulatory Reform Act 2006 Chapter 51, section 2(3).
\textsuperscript{27} Department of Taoiseach, White Paper Regulating Better in Ireland, 2004
\textsuperscript{29} OECD, "Better Regulation in Europe: Sweden," (OECD, 2010), 16
\textsuperscript{30} “Better Regulation in Europe: Denmark,” (OECD, 2010), 19-20.
impact of the phenomenon to be regulated. For example, companies may exaggerate their burden, and public interest groups overlay the danger. Further, impact assessments may be sporadic and not engage adequately with all stakeholders. Furthermore, they may slow regulation, leading to harm in the meantime. Furthermore, where assessments are not mandatory, results may arbitrarily limit political discretion. Although many states engage in impact assessments ex-ante, few appear to undertake evaluations ex-post, meaning that the actual impact of the regulation remains unknown. Furthermore, consultation may be dominated by non-representative members of the population, such as industry interests. Without adequate consultation, better regulation may focus on economic impacts that are easier to quantify, and exclude individuals’ rights and states’ obligations. With its emphasis on efficiency, better regulation risks marginalising children’s rights as children are not powerful economic actors.

6.3.2 Better Children’s Rights Regulation?

Yet, regulatory impact assessments do not have to focus on economic interests alone and can also include an assessment of the impact of proposed regulation on children’s rights and an ex-post evaluation. The CRC Committee recommends child-rights impact assessments (CRIA) to predict the impact of any proposed law, policy or budgetary allocation on children and the enjoyment of their rights, and child rights impact evaluation to measure the effect of implementation.

The aim of CRIAs is to give power and a voice to children. It is easy to neglect children in decision making as they lack power – they cannot vote and are not represented in parliament. CRIAs offer a means of taking children’s rights into account when devising laws and policies that impact on children. They can operationalise states’ obligation to consider the child’s best interests in decision making. Assessments should consider the impact of measures on children generally as well as whether there will be a differential impact on certain categories of children. The impact of a proposed law, policy or budget on children’s rights is measured and their actual impact is subsequently evaluated.

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33 These claims have been made in relation to Ireland: EPS Consulting, "Smart Regulation: A Driver of Irish Economic Recovery," (Dublin: EPS Consulting, 2014).
34 Radaelli, "Better Regulation in Europe: Between Public Management and Regulatory Reform.", 477.
35 "Ibid., 513.
36 Committee on the Rights of the Child, "General Comment No. 14: The Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration "., para 35.
38 Committee on the Rights of the Child, "General Comment No. 16, State Obligations Regarding the Impact of the Business Sector on Children’s Rights.", para 83.
39 "General Comment No. 5: General Measures of Implementation of the Convention on the Rights of the Child.", para 45.
Therefore, CRIAs can transform “better” regulation into “better” children’s rights regulation. Accordingly, there is a clear basis for evaluating the regulations below in terms of children’s rights.

Further, children’s views should be heard as part of CRIAs in line with Article 12 CRC.40 The CRC Committee proposes five steps for enabling children’s right to be heard: 1) preparation, through informing the child of her right41 2) creating an “enabling and encouraging” environment at the hearing42 3) assessing the capacity of the child to form her own views43 4) feedback to the child on the impact of her views and the decision reached44 5) complaint procedures and remedies where the right to be heard is violated.45 However, under the CRC children are not automatically the decision makers; instead the weight of children’s views is subject to their capacity to express views in a “reasonable and independent manner”46. This seems to be quite a high threshold. Article 12 prevents a determination of the child’s best interests being based solely on adults’ views. Thus, unlike traditional welfarist models, children have a role to play in determining their best interests.47 Therefore,

Children are no longer envisaged as mere recipients of services or beneficiaries of protective measures. Rather, they are subjects of rights and participants in actions affecting them. They need to be respected in their individuality and in their evolving capacity to influence decisions relevant to their lives.48

Therefore, when considering regulation in line with children’s rights, states should gather children’s views on the need for regulation and on the issues it should address.

Children’s rights impact assessments are undertaken in a small number of states.49 As already noted, the European Commission also recommends that a children’s rights perspective “must be taken into account in all EU measures affecting children.”50 However, to date this has been limited. Garde suggests that the European Commission

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40 “General Comment No. 14: The Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration.”, para 21.
41 “General Comment No. 12: The Right of the Child to Be Heard.”, para. 41.
42 Ibid., para. 42.
43 Ibid., para. 44.
44 Ibid., para. 45.
46 Ibid., para 30.
50 European Commission, “Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, an EU Agenda for the Rights of the Child.”
should include greater regard for children’s health and best interests in impact assessments, and strike a balance between economic considerations and children’s rights. Therefore, EU impact assessments should not only address economic concerns, but also consider children’s rights and views on issues affecting them. As we will see in the forthcoming analysis, however, children’s rights are given limited consideration in existing marketing laws.

A child-focused approach has the potential to ensure that children’s perspectives and interests are included in regulation. It offers the possibility for regulation to place children at the apex of decision making affecting them. It does not necessarily need to replace existing regulatory strategies, but calls on states to take their obligations towards children's rights seriously when regulating. Accordingly, it is encouraging that CRIAs have been endorsed at EU and Member State level. Further, there is scope for expanding assessment to ensure that they apply to broader laws affecting children, not only those specifically child-focused. In the next section, the different types of regulation that can be used to limit HFSS food marketing are introduced and analysed in light of children’s rights.

6.3.3 COMMAND AND CONTROL REGULATION

Firstly, the “command and control” approach follows classic legal theory, whereby the state exercises control over private behaviour through imposing standards backed by sanction. Given that command and control regulation is state driven, it can offer democratic legitimacy and accountability. On the other hand, command and control approaches are subject to criticism as they may result in over-regulation, intrude on managerial discretion or be framed too generally to produce the necessary effect. Furthermore, state enforcement may prove expensive and produce uncertain results.

From a children’s rights perspective, however, it offers a means by which the state can discharge its legal obligations to children. Command and control is a protective method as the state delineates certain content or techniques as inappropriate and compels companies to comply. But, protectionist approaches should also be balanced with children’s participatory rights, through including children’s perspectives on the risks and benefits of the particular forms of marketing. Regulation can thus avoid adult-focused definitions of harm and infringing on competing rights, such as the right to information or play. Therefore, command and control should not be used as a blunt tool to protect

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children from ill-defined harm. Instead, following a children’s rights approach it should pursue rights respecting aims and objectives, contribute to an enabling environment and empowerment, respect the voice of the child and consider best interests as a determinative concept.

6.3.4 Regulation through Disclosure

Secondly, regulation through disclosure offers a less restrictive regulatory approach whereby producers must make information or warnings public for the benefit of consumers, and also exclude misleading information. An information failure can occur where the consumer lacks the cognitive abilities to digest food advertising or information on nutritional implications to empower her to make rational choices. Disclosure seeks to rebalance the market through enabling consumers to make rational choices. The approach is predicated on the assumption that consumers are rational; they will read and understand information and act upon it. Disclosure has become a dominant regulatory technique in the EU, with even truthful information limited in the case of tobacco. Disclosure suggests fewer costs for the state, although the costs for the companies of producing information may be transferred to the consumer. Further, the state should provide oversight to ensure that the information is adequate, which will incur public cost. While marketing disclosures have been typically related to television and front of packaging labelling, they can also be applied to digital advertising.

In contrast to command and control approaches, disclosure focuses primarily on empowerment, not prohibition. On the one hand, information has already been highlighted as important to a children's rights approach, and should be clear and accessible to children and adults. On the other hand, as recognised by the Special Rapporteur on the right to health, information on its own appears insufficient to achieving a genuine power shift and empowering children and their parents. Disclosure alone is problematic in light of research demonstrating that consumers often do not make choices in their long-term best interests, particularly in the case of health.

The size and clarity of the message displayed are also important factors in the consumer’s

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58 Robert Baldwin, “Regulatory Strategies.”, 123.
ability to process information. Further, state information campaigns cannot compete with multinational food companies' resources to promote unhealthful products. Accordingly, states and companies should not hide behind information provision, but instead ensure children's rights in the spirit of the CRC. Information provision is only one step in fully realising children's rights to health, adequate food and freedom from exploitation.

6.3.5 SELF-REGULATION

Finally, self-regulation is a contentious approach to limiting corporate behaviour, whereby groups of companies, usually within an industry, regulate their own behaviour. Self-regulation tends to favour resolving bad corporate behaviour through co-operation, not punitive sanctions. Self-regulation has a number of meanings as there is a variety of forms. Bryden et al. suggest that voluntary agreements can be classified into three categories: (1) completely voluntary without sanctions; (2) voluntary with the threat of future regulation should the scheme be ineffective; or (3) voluntary agreements in conjunction with regulations (co-regulation). Therefore, self-regulation has multiple meanings.

Self-regulation has emerged as a prominent regulatory tool as it offers benefits to both states and companies. Governments appear to engage in voluntary agreements as they are cheaper and faster than legislation, and may protect economic competitiveness. For one, self-regulation pushes the costs of regulation from the state to companies. For example, the UK Advertising Standards Authority (ASA) funds its code through a 2 per cent levy on members. Similarly, participating in the EU Pledge can cost companies about €560,000 over five years. Therefore, states with limited resources may find self-regulation more acceptable. Furthermore, partnerships with industries can promote

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64 Black, 'Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a 'Post Regulatory' World.'
66 Self-regulation has been encouraged in Council Of Europe Committee Of Ministers, "Recommendation 8 of the Committee of Ministers to Member States on Self-Regulation Concerning Cyber Content (Self-Regulation and User Protection against Illegal or Harmful Content on New Communications and Information Services)," (Council Of Europe, 2001).
in institutional change as companies develop a greater stake in how the rules operate. It means that the industries which know the most about the issue set the standards. Naturally, while this could allow for effective regulation, it is also susceptible to abuse as companies may avoid tackling their most profitable techniques. Self-regulation may also avoid legal challenges, which generally require a limitation on a right or freedom by a state body to amount to a breach. At the same time, this can lead to a lack of accountability and legal scrutiny of decision making.

Businesses may engage with self-regulation to avoid legislation and sanctions, or for marketing and reputational purposes. Companies can boost their image and avoid the imposition of state regulation over which they have less control. Facing increasing calls for government regulation, the food industry has adopted self-regulation in a number of jurisdictions, predominately in the developed world. Self-regulation is highest in Europe, Australia, Brazil and North America, where pressure from government and civil society, and lawsuits, are highest. Action is most limited in developing countries with little advocacy. Within the WHO European region, food marketing policies are most prevalent in the EU and neighbouring countries. Therefore, political and social pressure is a significant factor in motivating companies to limit their activities. Accordingly, it is important that standards actively delimit companies.

Despite these putative benefits, self-regulatory systems are also criticised as inadequate when compared to command and control regulation. Public health professionals tend to be sceptical about industry initiatives, in light of experiences with the tobacco industry. Self-regulation lacks democratic accountability as standards are set by private industry, not state appointed officials who have obligations to the public. When companies adopt their own standards, they have the potential to boost reputational and political benefits. Although companies may follow the letter of their pledges, they often set standards lower than in legislation. For example, as we have seen, no company pledges to prohibit

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69 Black, “Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a ‘Post Regulator’ World.”
71 Bryden et al., "Voluntary Agreements between Government and Business - a Scoping Review of the Literature with Specific Reference to the Public Health Responsibility Deal.”
74 Hawkes and Lobstein, "Regulating the Commercial Promotion of Food to Children: A Survey of Actions Worldwide.”
75 For example, Staiano and Calvert, "Digital Gaming and Pediatric Obesity: At the Intersection of Science and Social Policy.”
76 Bryden et al., "Voluntary Agreements between Government and Business - a Scoping Review of the Literature with Specific Reference to the Public Health Responsibility Deal.”
77 Jensen and Ronit, "The Eu Pledge for Responsible Marketing of Food and Beverages to Children: Implementation in Food Companies.”

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marketing to children aged 14-18, while 18 years is often a cut-off point in domestic legislation. Therefore, it is important that self-regulatory standards are adequately robust in their aims and objectives to ensure that companies do not benefit unfairly.

In light of the criticisms of self-regulation, a number of studies assess its effectiveness and suggest factors that may contribute to public health success. Bryden et al. conclude that the evidence on voluntary agreements is too limited to claim that they are as effective as legislation. They suggest that self-regulation requires realistic, clear targets, as well as sanctions and independent monitoring. Without sanctions, businesses "may gain the benefits of participation whilst making little effort." Thereby, self-regulation appears to be more successful when the objectives are clear. Hawes and Lobstein suggest that self-regulation can be effective where governments set targets for industry and ensure that these are met. Gostin adds that good governance should be honest, transparent, deliberative, efficient and accountable. This requires the free flow of information and public participation in decision-making. Sharma and Brownell observe that self-regulation may become a public health failure where leading companies do not take part, standards are weak and do not apply globally, where there is an absence of transparency and objective scientific input, and a lack of benchmarks and objective evaluation leads to ambiguity. These benchmarks should be considered when evaluating existing self-regulations.

Given the subject of this thesis, it must be asked whether self-regulation is capable of adequately respecting children's rights. On the one hand, self-regulation causes concern where it may transfer states' obligations to private industry. As states are the primary duty bearers, this is problematic if the state does not maintain ownership of the process. Accordingly, companies may fail to adequately enshrine children's rights despite their responsibilities. Thornley et al. analyse self-regulation in New Zealand from the perspective of the CRC and conclude that children's rights are neglected. They find that the sole rights focus is on children's right to receive information, while other competing rights are side-lined. On the other hand, where self-regulation meets the obligations

78 Vivica I Kraak, "Progress Achieved in Restricting the Marketing of High-Fat, Sugary and Salty Food and Beverage Products to Children.", 544.
79 Bryden et al., "Voluntary Agreements between Government and Business - a Scoping Review of the Literature with Specific Reference to the Public Health Responsibility Deal.", 191.
80 Ibid, 195.
82 Hawes and Lobstein, "Regulating the Commercial Promotion of Food to Children: A Survey of Actions Worldwide.", 93.
83 Gostin, Global Health Law., 73.
84 Ibid, 75.
imposed by a children’s rights approach, it could be a preliminarily approach for states with limited resources. The CRC recognises self-regulation as a legitimate strategy under Article 17, as discussed in 0. However, as highlighted by the Special Rapporteurs, states should not transfer their obligations to companies, as they are primarily accountable. Therefore, states must monitor children’s rights, regardless of the regulatory strategy. Self-regulation can respect children’s rights and pursue public health where it meets qualitative standards.

6.3.6 Regulating Media Content

In 2.2 it was argued that companies use multiple media to market HFSS food to children and, therefore, regulation must extend beyond limiting broadcast advertising. However, different regulatory structures are in place depending on whether marketing occurs on television/radio, on billboards, leaflets and over the internet. Broadcast media have traditionally been strictly licensed and regulated by a specialist agency created by the state. Other marketing outlets, such as print advertising, are often regulated by domestic consumer protection or market practices legislation which is overseen by a consumer ombudsman. Outdoor advertising is generally controlled by local authorities. However, the internet is by its nature global and not bound to a single national regulatory body. Further, the internet was originally created as a space free from state regulation. It is now governed by a non-binding organisation called Internet Governance Forum, while many oppose state controlled internet regulation.

Although, the difficulties in regulating the internet - a globalised, borderless medium - are well recognised. Discussions on internet governance recognise, further, that the risks posed by the internet must be balanced with the opportunities. Three challenges in regulating the internet in relation to children’s rights have been identified: the difficulty in defining harmful content, the global nature of the internet and the ineffectiveness of age verification as a tool for protecting children. Unlike broadcast media, while harmful content may affect children in one jurisdiction, it is often hosted in other parts of the world. It can be difficult to determine the individual responsible for making the material

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87 Kleinsteuber, “The Internet between Regulation and Governance.”, 62-3.
89 For instance, in the UK, see: Highways Act 1980 (as amended), s. 115E (1)(b)(iii).
90 Kleinsteuber, "The Internet between Regulation and Governance.”, 74.
92 Marsden, "Co- and Self-Regulation in European Media and Internet Sectors: The Results of Oxford University’s Study "; Yaman Akdeniz, "Who Watches the Watchmen? The Role of Filtering Software in Internet Content Regulation," Ibid.
95 Packard, Digital Media Law, 89.
Due to its porous nature, effective internet regulation is likely to be best achieved by global agreements, which should, inter alia, mainstream children’s rights. Livingstone and O’Neill thereby recommend a global body with responsibility to enforce children’s rights in the digital environment.

In light of these regulatory challenges, a number of alternatives have been developed that centre on private action, such as advert blockers or age limits for accessing content. For example, filtering software offers parents the opportunity to block their children from accessing certain websites or stopping certain advertisements appearing based on keywords. A children's rights approach recognises that supporting and empowering children requires that they become effective and nuanced users of digital media. As discussed in 5.3, blanket restrictions based on broad classifications of harm should be avoided. Further, a closer look suggests that such approaches are often ineffective, limit freedom of expression and are easily bypassed. For instance, informative content is often erroneously blocked. Children’s abilities to gain access to beneficial information should not be undermined in light of Article 13 and 17 CRC. Therefore, while blockers and filters can empower parents to protect their children from harm, they are insufficient and laden with limitations.

Finally, while children are often recognised as vulnerable consumers who require extra protection, children’s rights are seldom the primary focus of marketing regulations. Instead, laws and self-regulatory codes are usually designed with both business and public interests in mind. In some jurisdictions, marketing law originally focused on the interests of other businesses, with consumer interests emerging later. Competitors benefit from clear laws that limit unfair advantage, while consumers are provided with fair and accurate information to enable them to make balanced purchase choices. Misleading advertising risks distorting the market as consumers may decide to buy products based on false expectations. This can result in companies that engage in unethical practices benefiting at the expense of those that abide by established norms of truthfulness. Therefore, marketing law mandates that an appropriate balance is achieved between public and private interests, with limited regard for children as rights holders.

97 Livingstone and O’Neill, “Children’s Rights Online: Challenges, Dilemmas and Emerging Directions.”, 34.
100 See further: Akdeniz, "Who Watches the Watchmen? The Role of Filtering Software in Internet Content Regulation."
101 Ibid., 108.
103 See, for example, Article 1 Directive 94/450/EEC (now Directive 2006/114/EC).
6.4 Regulating HFSS Food Marketing in the European Union

Following the introduction into the regulatory landscape, this section outlines the manner in which HFSS food marketing is currently regulated in four case study countries. While all the states reviewed have adopted domestic laws on marketing, they are also influenced by EU law. Therefore, EU standards relating to HFSS food marketing are introduced. A discussion on EU data protection is also included in light of the right to privacy discussed in 4.6.

Further, all the states under review are part of a network of European states – WHO European Action Network on reducing marketing pressure on children – that was established in 2008. Participants to the network are usually representatives from the relevant public health department or nominated by government. However, it is not an intergovernmental group as the network’s views do not necessarily reflect those of the states. Therefore, it is not a governance regime but a network to share experiences and best practices. The network has recently proposed to monitor marketing in the Nordic region, although details are not yet publicly available. While not regulatory, the network shows the states concerned are committed to HFSS food marketing restrictions.

6.4.1 European Union Law

The EU does not specifically regulate HFSS food marketing to children, although its directives include a number of provisions that provide minimum standards for children. As discussed in 3.7.2, one explanation for the EU’s lacklustre record to date is that the EU is not empowered to act purely on public health or children’s rights grounds. However, the EU has gradually become involved in non-harmonising measures aimed at NCD prevention that support Member State action, including obesity prevention. The EU’s concern is primarily the high NCD disease burden in the EU and the corresponding costs on Member States, not rights considerations. Although the EU cannot harmonise on public health grounds alone, it can introduce harmonising measures on other legal bases which may have a health nexus.

EU law imposes standards relating to food marketing through the Unfair Commercial Practices Directive, Audio Visual Media Services Directive (AVMS) and the Regulation on Health and Nutrition Claims. EU law imposes general legal and ethical constraints on

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106 Article 6(a) TFEU.

the scope of marketing and broadcasting. For instance, under the Unfair Commercial Practices Directive, commercial practice is unfair if contrary to rules of professional diligence and if it materially distorts or is likely to distort the economic behaviour of the average consumer, *i.e.* impairs her ability to make an informed decision or leads to a decision she would not otherwise have taken.\(^{108}\) The Regulation on Nutrition and Health Claims requires that health and nutrition claims must not be false, ambiguous or misleading, give rise to doubt, and encourage or condone excess consumption.\(^{109}\) However, while the European Commission was to create a nutrient profile under the Regulation, this has been stalled.\(^{110}\) The European Parliament is now considering removing the provision from the Regulation due to lack of legal competency.\(^{111}\) While these laws undoubtedly limit commercial operators, they have not been interpreted by Member States in a manner that fully addresses the techniques described in 2.3. The next section focuses on the AVMS as it contains explicit reference to HFSS food marketing.

The AVMS Directive displays some, albeit limited, recognition of children’s increased susceptibility to marketing and lesser capacity to identify advertisements. However, the Directive is limited to television and on demand services, and therefore does not cover most internet advertising, unless in connection with mass media.\(^{112}\) Advertising is limited to 20 per cent (12 minutes) per hour of broadcasting time.\(^{113}\) Audio visual commercial communications “shall not cause physical or moral detriment to minors”. Communications must not directly encourage minors (or encourage them to convince their parents or others) to buy or hire a product or service by “exploiting their inexperience or credulity”.\(^{114}\) All advertising must be truthful, responsible, not misleading, and identifiable.\(^{115}\) The AVMS Directive obliquely addresses “pester power”\(^{116}\) and prohibits most forms of paid product placement (although not unpaid), including when directed at children.\(^{117}\) However, other techniques such as sponsorship,\(^{118}\) use of characters and celebrities, as well as gifts, discounts and advergames do not expressly fall

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\(^{109}\) Nutrition and Health Claims Regulation, Article 3(a)-(c).


\(^{112}\) Audio visuals covers ‘mass media in their function to inform, entertain and educate the general public, and should include audio visual communication but should exclude any form of private correspondence...’ (preamble para 22).

\(^{113}\) Article 23 AVMS Directive.

\(^{114}\) Article 9(1)(g) AVMS Directive.

\(^{115}\) Article 6.1 Unfair Practices Directive.

\(^{116}\) Article 9(1)(a), AVMS Directive.

\(^{117}\) Article 9(1)(g) AVMS Directive.

\(^{118}\) Article 11(2) AVMS Directive.

\(^{119}\) The only limitation on sponsorship is that it should be clearly identified Article 10(c), AVMS Directive.
within the scope of its provisions. Therefore, while the AVMS Directive harmonises important protections for children, they are too broad to address the specifics of HFSS food marketing. At the same time, Member States are free to adopt more rigid standards when transposing the AVMS Directive into national law, subject to the requirements of EU law.\textsuperscript{120} Furthermore, the Directive shows preference for industry approaches, suggesting that its provisions can be complemented by co-regulation and/or self-regulation.\textsuperscript{121}

As minimum standards, the provisions of the AVMS Directive lack the specificity and clarity necessary to limit HFSS food marketing to children. The Directive does not define the age of a child or when advertising is directed at children. There is no uniform categorisation of unhealthy food, meaning that companies and Member States must adopt their own standards. While the AVMS Directive includes a provision relating to HFSS food marketing, this does not require states to limit HFSS food marketing, but merely to encourage the industry to do so:

Member States and the Commission shall encourage media service providers to develop codes of conduct regarding inappropriate audiovisual commercial communications, accompanying or included in children’s programmes, of foods and beverages containing nutrients and substances with a nutritional or physiological effect, in particular those such as fat, trans-fatty acids, salt/sodium and sugars, excessive intakes of which in the overall diet are not recommended.\textsuperscript{122}

This standard is in keeping with the EU’s support of self-regulation. Further, it echoes Article 17 CRC.

Therefore, the AVMS Directive displays clear weaknesses. Its lack of harmonisation of important standards leads to fragmentation, whereby children in different Member States are subject to different protections. As companies are thereby subject to various rules depending on where in the EU they market, this may disrupt the free flow of goods and services in the internal market. Accordingly, Bartlett and Garde are critical of the AVMS Directive, arguing that weak minimum standards fail to contribute to the proper functioning of the internal market and do not ensure an adequate level of consumer or public health protection.\textsuperscript{123} They suggest that Article 9(2) merely suggests that “there are appropriate and inappropriate HFSS food adverts” instead of prohibiting HFSS food marketing per se.\textsuperscript{124} Further, the provision fails to require that codes are adopted or

\textsuperscript{120} Article 4.1 AVMS Directive.
\textsuperscript{121} Art 4(7) AVMS Directive.
\textsuperscript{122} Article 9(2) AVMS Directive.
\textsuperscript{123} Oliver Bartlett, Garde, Amandine, “Time to Seize the (Red) Bull by the Horns : The Eu’s Failure to Protect Children from Alcohol and Unhealthy Food Marketing,” European law review 38, no. 4 (2013), 515.
\textsuperscript{124} Ibid., 506.
effective, meaning that it is essentially toothless. While the EU is currently revising the AVMS Directive, it does not look set to amend the provisions relating to HFSS food marketing. Instead, advertising is likely to be further liberalised.

Furthermore, the AVMS enshrines the principle of country of origin (COO), whereby media service providers must comply with the rules relevant to the jurisdiction where they have their head office and editorial decisions are made, or where a significant part of the work-force operates or where decisions are taken and a significant number of the work-force is based. This is central to the aims of the AVMS Directive: the right to establishment (Article 49 TFEU) and the free movement of services (Article 56 TFEU). It means that broadcasts in Member States are subject only to one set of rules, not multiple rules depending on the EU states to which they broadcast. On the other hand, it means that children view marketing from abroad which their national legislature has deemed inappropriate or contrary to their rights. Therefore, while the provision is vital for integration of AVMS into the Union, the failure to ensure children’s best interests through sufficient harmonisation means that their rights are neglected and potentially violated.

The limits of domestic regulation were exemplified in De Agostini, where the Swedish Consumer Ombudsman sought an order prohibiting an Italian company from advertising a children’s magazine on a Swedish TV channel broadcasting from the UK. The Swedish Court sent a preliminary reference to the CJEU asking whether the free movement of goods and services prevented a Member State from taking action against television advertisements broadcast from another state, or precluded national law from prohibiting advertising to children. In its judgment, the CJEU held that the Directive did not impede national rules with the general aim of consumer protection, as long as they did not impose a secondary control on television broadcasting in addition to the broadcasting Member State’s rules. The CJEU also recognised that the protection of vulnerable consumers such as children constituted an overriding public interest ground. A ban on advertising to children would be contrary to free movement of services if it did not affect the marketing of national products in the same manner as products from other Member States. Therefore, Member State legislation, such as in Sweden, did not amount to an obstacle prohibited by the Directive. However, Sweden could not apply its rules to

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126 Proposal for a Directive Of The European Parliament And Of The Council amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services in view of changing market realities COM/2016/0287 final - 2016/0151 (COD).
127 Article 2.3(b) AVMS Directive.
128 Recital AVMS Directive, para 33.
129 Judgment of the Court of 9 July 1997, Konsumentombudsmannen (KO) v. De Agostini (Svenska) Förlag AB(C-34/95) and TV-Shop i Sverige AB(C-35/95 and C-36/95), EU:C:1997:344.
130 Ibid, para 34.
131 Ibid, para 44.
132 Ibid, para 35.
advertising that broadcast from another Member State as this would amount to a secondary control which is prohibited under the Directive.\textsuperscript{133}

The CJEU concluded that it was for the national court to decide whether the ban was necessary to satisfy the aims of Article 36, proportionate to the purpose and whether the aims could have been fulfilled by means that are less restrictive to EU trade.\textsuperscript{134} The Swedish Market Court held following the CJEU that, contrary to the Consumer Ombudsman's assertions, the Broadcasting Act could not be applied to broadcasts coming from another Member State as this would amount to a secondary control.\textsuperscript{135} Furthermore, the prohibition on advertising did not breach Article 34 TFEU as De Agostini had not presented evidence to the Market Court that products from another EU Member State were more affected than national products.\textsuperscript{136} As we will see in 7.9, the CJEU has since varied its approach to national restrictions on advertising.

\textit{Data Protection}

Finally, EU law also harmonises norms on data protection through the Data Protection Directive.\textsuperscript{137} The Directive is predated by the Council of Europe European Convention for the protection of individuals with regard to the automatic processing of personal data, which enshrines many of the same principles.\textsuperscript{138} Further, under the EU Charter, the right to private life (Article 7) is recognised, as well as the right to data protection (Article 8). The protection offered by EU law has recently been reformed through the General Data Protection Regulation (GDPR) 2016, which provides greater protection for children's privacy online.\textsuperscript{139} Under Article 8 GDPR, processing of children's personal data will only be legal if consent is given or authorised by those responsible for the child. Children are defined as aged under 16, although Member States can set a younger age limit that is not below 13 years. The controller is required to make “reasonable efforts” to verify that such consent has been given.\textsuperscript{140} These rules could go some way to addressing the privacy concerns mooted in 4.6.

However, as with the AVMS Directive, the GDPR leaves a number of aspects undefined and unclear. Firstly, as states are free (within limits) to define children’s age, fragmentation seems likely to occur. Companies operating within the EU may have to

\begin{footnotes}
\item[133] Ibid, para 61.
\item[134] Ibid, para 45.
\item[136] Ibid, 21.
\item[137] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data OJ L 281, 23.11.1995, p. 31–50.\textsuperscript{137}
\item[138] Council of Europe, Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, Council of Europe, CETS No. 108, 1981.
\item[140] Article 8.2 Ibid.
\end{footnotes}
comply with different regulations depending on the Member States, leading to confusion.\textsuperscript{41} As the US Federal Trade Commission’s COPPA defines adulthood as beginning at 13 years, states may adopt this as the legal standard.\textsuperscript{42} Further, while 16 years may be proportionate in terms of protecting children from marketing, at the same time children will be unable to access websites without parental consent, which may be contrary to their participation rights.\textsuperscript{43} As the European Commission has not presented any evidence that a children’s rights impact assessment was undertaken or that children’s views were sought, we cannot know whether this impact was considered. Secondly, the regulation assumes that parents have adequate knowledge to support their children’s internet use, which does not appear to be borne out in reality. Thirdly, “reasonable efforts” is an unclear standard, meaning that industry may have wide latitude in its interpretation. Finally, empirical evidence suggests that users and internet platforms disregard these standards and that children often give false ages to bypass thresholds.\textsuperscript{44} For example, approximately one in five children in the EU aged under 13 have Facebook profiles, although Facebook’s rules allow only children aged over 13 to have an account.\textsuperscript{45} Therefore, while the GDPR has the potential to promote children’s rights, it remains to be seen how Member States will implement its standards.

6.4.2 Self-regulation in the EU

In tandem with the EU legal framework, the European Commission encourages companies in the Union to self-regulate HFSS food marketing. Accordingly, the EU Pledge represents the central self-regulatory method of limiting HFSS food marketing at EU level. The Pledge is a simple framework with two main components. Firstly, pledge companies agree to only advertise food and beverages that fulfil certain nutritional criteria to children aged under 12 on television, print and internet. Secondly, there must be no communications to primary schools, unless requested by or agreed with the school administration for educational purposes. Companies are also encouraged to make specific pledges, and many large companies, such as McDonald’s Europe and Coca-Cola, have done so.\textsuperscript{46}

The EU Pledge has been successively strengthened over the years and now covers about 80 per cent of EU food and beverage advertising spending.\textsuperscript{47} This highlights the flexibility and adaptability of self-regulation compared with EU law where agreement among Member States is slower. The Pledge originally focused on television advertising and

\textsuperscript{41} World Health Organisation (Europe), “Tackling Food Marketing to Children in a Digital World: Trans-Disciplinary Perspectives.”
\textsuperscript{43} Sonia Livingstone to Media Policy Project Blog, November, October 17th, 2016.
\textsuperscript{44} World Health Organisation (Europe), “Tackling Food Marketing to Children in a Digital World: Trans-Disciplinary Perspectives.”
\textsuperscript{46} EU Pledge, “Eu Pledge Members,” EU Pledge.
\textsuperscript{47} Ibid.
allowed companies to define HFSS food individually, but since 2012 it applies uniform nutrition criteria.\textsuperscript{148} Further, since 2012, the definition of child-centred television programming has been lowered from requiring 50 per cent of the audience to be children, to 35 per cent, thus encompassing more programming. The Pledge is set to be extended again to apply to radio, cinema, DVD, product placement, interactive games and mobile marketing, but not to packaging, point of sale or sponsorship.\textsuperscript{149} However, only companies that agree to be bound are subject to the standards, meaning that non-member companies benefit from less competition while still legally advertising to children.

Despite the seemingly positive signs of progression, gaps remain and the bar is set low. Every year the Pledge is independently monitored in a representative sample of EU Member States.\textsuperscript{150} A substantial decrease in children’s exposure to HFSS foods through children’s programmes, other programmes and general exposure to the companies’ products is reported.\textsuperscript{151} The 2014 Annual Report claims 98.5 per cent compliance in television and 97 per cent compliance on company websites (7 out of 219 websites non-compliant). Therefore, the monitoring process shows that gaps remain and that children are exposed to marketing that has been deemed inappropriate. Furthermore, the fact that public complaints are not utilised means that children and parents’ voices cannot be heard.

The European Consumer Organisation has recently called for the EU Pledge to adopt WHO Europe’s nutrient profile and to stop using branded characters to market to children.\textsuperscript{152} For instance, a comparison of the Pledge’s nutritional criteria with WHO Europe’s standards showed that 89.7 per cent of products that the Pledge allowed to be advertised would not be permitted under WHO Europe’s profile. These weak nutritional criteria mean that many processed food products are classified as “healthy”. Further, many companies decline to participate.\textsuperscript{153} There is no sanction for non-compliance or provision for public complaints. Meanwhile, companies’ reputations stand to benefit from claiming to engage in socially responsible conduct.

\section*{6.5 REGULATIONS ON HFSS FOOD MARKETING IN SELECTED JURISDICTIONS}

The following section outlines the regulatory framework for limiting HFSS food marketing in the United Kingdom, Ireland, Denmark and Sweden. As already discussed, EU law places certain requirements on Member States. These broad standards have been transposed into Member State law but are not discussed in detail. Instead, the provisions


\textsuperscript{149} "Enhanced 2014 Commitments," www.eu-pledge.eu/content/enhanced-2014-commitments.

\textsuperscript{150} EU Pledge, “Annual Reports,” EU Pledge.


\textsuperscript{152} BEUC The European Consumer Organisation, "Food Marketing to Children: Game Over?,” www.beuc.eu/game-over.

specifically pertaining to HFSS food marketing are focused upon. In 6.6, these frameworks are analysed in tandem in light of the criteria laid out in the introduction.

6.5.1 The United Kingdom: Co-regulation & Self-regulation

The UK was one of the first states to introduce comprehensive regulatory rules designed to limit children's exposure to, and the power of HFSS food marketing. Furthermore, the rules were adopted following extensive research on, and assessment of, the impact of HFSS food marketing on children. In 2003, research commissioned by the Food Standards Agency (FSA) claimed there was a high level of food advertising to children, that this was primarily for HFSS food, that children were engaging with and enjoying the advertising, and that advertising was having an independent effect on children' purchase preferences, behaviour and consumption at both brand and category level.\(^{154}\) In 2004, the UK Department of Health issued a White Paper recommending new restrictions on advertising of HFSS food to children.\(^{155}\) The regulatory assessment determined that the costs of obesity (both economic and health related), coupled with consumer and public health concerns required government action.\(^{156}\)

The UK broadcast regulator (the Office of Communication – Ofcom) undertook a detailed analysis and review of the literature, and subsequently determined that food advertising on television had a modest impact on children's food choices, but that there was insufficient evidence to determine the scope of this effect in relation to other factors.\(^{157}\) Ofcom proposed limitations on broadcast advertising of HFSS food, but not a ban as this was considered to be disproportionate.\(^{158}\) At the time the prevalence of childhood obesity in the UK had risen substantially to 16 per cent of children aged between two and fifteen.\(^{159}\) A further review suggested that, although the effect of food marketing appeared small, it could have a cumulative effect.\(^{160}\) Accordingly, in 2007, Ofcom introduced broadcast regulations with the aim of reducing the exposure of

\(^{154}\) The first review was conducted in 2003 on unhealthy food marketing in 2003: Hastings, "Review of Research on the Effects of Food Promotion to Children."


\(^{158}\) Ibid.


children (aged under 16) to HFSS food marketing. Further aims were to redress the imbalance in which foods are marketed to children, to encourage consumers to switch to healthier options and to encourage businesses to advertise healthier options.

Ofcom has statutory responsibility for regulating broadcast advertising and is under the obligation to further the interests of citizens and consumers, where appropriate by furthering competition. The principles of "better" regulation inform Ofcom's work by law: regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed. Under the Communications Act 2003 (as amended), Ofcom is tasked with reviewing standard's codes which, inter alia, aim to protect those aged under 18. Ofcom is obliged to carry out impact assessments where its actions will impact upon the public or result in a significant change to its activities. It is not under an obligation to consider the impact on children's rights, and does not appear to have done so.

In keeping with the aim to limit regulatory burdens, the UK operates a co-regulatory system for broadcast advertising. Ofcom has contracted its codes' function to the Broadcast Committee of Advertising Practice (BCAP). BCAP is made up of industry representatives and sets, reviews and revises codes. The BCAP Code relates to television and radio only, while the Committee of Advertising Practice (CAP) (an organisation comprising representatives of the industry) writes and maintains non-broadcast codes.

The CAP Code 2010 applies to a wide range of media, such as print and electronic advertising, including newspapers, magazines, leaflets, emails, texts, posters, cinema, and online advertisements including advergames. It does not apply to, inter alia, marketing in foreign media (including non-UK registered websites), practitioner communications, editorial content, packaging and point of sale displays. Therefore, there are separate systems for regulating broadcast and non-broadcast media, with stricter, binding rules attached to the former.

The CAP and BCAP codes are institutionally separate, but subject to the same complaints mechanism. The Communications Act requires Ofcom to establish a complaints procedure, which Ofcom has in turn contracted to the Advertising Standards Authority

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\[\text{\textsuperscript{a6}}\text{Ofcom, "Television Advertising of Food and Drink Products to Children – Final Statement," (UK: Ofcom, 2007).}\]


\[\text{\textsuperscript{a8}}\text{Section 3(1) Communications Act 2003.}\]

\[\text{\textsuperscript{a9}}\text{Ibid, s. 3(3)(a).}\]

\[\text{\textsuperscript{a10}}\text{Ibid, section 7. See further: Ofcom, Impact Assessment Guidelines, available at: https://www.ofcom.org.uk/_data/assets/pdf_file/0026/57194/better_policy_making.pdf}\]

\[\text{\textsuperscript{a11}}\text{Under the Contracting out (Functions relating to Broadcast Advertising) and Specification of Relevant Functions Order 2004, 2004 No. 1975. See Advertising Standards Authority, "Co-Regulation of Broadcast Advertising," Advertising Standards Authority.}\]


\[\text{\textsuperscript{a13}}\text{"Scope of the Code," (UK: CAP, 2010).}\]
(ASA). The ASA handles complaints from both broadcast and non-broadcast media, although Ofcom retains powers to impose financial penalties and revoke or shorten a licence period should the impugned conduct continue. The ASA Council (which reviews complaints) is made up of both lay and industry members from a variety of backgrounds. It has the power to require a licence holder to exclude an advertisement or certain descriptions and methods, and to request evidence demonstrating the factual accuracy of information.

Although the ASA also investigates and decides complaints relating to the CAP Code, the Code does not have force of law. The ASA has the power to prevent an advertisement from being repeated, to name and shame or advise media not to host, revoke privileges or require persistent non-compliers to be pre-vetted before advertising. The CAP Code depends on individuals, civil society or competitors to complain. The ASA does not approach the complaint holistically as it only examines aspects specifically mentioned in the complaint, thus requiring the individual or group to possess a strong understanding of the rules. Civil society has further accused the ASA of being secretive and inconsistent in its decisions.

Television advertising is also monitored through preclearance (Clearcast). Further, the UK is also party to the 1989 Council of Europe Convention on Transfrontier Television and must, where an advertisement is specifically and frequently aimed at a party, comply with the television advertising rules of that party (unless the party is an EU Member State).

The regulations tackle both scheduling and content of HFSS food marketing to children. As it stands, scheduling rules related to HFSS food apply only to broadcast media. On broadcast media, HFSS food marketing is prohibited during, after and before children’s programming, and children’s television channels may not advertise HFSS foods. However, Ofcom declined to adopt a watershed as it considered this to be

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169 Advertising Standards Authority, “Co-Regulation of Broadcast Advertising”.
174 Clark and Powell, “Through the Looking Glass a Review of the Topsy Turvy World of the Regulations That Are Supposed to (but Don’t) Protect Children from Online Marketing of Junk Food.”
175 British Heart Foundation & CFC, “Protecting Children from Unhealthy Food Marketing,” (London: Sustain, 2008), 24
176 European Convention on Transfrontier Television, CETS No.132, Strasbourg, 05/07/1989, Article 19.
177 “The UK Code of Broadcast Advertising,” (Committee on Advertising Practice, 2010), rule 32.5.
disproportionate due to the impact on manufacturers and adults.\textsuperscript{178} Therefore, adults’ and companies’ rights appear to have trumped children’s. Food is categorised through the Food Standards Agency Nutrient Profiling Model (NPM).\textsuperscript{179} Points are awarded for A nutrients (energy, saturated fat, total sugar and sodium) and C nutrients (fruit, vegetables and nut content, fibre and protein).\textsuperscript{180} By subtracting C from A a score is given, with food of four or more points classified as less healthy. Although based on scientific standards, this has been criticised by civil society and industry alike.\textsuperscript{181} It is currently under review.\textsuperscript{182} CAP rules are due to be amended in July 2017. However as it stands, marketing of HFSS food is not prohibited \textit{per se} only if it breaches certain qualitative criteria.\textsuperscript{183}

Generally, marketing should avoid exploiting children. For instance, in one UK case the ASA decided that a \textit{Weetabix} breakfast cereal advergame breached the CAP Code, through including messages such as “What?! No Weetabix?! Why make things harder for yourself?” and “Tired is not a good look for you. Why not eat something?” The ASA concluded that these tactics exploited children’s credulity, vulnerability and were likely to make them feel inferior if they did not buy the product. However, it concluded that this did not amount to a “direct exhortation to buy”.

Further, both codes seek to limit or prohibit the use of specific marketing techniques that aim to boost purchases of HFSS food. Both the BCAP and CAP codes require that all marketing communications for food (not only those directed at children), must not condone or encourage excessive consumption,\textsuperscript{184} or condone or encourage damaging oral health-care practices, especially in children.\textsuperscript{185} Advertisements must not condone or encourage poor nutritional habits or an unhealthy lifestyle, especially in children,\textsuperscript{186} or disparage good dietary practice or healthful options.\textsuperscript{187} Further, promotions may not be used in television advertising of HFSS products directed at children under 12 years.\textsuperscript{188} For non-broadcast media, promotions are allowed only in relation to fruit and vegetables in media directed at children aged under 12 years.\textsuperscript{189} In general, promotional offers to children under 16 years must be prepared with a due sense of responsibility,\textsuperscript{190} not

\textsuperscript{178} Department of Health, “Choosing Health: Making Healthier Choices Easier.” Watersheds are a long standing practice in the UK and Ireland where advertising, such as for gambling, and violent programmes are only broadcast after 9pm to protect children.


\textsuperscript{180} \textit{Ibid.}

\textsuperscript{181} Industry has complained that the values are based on 100g servings rather than recommended servings. See further: Caroline Chatterton James Grant, “Making a Meal of It: New Restrictions on Advertising Hfss Products to Children,” \textit{Ent. L.R.} 18, no. 5 (2007).


\textsuperscript{183} ASA Ruling on Weetabix, 13 February 2013.


\textsuperscript{187} “The Cap Code.”, 15-12

\textsuperscript{188} CAP Broadcast, “The Bcap Code.”, 13-9


encourage children to eat/drink a product merely to take advantage of the promotion,\textsuperscript{99} not create a sense of urgency\textsuperscript{100} or encourage purchases in excess quantity\textsuperscript{101} or irresponsible consumption.\textsuperscript{102} Collection-focused promotions must not “seem to urge children or their parents to buy excessive quantities of food”.\textsuperscript{103} Therefore, a number of standards are imposed in both broadcast and non-broadcast media. However, the vagueness of the standards means that their interpretation relies heavily on the ASA.

Further techniques are restricted under both codes. Licensed characters and celebrities popular with children cannot be used in HFSS television advertisements targeting children under 12 years.\textsuperscript{104} No nutrition or health claims are authorised on television advertisements for that age group\textsuperscript{105} and other claims are permitted only in non-broadcast advertising if authorised by the European Commission.\textsuperscript{106} Radio advertising and CAP marketing may not use licensed characters and celebrities popular with children in food advertisements targeted at children under 12 years, except for advertisements for fresh fruit and vegetables.\textsuperscript{107} The BCAP rules seek to limit conflict in the family through prohibiting “pester power”.\textsuperscript{108} Children should not be pressured to buy through appealing to emotions such as inferiority, pity and loyalty.\textsuperscript{109}

Due to the differences in the standards between the codes, CAP has announced that, following consultation, the CAP Code will be amended as of July 2017 to meet the same standards as broadcast media. Unhealthy food marketing (as defined by the nutrient profile already in use) will be prohibited where directed at children and when more than 25 per cent of the audience is thought to be children.\textsuperscript{110} In the consultation, this threshold was criticised given that children under 15 make up only 19 per cent of the UK population, but CAP rejected alternatives as disproportionate.\textsuperscript{111} The rules will apply to all media that CAP regulates, such as print and online, but not to packaging, brand characters, in-store placement, sponsorship and in-school marketing. Brand advertising will also be prohibited where it seeks to promote specific HFSS food products.\textsuperscript{112} However, such branding cannot relate to a range of products.\textsuperscript{113} Children are defined as aged under 16. Finally, the new rules will allow marketers to use promotions, licensed characters and

\textsuperscript{103} “The Bcap Code.” 13.9.3.
\textsuperscript{104} Ibid., 13.10.
\textsuperscript{105} Ibid., 13.11.
\textsuperscript{106} Ibid., “The Cap Code.”, 15.17.
\textsuperscript{111} Ibid., 20.
\textsuperscript{112} Ibid., 4.
\textsuperscript{113} Ibid., 14.
celebrities to market food that is not defined as HFSS, in order to boost exposure to healthy foods.\footnote{Ibid., 4.}

Interestingly for the purposes of this dissertation, in the consultation, CAP recognised the rights of business and consumers, but merely the “protection” of children.\footnote{“Cap Consultation: Food and Soft Drink Advertising to Children: Introducing New Restrictions on the Advertising of Food and Soft Drink Products to Children,” (UK: CAP, 2016.), 4.} However, in its regulatory statement, CAP notes that the respondents to the consultation stressed the WHO Commission on Ending Childhood Obesity recommendations, suggesting it was influenced by this international guidance.\footnote{“Cap Consultation: Food and Soft Drink Advertising to Children: Regulatory Statement.”, 10.} Of further interest is the fact that CAP introduced the changes although it claimed that there is no “robust” evidence to establish that non-broadcast media have the same effects as broadcast. Instead, CAP claims to have been motivated by the scale of obesity in the UK and the rise in digital media. This is interesting considering that the CAP overtly claims to be “evidence-based”.\footnote{“Cap Consultation: Food and Soft Drink Advertising to Children: Introducing New Restrictions on the Advertising of Food and Soft Drink Products to Children.”, 10.} Therefore, the consultation seems to be motivated by public opinion on the need to address obesity and lessen costs.\footnote{Ibid., 14.} Buckingham has previously criticised Ofcom for going against evidence and instead being swayed to regulate due to political pressure.\footnote{Buckingham, The Material Child., 109.} This suggests the limits of better regulation standards, even when provided for by law. Although the rules have been amended, a number of complaints related to the previous edition of the CAP code will be discussed below, as they are illustrative of the reasoning behind the changes and remain pertinent to Irish self-regulation.

\section*{6.5.2 Ireland: Regulation and Self-Regulation}

The Irish system of regulating HFSS food marketing is similar to the system used in the UK prior to the changes. Broadcast and non-broadcast media are regulated separately, with weak self-regulation applied to non-broadcast. However, Ireland has not adopted co-regulation and instead regulates broadcast media. Under the Broadcasting Act 2009, broadcasting codes shall provide that commercial promotions of direct or indirect interest to children “protect the interests of children having particular regard to the general public health interests of children.”\footnote{Section 42(1)(g) Broadcasting Act.} Therefore, a protective approach to children is adopted over a children’s rights approach.

Under the Act, a statutory body, the Broadcasting Authority of Ireland (BAI) may prohibit advertising of particular classes of food and beverages that it considers of public concern in respect of the health of children, in particular “those which contain fat, trans fatty acids, salts or sugars”.\footnote{Sections & \& 42(4) Ibid.} Every broadcaster established in Ireland is bound to comply with
these codes.\textsuperscript{214} With this legislation as a basis and a clear signal from the legislator, the BAI introduced rules on HFSS food marketing in the Children’s Commercial Communications Code. The BAI is required to review the effect of Codes every four years.\textsuperscript{215} As a result the BAI undertook a consultation on the Children’s Code in 2011. It solicited the views of interested parties, including children, on changes they would like to see in the rules on food and non-alcoholic beverages.\textsuperscript{216} The BAI found that the most frequent advertisements viewed by children on Irish television were food advertisements, and that prepared and convenience foods were the most viewed food category.\textsuperscript{217}

Accordingly, the BAI revised the Children’s Code to include greater protection for children in light of unhealthy eating patterns and the impact of advertising.\textsuperscript{218} The rules were updated on the basis of consultation with the public, industry, civil society and politicians. The Code seeks to balance children’s public health with economic interests in light of its duty to ensure proportionate, predictable and stable measures.\textsuperscript{219} The Code aims to protect children from harmful communications and ensure that they are not exploited through providing communication in a fair, clear manner that does not raise unrealistic expectations of the product.\textsuperscript{220} As in the UK, the Children’s Code applies only to television and radio, while the Advertising Standards Authority Ireland (ASAI) monitors and devises a self-regulatory code (Code of Standards for Advertising and Marketing Communications) that is applied to other forms of marketing.\textsuperscript{221} In light of its statutory duties, the BAI will start another review of the Code in 2017.

The Children’s Code addresses the same general techniques as the UK BCAP with some variations.\textsuperscript{222} The BAI actively aligned the Code with that in the UK for both practical and pragmatic reasons. As Irish children watch a large amount of British television, their protection would be undermined if different rules applied. Further, advertisers are likely to buy slots in both markets given their similarities.\textsuperscript{223} However, unlike Ofcom, the BAI decided that regulation was unsuitable for the protection of minors.\textsuperscript{224} Moreover, as in

\begin{itemize}
\item \textsuperscript{214} Section 42(6) \textit{Ibid.}
\item \textsuperscript{215} Section 45(3) \textit{Ibid.}
\item \textsuperscript{216} Broadcast Authority of Ireland, "Draft BAI General and Children's Commercial Communications Codes: Consultation Document," (Dublin: Broadcast Authority of Ireland, March 2012), 6.
\item \textsuperscript{217} Broadcasting Authority of Ireland, "Children's Commercial Code - Consultation Document," (Dublin, 2011).
\item \textsuperscript{218} Broadcast Authority of Ireland, "Draft Bai General and Children's Commercial Communications Codes: Consultation Document." 10-11.
\item \textsuperscript{219} \textit{Ibid.}, 9.
\item \textsuperscript{220} At the time of writing the Code is in its 7\textsuperscript{th} edition.
\item \textsuperscript{221} Broadcast Authority of Ireland, "Children's Commercial Code - Consultation Document.", Section 1, 4.
\item \textsuperscript{222} Broadcast Authority of Ireland, "Children's Commercial Code - Consultation Document.", Guidance Notes.
\item \textsuperscript{223} Broadcast Authority of Ireland, "Draft Bai General and Children's Commercial Communications Codes: Consultation Document." , 11.
\item \textsuperscript{224} \textit{Ibid.}, 16.
\end{itemize}
the UK, a watershed was not adopted as this was considered disproportionate. As the Irish regulations mirror those of the UK, it is credible to posit that the Irish regulations may soon be amended to meet the same level of protection as in the UK.

Both the UK and Irish codes include a number of general provisions that recognise children's susceptibility to advertisements. Advertisements must not, *inter alia*, cause harm or exploit the trust that persons under 18 years place in parents, teachers or guardians. Advertising must not condone or encourage practices that are detrimental to children's health. Advertisements should not emotionally manipulate children, for example through implying that not owning a product will result in ridicule or unpopularity, and should not take advantage of their inexperience, credulity or sense of loyalty. They must not appeal to children's emotions, including pity, fear, loyalty or self-confidence, or suggest that purchasing a product renders the child superior to others. Advertisements must not encourage children to pester or “directly exhort a child to buy a product or encourage them to ask an adult to buy it.” Promotions requiring a purchase must not be targeted “directly at children.”

As with the previous UK rules, scheduling and content rules apply to broadcast media, while only content rules apply to non-broadcast. In some instances the scheduling rules differ to those in the UK. Firstly, children are defined as under 18 years. Secondly, commercial communications for HFSS foods are not permitted during children's programmes - programmes with an audience profile of over 50 per cent of children. The time of broadcast, type of programme and channel, the nature of the product, the target audience and the likely composition of the audience are considered when assessing if a programme is directed at children.

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228 CAP Broadcast, "The Bcap Code.” 5.3.
229 Ibid. 5.6- 5.7; Advertising Standards Authority Ireland, "Code of Standards for Advertising and Marketing Communications in Ireland.” 7.5; Broadcast Authority of Ireland, "Children's Commercial Communications Code.” 7.2- 7.4.
231 Ibid. 13.12.1.
232 Ibid. 5.9; Broadcast Authority of Ireland, "Children's Commercial Communications Code.” 7.1.
234 Broadcast Authority of Ireland, "Children's Commercial Communications Code.”., para 2(1).
235 Ibid., paras 3, 11.4.
236 Ibid., para 4.2.
In terms of content rules, these are also stricter in some instances than those which apply in the UK. For instance, licensed characters may not be used in advertisements directed at children aged under 18. Celebrities (who are widely known by children) may not be used to promote HFSS food or drink to children under 15 years. Programme characters may not feature in promotions for two hours before or after children’s programmes. However, the ASAI code does not prohibit HFSS food marketing, but only certain techniques.

A number of rules apply that are not used in the UK system. For instance, disclosure rules require that all fast food advertising directed at children must include the message that it "should be eaten in moderation and as part of a balanced diet". Advertising for confectionary to children must include the message “snacking on sugary foods and drinks can damage teeth”. Although the BAI adopted the UK nutrient profiling system, advertisements for cheese are excluded from the final Code. These advertisements must be transmitted with the following message: “children should consume no more than a small matchbox size piece of cheese a day and lower fat choices are more suitable.” In relation to both adults and children, a maximum of 25 per cent of sold television and radio advertising time may be used to broadcast HFSS foods.

Furthermore, as in the UK, there are different sanctions for complaints to broadcast and non-broadcast media. Broadcasting complaints should be sent to the broadcaster in the first instance. Under the Broadcasting Act, a broadcaster must give consideration to complaints where they are thought to have been made in good faith, and not frivolous or vexatious. If the broadcaster fails to act, or the complainant is not satisfied with the response, the complaint can be referred to the BAI. Where the broadcaster fails to comply with the BAI’s decision, it can apply to the High Court for a financial sanction of up to €250,000. The matter of financial sanctions is then a determination for the High Court having regard to, inter alia, the principles of appropriateness, proportionality,

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837 Identical rules apply regarding promotional offers, pressure to purchase, and health and nutrition claims. (Ibid, para 11.7 & 11.6.) Advertising Standards Authority Ireland, "Code of Standards for Advertising and Marketing Communications in Ireland," 8.19, 8.24, 8.23- the same rules apply in relation to licensed characters under the ASAI rules, para 11.8.22.

838 Broadcast Authority of Ireland, "Children’s Commercial Communications Code.", para 11.5.

839 Ibid., para 11.13.

840 Ibid., para 11.13.

841 Ibid., para 11.8.

842 Ibid., para 11.8.


845 "General Commercial Communications Code Guidance Notes & Direction in Respect of Product Placement " (Dublin, 2013). 8.4.3.

846 Sections 47 & 48 Broadcasting Act.

847 Sections 47(1), 54(4)(c) Broadcasting Act.


849 Section 54(4)(c) Broadcasting Act.
whether it serves as an incentive to comply, the seriousness of the breach, the broadcaster’s turnover and failure to co-operate, any gain made by the broadcaster, the likely degree of harm, repeated breaches and the extent of the time period of non-compliance. In the case of non-broadcast media, members of the public can only complain to the ASAI. The primary sanctions available to the ASAI should the advertiser not remove the offending advertisement, are reputational. A member that does not accept the ASAI decisions may be disciplined by the board and subject to penalties including fines and/or suspension of membership. Finally, persistent breakers of the code may be required to have their advertisements vetted before transmission. The ASAI gives advice to advertisers where requested, although this is not binding. These decisions have not been subject to judicial review to date.

Thus, Irish regulations are similar to those in the UK (until now) with separate systems of command and control and self-regulation used. In the case of broadcast media, these rules provide strong protections, although as will be discussed gaps remain. Further, self-regulation amounts to vague rules and insufficient accountability.

6.5.3 DENMARK: REGULATION AND SELF-REGULATION

Danish and Swedish marketing law are similar, both seek to regulate competition, protect consumers and to take society’s general interests into account. This, it has been suggested, means that businesses’ economic interests must be balanced with societal and ethical concerns. Danish broadcasting and marketing law provide limited restrictions on marketing of HFSS food through the Radio and Television Broadcasting Act (RTBA) as supplemented by the Marketing Practices Act (consolidated, 2013). As a result, Danish law is complemented by industry self-regulation. The Marketing Act does not apply to any specific marketing medium and is therefore applicable to all marketing, whereas the Broadcasting Act is limited to television, on-demand services and radio. The standards of protection are broad, rendering it difficult to establish whether certain techniques used in HFSS food marketing amount to violations of the law.

Although both Acts recognise children as vulnerable, children’s rights principles are not expressly included. The relevant general requirements are that broadcasting should be legal, decent, honest and truthful, with consideration of social responsibility, and

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250 Sections 55(1) & 56 Broadcasting Act.
252 Email on file.
254 More guidance in relation to food marketing is also given under the Danish Food Act: (Lovbekendtgørelse nr 43 af 12/01/2016 om fødevarer, available at (in Danish www.retsinformation.dk/Forms/R0710.aspx?id=176f8f1fddbc7dco3-9663-ec8f-8t8e-5eg27ac2a752c ).
255 Section 7 Order on advertising and sponsorship, etc. of programs on radio, television and on-demand audiovisual media services as well as entering into partnerships (hereafter: Order on advertising and sponsorship, etc.) (Bekendtgørelse nr 801 af 21/06/2013 om reklamer og sponsering m.v. af programmer i radio, fjernsyn og on demand-audiovisuelle medietjenester
clearly identifiable. As with the UK and Irish legislation, children are recognised as a vulnerable group that advertising should not harm or exploit. Advertising should not appeal to minors to persuade others to buy. Advertising must not undermine social values, such as suggesting that a product will render one minor superior over another or disadvantaged should she not have the product. It must not encourage behaviour prejudicial to health. Finally, advertisements for “junk” food, i.e. chocolate, sweets, soft drinks and snacks, should not suggest that the product may replace regular meals. Therefore, there are some, albeit unclear, limitations on companies’ freedom to use broadcast advertising to promote HFSS foods to children.

The Marketing Act complements the RTBA and places an obligation on economic actors to exercise good marketing practice for the benefit of consumers, other traders and the public interest. Good marketing practice is not defined, allowing it to develop organically over time through case law and guidance. It requires that the interests of industry, consumers and the public are weighted. The Marketing Act expressly recognises the particular vulnerabilities of children, and requires that marketing directed at them shall have regard “to their natural credulity and lack of experience and critical awareness, as a result of which they are readily influenced and easy to impress.” The Act defines children in line with the CRC as under 18 years. However, the provision is derived from the ICC Code, without consideration of the CRC.

The RTBA and Marketing Act provide for different means of enforcement and sanction, depending on the severity of the case. The Radio and Television Board (Radio-og tv-nævnet) is established by law to monitor the RTBA and given the power to withdraw a licence or provide for the temporary or permanent discontinuation of programme services if the licensee, inter alia, grossly or frequently infringes the Act. Under the

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Marketing Act, the Consumer Ombudsman (Forbrugerombudsmanden) monitors compliance with good marketing practice.268

The aim of the Ombudsman is not to punish or impose sanctions but to achieve enforcement through a variety of means.269 Therefore, the Ombudsman's first approach is negotiation270 with businesses.271 Secondly, the Ombudsman should empower duty bearers through providing an “advance indication” as to the legality of a planned marketing action.272 Furthermore, the Ombudsman has duties to empower the public through information on matters that are of general interest or importance to marketing law.273 Thirdly, the Ombudsman can escalate a case - where marketing is suspected of contravening good marketing practice, she can issue an enforcement notice, ordering a marketing campaign to be stopped.274 The Ombudsman (as well as anyone with a legal interest) has the power to instigate legal proceedings.275 Finally, following negotiation with consumers, and trade and industry organisations, the Ombudsman may prepare and issue guidelines, particularly in the interests of the consumer.276 Accordingly, since 1998, the Consumer Ombudsman has issued non-binding guidance on children, young people and marketing, inspired by the International Chamber of Commerce's Guidelines on Marketing to Children but not the CRC.277

The Ombudsman Guidelines includes a number of protective provisions that are relevant to the assessment of Danish law. Firstly, advertisements directed at children should be more clearly marked than for adults.278 This includes avoiding mixing advertising and entertainment on company websites as children often have difficulties identifying such advertising.279 Secondly, online marketing should not encourage children to buy virtual items via SMS. Accordingly, following a complaint by the Ombudsman, a company changed its practice so that children under 18 years need their parents' permission to buy via SMS and may only spend a small sum each month.280 Further, by law a child cannot

268 Section 22(1) MFL.
269 Madsen, Markedsret Del 2, 2., 25.
272 Section 29(1) MFL.
273 Section 2, Ombudsman rules.
274 Section 27(2) MFL.
275 Section 27(1) MFL.
276 Section 24(1) MFL.
277 Forbrugerombudsmanden, "Guidance on Children, Young People and Marketing (Børn, Unge Og Markedsføring Vejledning) (in Danish)," (Copenhagen2014).
enter into a subscription agreement, even if she lies about her age.\textsuperscript{31} Thirdly, friend-to-
friend solicitation breaches good marketing practice as it exploits children’s feelings of
loyalty. Fourthly, companies should not send personally addressed advertising to children
as personalisation can create a positive feeling towards the brand.\textsuperscript{32} Fifthly, the
Ombudsman has also found it to be contrary to good marketing practice to use children
as brand ambassadors, as encouraging children to seek customers among their friends
and acquaintances can exploit their loyalty.\textsuperscript{33} Therefore, the Ombudsman seeks to limit
the exploitative techniques employed by marketers.

Although the legal framework recognises children’s vulnerabilities, it does not provide
comprehensive limitations on HFSS marketing, only generally worded standards. The
standards are mainly derived from EU law or the ICC Code, which means there is a degree
of harmonisation among Member States. However, these standards seem to have proved
insufficient in relation to HFSS food marketing, as in 2007 a law reform proposal was
made for command and control regulation. This proposal suggested that television and
internet advertising of HFSS food and beverages should not be directed at children, or
appear where children under 16 years formed a significant portion of the audience.\textsuperscript{34} The
measure was not adopted. Instead, Danish industry devised an informal grouping in
response to the threat of regulation - the Danish Forum of Responsible Food Marketing
Communication- that formulated a voluntary marketing code.

The Code of Responsible Food Marketing to Children (2008) is less restrictive than the
law proposal.\textsuperscript{35} Under the Code, marketing HFSS foods to children under 13 years
through print, television and the internet is not permitted.\textsuperscript{36} The Code seeks to apportion
responsibility throughout the industry (including media agencies), with advertisers
responsible for ensuring that HFSS foods are not marketed to children, and members of
the Forum required to act where they detect a breach.\textsuperscript{37} Food is defined as unhealthy as
per a Danish nutrient model, which has since been adopted with some modifications by
WHO Europe.\textsuperscript{38}

\begin{itemize}
\item \textsuperscript{31} Section 1.2 Law on Guardianship (\textit{Lovbekendtgørelse nr. 1015 af 20/08/2007 om
værgemålsloven}), available at (in Danish): www.retsinformation.dk/Forms/R0710.aspx?id=2681
\item \textsuperscript{32} Forbrugerstyrelsen, "Forbrugerjura 2008," (Denmark 2009), 31
\item \textsuperscript{33} Ibid., 32.
\item \textsuperscript{34} Proposal for a bill prohibiting the marketing of unhealthy foods and beverages to children
under 16 years (\textit{Forslag til folketingsbeslutning om forbud mod markedsføring af usunde føde- og
drikkevarer til børn under 16 år 2006/1 BF 151 Offentliggørelsesdato: 10-04-2007 Folketinget},
available at (in Danish): https://www.retsinformation.dk/eli/ft/20061BBF/20151.)
\item \textsuperscript{35} Forum of Responsible Food Marketing Communication, "Code of Responsible Food Marketing
Communication to Children," (Denmark, 2014).
\item \textsuperscript{36} Ibid., S. 7.
\item \textsuperscript{37} Ibid.
\item \textsuperscript{38} WHO Europe, "Who Regional Office for Europe Nutrient Profile Model."
\end{itemize}
The Forum considers the Code a success, and claims that advertising of HFSS foods to children has disappeared since its introduction. However, there are limitations. The broadcaster uses an electronic booking system which stops such advertisements appearing around children’s television programming. But, the Code centres on programmes directed at children, not the broader advertising landscape, such as programmes that children are exposed to although not directly targeting them.

Children’s slots are defined as from 5.30-11.00 am daily, although this is clearly not the only time children watch television. Further, internet monitoring is less concrete and seems to monitor only Danish-based homepages of company partners directed at children. Monitoring of print media is also vaguely phrased, with only marketing directly targeting children under 13 years considered. While a complaints mechanism is available online, the Forum receives few complaints. One reason for the limited complaints could be that there is little direct marketing to children; another is that there is insufficient awareness of the Forum among children and their parents. The Forum seems to provide outreach only to industry, not children.

Individuals can still complain to the Ombudsman should they be unhappy with the outcome. Since 2013 the Ministry of Food, Agriculture and Fisheries acts as an observer in the Forum. But, this simply means that a representative attends the annual meeting, where the report is submitted. Therefore there is scope for the Ministry to play a more active role, including through monitoring compliance, in light of its obligations under the CRC. Further, greater monitoring and investigation of the level of HFSS food advertising that children in Denmark are exposed to is required. The proposed Nordic monitoring tool could go some way to addressing this, yet its details are awaited.

6.5.4 SWEDEN: REGULATION AND SELF-REGULATION

In Sweden, similarly to Denmark, marketing and broadcasting are regulated through the Marketing Act and Radio and Television Act (RTL). As in Denmark, marketing must be consistent with good marketing practice. Marketing is unfair if it plays on fears or affects, or is likely to affect, the recipient’s ability to make an informed choice. Unlike the Danish Act, the Swedish Marketing Act does not explicitly highlight children as a vulnerable group. However, in its case law, the Market Court has recognised that children

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a90 Forum for Fødevarereklamer, "Børn, Mad Og Medier," (Denmark: Forum for Fødevarereklamer, 2010), 8.
a91 Ibid., 9.
a92 Ibid., 8.
a93 Ibid., 8-9.
a94 Available at: http://kodeksforfoedevarereklamer.di.dk/om%20Kodeks/Kontakt%20Forum/Pages/Kontakt%20til%20forum.aspx
a95 Forum for Fødevarereklamer, "Børn, Mad Og Medier.",14
a96 Marketing Act (Marknadsföringslagen SFS 2008:486).
a97 Marknadsdomstolen Dom (MD) 2002:22.
require particular protection. For example, the Market Court considers that, in general, direct advertising through mail to children under 16 years is contrary to good marketing unless, for example, parental consent is established. Internet games that urge children to “buy” and “buy more” have been considered an aggressive sales method. Therefore, children are protected from certain sales practices.

Further, the RTL provides express protection for children through prohibiting advertising during television programmes (including on demand television) directed at children. According to its preparatory works, the basis for the rule is that children under age 12 have difficulty distinguishing advertising from programmes. Accordingly, television advertising may not be “designed to attract the attention of children under 12 years of age”. No advertising is permitted during, immediately before, or after children’s programmes. Radio advertising employing children’s voices can also be considered unfair. Equally, characters or individuals prominently featured in children’s programmes may not appear in commercial television advertising. The legal framework provides for monitoring and sanctions. Advertisements directed at children under 12 years are considered unfair and can be subject to a fine (possibly for disruptive marketing practices) under the Marketing Act. The fee is limited to between 5,000 and 5 million SEK, but not more than the advertiser’s annual turnover. The broadcaster’s licence may be revoked where it has “materially contravened” the section. The Consumer Ombudsman monitors compliance with the RTL.

Clearly, digital media in Sweden is not subject to the RTL. There is increasing interest in protecting Swedish children when online, as their internet use is high from a young age. So far only a self-regulatory code has been devised by Swedish advertisers. Accordingly, the Advertising Ombudsman (Reklamombudsmannen) assesses complaints from individuals, businesses and organisations in line with the ICC Code. However, as this advertising “Ombudsman” is an industry professional with no state powers, the title can prove misleading, given that an Ombudsman is typically thought to act in the public

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299 MD 2012: 14.
302 RTL, ch 8:7.
303 MD 1993:23.
304 RTL, ch 8:8.
305 RTL, ch 17:9.
306 RTL section 31.
307 RTL ch 18:2.1.
308 RTL section 32.
309 RTL ch 16:4.
interest. All means of advertising are included, with decisions published online. However, the Ombudsman cannot impose fines or fees.\textsuperscript{324} Therefore, while the Swedish system provides strong protections when directed at children through broadcast media, it does not address HFSS food marketing specifically or the wider advertising landscape. From examining the available complaints, the Ombudsman has not addressed HFSS food marketing.

6.6 \textbf{Analysis of the regulations under WHO Recommendations}

The above summation suggests that the states reviewed vary in their commitment to the WHO Recommendations. The domestic rules demonstrate many commonalities, which is unsurprising given that all are subject to EU law. The UK regulations expressly aim to reduce children's exposure to HFSS food marketing, although this is limited by the principles of better regulation. The Irish rules also aim to reduce children's exposure to HFSS food marketing, from a more explicit child protection standpoint. The UK and Irish approaches are closely linked, while the Danish and Swedish systems also display certain similarities in their legal structure. In Denmark a self-regulatory code was introduced with the aim of avoiding state regulation. In Sweden, there is no specific scheme for limiting HFSS food marketing, although pre-existing broadcast rules prohibit advertising from targeting children to protect them from exploitation. Further, the regulations also display variations which may limit their combined effectiveness in light of the cross-border elements of the media viewed.

The regulations are now analysed together in light of the criteria outlined in 6.2. These are: the age of a child, criteria for assessing whether advertising is "directed" at children, how food is defined as healthy/ unhealthy, the media covered by the rules, which techniques are prohibited, the role of the state, the extent to which cross-border cooperation is included, the extent to which monitoring and complaints are provided for, the presence or absence of a sanction and the clarity of the regulations. Children's rights indicators are mainstreamed throughout the analysis, except for information provision, gender, family unity and child-consultation, which are not contained within the WHO framework and are accordingly examined at the end.

6.6.1 \textbf{Age used to define childhood}

In all jurisdictions under review, children under at least 12 years are recognised as vulnerable and given extra protection compared to adults. In the rules specific to HFSS food marketing, the definitions of a child vary from under 18 years (Ireland), under 16 (UK), under 13 (Denmark) and under 12 (Sweden). There is also a difference between the age limits imposed by law and by self-regulatory schemes: under Danish law children are aged 18 or less, whereas under the Code, children are defined as aged under 13. Furthermore, the UK and Ireland apply extra protections to younger children. There is no clear rationale for these different ages; the decision is likely based on cultural factors and political compromise.

\textsuperscript{324} It is free for individuals to complain, see: www.reklamombudsmannen.org/anmal_reklam (report ad).
From a children’s rights perspective, it is of concern that the jurisdictions reviewed provide different definitions of the age of the child. While the CRC recognises that states may set individual age limits, 18 years is suggested as a recommended standard. UNICEF recommends that minimum ages should be as high as possible where the law is protective and as low as possible where it relates to autonomy and the need to respect children’s participatory rights. Therefore, the states in question should justify digression from the standard of 18 years. The varied ages suggest that the policies are not evidence based but rely on arbitrary distinctions. Cultural and legal differences should be given consideration subject to children’s best interests.

Furthermore, age limits may be ineffective, which is contrary to regulatory efficiency as promoted by the better regulation agenda. For instance, there seems to be an overlap between the programmes watched by children of similar age groups, making it difficult to define clear limitations. Furthermore, research suggests that when regulation targets pre-teens, companies move their marketing practices towards the teenage and young adult markets instead. Also, while age limits can be applied to the internet through prohibiting children from entering certain websites, research shows that such controls are easily and often bypassed. Companies may require a date of birth to access a website, which although easily bypassed, allows companies to hide behind a veil of rectitude. Accordingly, using social media should not allow companies to claim to act responsibly, while in fact doing little to limit children’s exposure. Accordingly, the Danish Consumer Ombudsman is sceptical of age filters, given that the Danish courts have found that merely having to click yes or no as to whether one is over 18 years has no value in terms of ensuring that content is not directed at children. Therefore, regulatory efficiency would support children’s rights protection.

6.6.2 Targeting Children

In 2.2, the ways in which children are directly and indirectly targeted by marketing were explored. The regulations reviewed primarily limit advertising directed at children through scheduling and content restrictions. While strong restrictions apply to marketing directed at children, the broader marketing environment continues to promote HFSS food marketing. Therefore, the definition of when marketing targets children has important ramifications for the protection offered to their rights.

Firstly, scheduling restrictions limit HFSS food marketing broadcast at a time when children make up a significant proportion of the viewers. In all states reviewed, marketing

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398 Maritime and Commercial High Court U 2005.2250S.
of HFSS food during, after or before “children’s” television broadcasts is prohibited. Children's programmes are those designed expressly for children, or whose viewer numbers are primarily made up of children. It also reflects a balance between children’s, and adults’ and companies’ rights. However, where scheduling restrictions are applied in too lax a fashion, the rules may be ineffective in light of their aims. As there is overlap between the content watched by children and young adults, scheduling rules alone will not catch all marketing to which children are exposed.

In the UK this manifests as audience indexing, whereby 20 per cent more children aged under 16 than the national average must watch a programme for it be children’s programming. The UK rules relate to the proportion of children thought to be watching, not their actual numbers. In Ireland, 50 per cent of the audience must be children aged under 18. Although 18 years is a high threshold compared to the other standards, using broadcast figures is open to criticism as children generally make up a minority of the population. Ofcom's 2010 review estimated that children are exposed to 37 per cent less television advertising for HFSS food than before the rules came into force. On the other hand, a survey by Newcastle University indicated that since the rules came into force children are actually exposed to a similar level of advertising, as they do not watch “children’s programmes” only. Children's programmes do not include “family” programmes, such as popular Saturday night shows. A consumer agency found that 16 of the top 20 programmes watched by the highest numbers of children were not covered by the restrictions. HFSS food companies also sponsor popular daily shows that appeal to young people.

Watersheds are an alternative approach explored by Ofcom and the BAI (and promoted by civil society), whereby HFSS advertisements would not be shown on television at children’s peak viewing hours (6am-9pm). The BAI has previously found that children

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322 Broadcast Authority of Ireland, “Children’s Commercial Communications Code.,” section 2(f).
326 Which?, “Food Fables- the Second Sitting: The Truth Behind How Food Companies Target Children.,” 8
328 Irish Heart Foundation, Submission to the Advertising Standards Authority of Ireland, (December 2013), 5. (on file).
are most exposed to advertising between 6 and 9pm.\(^{299}\) However, these periods are unlikely to be classified as children's viewing times as a large proportion of adults also watch television at this time. Further, these limitations would only address television and radio advertising, not wider obesogenic marketing. Although Ireland limits HFSS food products to one out of every four advertisements on television, this threshold may be set too high as it does not reflect a balanced diet. However, it may be a first step in pursuing greater food diversity as analysed further below. The Irish Heart Foundation recommends that this threshold be lowered to 10 per cent.\(^{300}\)

Secondly, qualitative standards are also used for assessing when advertising targets children, such as whether children's voices or cartoons feature.\(^{301}\) It means that companies cannot directly appeal to children outside of children's scheduling times. Still, it can be difficult to assess whether an advertisement targets children, which is prohibited, or adults which is allowed.\(^{302}\) For instance, the Swedish Market Court has found television advertising for the video *Cinderella* legitimate as it was not specifically designed to appeal to children, or broadcast at a time with a particularly high level of child viewers.\(^{303}\) Likewise, an advertisement for an ice-cream company featuring two clay penguins looking enviously at another with an ice-cream was not within the scope of the law. The court ruled that the use of clay figures did not in itself mean that the advertisement was directed at children. The advertisement could appeal to families generally, as it was not connected with typical children's programming time.\(^{304}\) Therefore, the line between advertising directed at children and adults blurs when a product appeals to both.

Another example from the Swedish self-regulator echoes these issues. In this instance, an individual complained that an advertisement for sweets was contrary to articles 12 and 18 ICC Code as it suggested that children must follow rules, while adults can eat sweets whenever they wish. The advertisement formed part of a campaign entitled *Att vara vuxen har sina fördelar* (“Being an adult has its advantages”). In the commercial a man eating sweets sits on the subway opposite a woman with two children. The child asks his mother, “what day is it today?” The woman looks at the man and smiles. The text reads:

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\(^{300}\) Correspondence on file with author.

\(^{301}\) Forum of Responsible Food Marketing Communication, "Code of Responsible Food Marketing Communication to Children.", 7.


“Being an adult has its advantages”. The Ombudsman concluded that the commercial was not discriminatory or likely to cause ridicule.335

While advertisers may argue that the campaign is directed at parents who can understand and enjoy the advertisement, it also features children and sugary foods that appeal to them. The Ombudsman did not look beyond the grounds complained upon and thereby did not discuss the fact that the advertisement could promote excessive consumption of sweets, which is within the scope of the ICC Code. The advertisement is problematic as it frames consumption of products that are high in sugar as something attractive, special and exclusive. This can be exploitative, considering that marketing should not make children feel inferior to those who have a product.336 The advertisements could encourage the perception among children that there is something exotic about gaining access to such food.

Further, the mere fact that an advertisement features a child actor does not mean that the advertisement is directed at children. In a complaint decided in 2008, the Radio and Television Board found that a Coca-Cola television advertisement featuring a girl aged under 14 was not contrary to good marketing practice.337 The complainant argued that using a young person in an advertisement for Coca-Cola which featured “Santa Claus” was unethical as Coca-Cola is unhealthy, with high caffeine levels. The Consumer Ombudsman, who was joined to the proceedings, found that the advertisement was not contrary to good marketing practice as it targeted all age groups, even though Santa Claus and the children in the advertisements would undoubtedly be of interest to children. However, if the advertisement had been placed during children’s programmes (which were not defined) it would be directed at children.338

The Radio and Television Board held that the advertisement was not unlawful. The girl’s role was a component of the advertisement which was directed at all age groups.339 Further, the advertisement did not suggest that the product should replace normal meals.340 At the time of the complaint the relevant standard was that “unhealthy” food products should not give an impression that eating the product could be healthy or bring success, and that the product did not encourage excessive consumption of unhealthy foods or undermine healthy eating habits and lifestyles. Following this standard, the Board found the advertisement was designed with respect for applicable norms.341 The complaint confirms that much of the advertising that children are exposed to is not

338 Ibid, 4-5.
341 Ibid, 7-8.
specifically directed at them, but at multiple age groups; furthermore, unless food is profiled, vague standards will do little to reduce advertising of HFSS food.

These limitations also apply to non-broadcast media. For instance, the Danish Ombudsman finds that special protections for children only apply to media targeting children, i.e. websites that sell products designed for children. Accordingly, marketing outdoors or on social media that does not primarily appeal to children is not included. Therefore, where protections are provided for, the specifics of how media is defined as targeting children are important in terms of their scope.

Finally, the legislation and codes studied do not expressly prohibit advertising in child-centred locations such as schools. However, under the EU Pledge companies undertake voluntary limitations on advertising to primary schools. Further, according to the Danish Ombudsman, it is contrary to good marketing practice to market in schools, day-care and similar institutions where children spend their day. This includes children's clothing magazines in child-care centres, even where targeted at parents and with management's permission. Furthermore, businesses that sponsor schools should not advertise this in the schools, although they may do so on their own advertising, away from schools.

6.6.3 DEFINITION OF HFSS FOODS AND BEVERAGES

There is no uniform or binding definition of which food is healthy or unhealthy. Further, research suggests that there is widespread public confusion regarding the components of a healthful diet. As already mentioned, it is unlikely that the European Commission will develop a binding nutrient profile. This is problematic given that varied nutrient profiles can obstruct the free flow of services, as advertisers need to vary their promotion among EU Member States depending on how food is profiled. This is one reason why Ireland adopted a nearly identical nutrient profile to the UK. Thus, the regulations would be more effective were all European states to adopt a uniform profile, such as WHO Europe’s nutrient profiling model. This, as I have previously suggested in 4.4.2.1, would assist states in meeting their right to adequate food obligations by delineating the adequacy of foods.

The design of the nutrient profiling systems has important ramifications, having the potential to substantially alter the type of food advertising to which children are exposed. Brinsden and Lobstein reviewed five nutrient profiling schemes in the USA, the EU Pledge, UK (OFCOM), US IWG and Danish Code. They concluded that the Danish Code is the most restrictive and would only allow 7 per cent of the products surveyed to be advertised, whereas the EU Pledge allowed 41 per cent of the products to be advertised. They also identified some ambiguities in the terms employed. For example, the Danish

342 Forbrugerombudsmanden, "Guidance on Children, Young People and Marketing (Børn, Unge Og Markedsføring Vejledning) (in Danish).", 12.
344 "Forbrugerjura 2005." (Copenhagen2006)., 32.
345 "Forbrugerjura 2004.", 25.
Code uses criteria such as "would a nutrition specialist agree that the food is appropriate for children". Therefore, nutrient profiling models must be adequate, science based and free from corporate manipulation.

The nutrient profiles applied vary under the regulations studied. Swedish legislation does not employ a nutrient profiling system as it prohibits all advertising directed at children under 12 years, including for healthful food. The Danish model, on which the WHO Europe model is based, adopts categories that apply to marketing on all media. In both the UK and Ireland, a scoring system is used for calculating whether food advertised on broadcast media is healthy or unhealthy. However, in the case of non-broadcast media, Irish self-regulatory systems do not apply a nutrient profile and instead require that advertising meets qualitative criteria, such as misleading advertising or advertising that encourages poor nutritional habits. For instance, a complaint in Ireland under the ASAI Code was rejected although the chocolate breakfast cereal advertised contains 39g sugar per 100g serving. Under the WHO Europe model, chocolate covered cereals, or cereal with more than 15g sugar per 100g cannot be advertised to children. Therefore, advertisements for HFSS food are permitted that would not be allowed to be directed at children through any medium in Denmark, or if the WHO Europe profile were adopted. Thus, from July 2017, CAP (UK) will apply the nutrient profile to non-broadcast marketing. It declined to adopt the WHO Europe model, which it considers potentially disproportionate and unfair for differentiating based on category, not nutritional composition.

Accordingly at present, Nutella is legally advertised as a "hazelnut spread" in Ireland, despite its 50 per cent sugar content. In one instance, an individual complained that a Nutella advertisement was misleading as it did not mention that the product contained sugar. The ASAI Complaints Committee rejected that the advert encouraged poor nutritional behaviour as a warning message was displayed, the label included the ingredients and a balanced diet of fruit and brown bread featured alongside Nutella. A warning that "snacking on sugary food may damage teeth" is displayed as per the legal requirements. As discussed in 2.3, highlighting healthful products beside HFSS foods can be misleading, as it may create "health halos" whereby the product primarily advertised is assumed to be healthier than it actually is or the brand becomes associated with healthful behaviour. However, the self-regulator did not consider this point.

348 See further on the food industry's role in nutrition standards in the US: Marion Nestle, Food Politics: How the Food Industry Influences Nutrition and Health (California: University of California Press, 2002).
350 WHO Europe, "Who Regional Office for Europe Nutrient Profile Model."
351 CAP, "Cap Consultation: Food and Soft Drink Advertising to Children: Regulatory Statement."
Interestingly, the Danish Radio and Television Board adopted a different approach in a complaint from 2012 relating to a similar television advertisement for *Nutella*. The complainant argued that the advertisement was misleading as Nutella was presented as “a good start to the day”. The voiceover also stated that one portion of 15g of Nutella contains two hazelnuts, skimmed milk and cocoa, without mentioning the sugar content. Accordingly, the Radio and Television Board held that the advertisement was contrary to good marketing practice as the scene suggested that Nutella was a healthy product. This finding was not altered by the fact that the ingredients were available on the label and online. Similar findings have been made in the UK and US regarding misleading claims by Nutella. This shows a more protective approach than the ASAI. It suggests that the impact of the advertisement should be considered as a whole in light of the assertions made by the advertiser. While the Irish advertisement displayed a warning message, this should not be used to justify a less protective approach in light of the limitations of disclosure messages.

**Right to food**

The right to adequate food is not reflected in any of the rules. As suggested in 4.4.2.1, failure to adopt sufficiently stringent nutrient profiling should be considered a right to adequate food issue. States should monitor whether food is adequately profiled and whether the reasons are scientifically supported and legally necessary. Furthermore, only Ireland expressly limits the cumulative amount of advertising allowed for HFSS food. In the UK, although the rules aim to ensure dietary diversity, companies increasingly advertise during teen or adult slots, meaning that cumulative exposure is not reduced.

Alternatively, it is sometimes suggested that the marketing techniques adopted by advertisers of unhealthy food should be used to boost consumption of fruit and vegetables. This type of marketing can also be problematic from a children’s rights perspective. It could imply that exploitation is acceptable if it is in children’s “best interests” and that the end justifies the means. One is faced with two scenarios. In scenario one, only marketing of unhealthy foods is exploitative, as healthy food

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354 Ibid., 10.
marketing is in children's best interests. The UK and Irish approaches to food marketing reflect this position and limit advertising based on a nutrient profile. In scenario two, all marketing directed at children is exploitative as it bypasses rational thought. Accordingly, in Sweden, as no advertising to children is allowed, food diversity is not pursued in advertising directed at children. This means that neither the state nor companies are able to use advertising as a means of influencing children's behaviour. Accordingly, as suggested by the Special Rapporteur on Cultural Rights, marketing directed at children under 12 years could be considered exploitative as they often do not understand the persuasive intent. For older children, states should engage with marketers and advertisers to limit exploitative or stealth techniques, and instead focus on the informative aspects of marketing.

6.6.4 MEDIA COVERED

In each legal system, broadcast and non-broadcast media are treated separately. This is unsurprising in light of the historical distinctions in their regulation as discussed in 6.3.6. Domestic legislation covers broadcast media, with other broader forms of media, such as internet websites, largely left to self-regulatory codes. In the UK, broadcast media is governed by co-regulation, whereas self-regulation applies to non-broadcast media. In Ireland, only broadcast media is regulated by the state, while self-regulation applies to non-broadcast media. In Sweden and Denmark "good marketing practice" applies to all media although the standards imposed by the broadcast acts do not seem to be specific enough to adequately limit HFSS food marketing. Therefore, in Denmark industry operates its own self-regulatory code to limit HFSS food marketing on multiple platforms. In Sweden, non-broadcast media is also regulated by a self-regulatory code – although this does not specifically address HFSS food marketing.

In Ireland (and formerly in the UK) self-regulatory rules offer less protection as they do not prohibit HFSS marketing but only impose limitations where food marketing is judged to breach qualitative criteria, such as encouraging excessive consumption or disparaging a healthy diet. It is submitted that this places a heavy onus on the complaints' body and results in a lack of clarity (see 6.7.4). It ultimately does not provide adequate protection for children's rights. This is illustrated in a complaint under the old CAP rules, related to a website/advergame called Swizzels Town - a heavily branded interactive environment which features a sweet shop, lollipops as traffic lights and a child frantically eating a lollipop. The relevant test was whether the website supported poor nutritional habits, not simply whether it promoted HFSS foods to children. ASA concluded that this did not breach the code as it did not encourage poor nutritional habits simply by featuring unhealthy food. This decision highlights the need for the adjudicator to interpret complaints from a child-focused perspective instead of narrowly following the letter of the rules.

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309 ASA Ruling on Swizzels Matlow, 29 August 2012.
Thus, the weaknesses of the non-broadcast codes in the UK and Ireland have meant that advertising that would not be allowed during children’s television programmes is allowed in other media, such as advertisements before children’s films in the cinema. In one instance, the complaint related to an advertisement for a cereal high in sugar that predominately appeals to children - *Cookie Crisp*. The advertisement was shown during a film appealing to children, and appeals to children through cartoon characters. However, ASA found that although the product was high in sugar, the advertisement did not encourage poor nutritional habits or an unhealthy lifestyle.\(^{360}\) Such advertisements will no longer be allowed under the new rules.

Moreover, non-broadcast rules do not capture all the media observed in scientific research. Codes do not apply to packaging or branded items, like lunchboxes, glasses, and prizes. In stores, products are often specially marketed or placed beside the check-out. While advertisements of gifts and promotions are limited by the UK/Irish rules, they are permitted in stores.\(^{361}\) There is also little regulation of sponsorship, therefore, *Coca-Cola* and *McDonald’s* are prominent sponsors of local and international sports events (see 5.6).

### 6.6.5 Techniques

In 2.3, techniques that may infringe upon children’s right to freedom from exploitation were identified. EU law prohibits techniques, such as “pester power”, direct exhortations to buy and techniques that manipulate children's vulnerabilities. However, this only applies to content coming from within the EU. Product placement and health and nutrition claims can still be broadcast in films and television programmes from outside.\(^{362}\)

The analysis above has highlighted that more specific techniques are also addressed by national law. The UK and Irish broadcast rules are detailed and prohibit a wide range of techniques that have been outlined in the literature, although usually only when directed at (younger) children. Therefore, companies can thereby circumvent restrictions through appealing indirectly to children. For example, celebrities can be used in advertisements if they have general appeal - not only particular to children. Further, techniques such as advertising of free gifts, discounts for multiple purchases and collection promotions are permitted in non-broadcast advertising unless they encourage “excessive consumption”. Free toys with purchases or advertised in stores are not restricted, although they impact on meal selection.\(^{363}\) As licenced characters are prohibited in the UK, brand characters

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\(^{360}\) ASA Ruling on Cereal Partners UK, 7 May 2014.


\(^{362}\) See: Proposal for a Directive Of The European Parliament And Of The Council amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services in view of changing market realities COM/2016/0287 final - 2016/0151 (COD).

increasingly appear in food adverts.\textsuperscript{364} CAP UK recently declined to extend existing prohibitions to brand characters, finding their impact limited and such restriction disproportionate.\textsuperscript{365} Thus, while comprehensive, gaps remain.

The Danish self-regulatory code does not expressly prohibit these techniques, although their use could imply that advertising is directed at children, and thereby prohibited in a HFSS advert. Further, they could be contrary to good marketing practice following the Marketing Practices Act. These techniques cannot be used on broadcast media in Sweden if directed at children under 12. However, this does not apply to non-broadcast media, although like under Danish law, the techniques could be interpreted as unfair due to children’s limited comprehension.

6.7  **Analysis of Qualitative Dimensions of Regulations**

The rules on HFSS food marketing in the UK, Ireland, Denmark and Sweden read as though children do not have rights when accessing media. None of the regulations reviewed is children’s rights focused, with children’s rights language largely absent. While all of the rules reviewed contain protective elements, recognising children as rights holders goes farther. This section analyses qualitative elements of the rules that are common to both children’s rights and WHO Recommendations: the role of states and cross-border co-operation, monitoring and complaints’ mechanisms, the extent to which sanctions are provided for, and the clarity of the regulations.

6.7.1  **The Role and Obligations of the State**

In each of the legal systems reviewed, the state provides a basic legal framework to protect children from inappropriate advertising. However, at the same time, the states only exercise limited control, with other elements regulated by industry. The power of the industry in an area where states have obligations is problematic as children’s rights is not companies’ basic concern. Further, they are accountable not to the public, but to their shareholders.

Instead, states have undertaken obligations under the CRC and therefore must implement them even where self-regulation is adopted. However, in line with previous research, none of the regulations analysed (both regulatory and self-regulatory) were undertaken with the states’ obligations under the CRC expressly in mind. The consultation documents do not consider children’s socioeconomic rights, such as children’s rights to health or adequate food. Further, rights’ principles, such as best interests, are not expressly included in any of the rules. Instead, the consultations for the Irish and UK rules were developed with companies’ rights to freedom of expression in mind. However, children’s inherent vulnerability is certainly considered in each of the


rules: the younger a child is, the more vulnerable she is considered to be. Thus, companies are recognised as rights holders, while children are generally offered protection as a matter of beneficence.

This raises the question that I asked in 6.3.5 – is self-regulation contrary to a children's rights approach? It is submitted that industry self-regulation without state oversight is problematic from a children's rights perspective. States have undertaken legal obligations, not companies. Further, self-regulation may be compromised where the industry's interests (i.e. in selling food) conflict with children's rights to adequate food and an enabling environment for health fulfilment.

Accordingly, it is of concern that the standards which apply to self-regulation are weaker than those which apply to state regulation, such as the definition of the child and the scope of the sanction. Still, self-regulation has benefits in that self-regulatory rules in the UK, Ireland, Denmark, and the EU Pledge, have been updated and strengthened. Further, the self-regulation imposed is not totally voluntary - it was introduced due to fear of legislation. Therefore, states should act as stakeholders through guiding the development of self-regulation, its monitoring and evaluation. Finally, the analysis suggests that self-regulatory systems are not per se irresponsible of rights. For instance, the Danish model adopts the most restrictive nutrient profiling system. However, as we will see, there are further limitations in terms of monitoring and sanctions. Where self-regulation does not adequately support children's rights, states must ensure adequate standards, including through - not only threatening - but implementing regulation.

6.7.2 CROSS-BORDER CO-OPERATION

The current system of regulating HFSS food marketing is fragmented; different protections apply depending on the medium employed and the age of the child. The fragmented approach means that children are protected by different rules depending on where they live. Although EU law makes provision for international co-operation where advertising is transmitted from one Member State to another, in reality this co-operation is limited due to the failure of Member States to agree on prohibitions at EU level.

Further, country of origin rules pose particular difficulties to effective regulation of broadcast media in the EU. Media broadcast from one Member State and received by another is subject to the rules of the host state, not the receiving state. While this legal principle provides for free movement of services within the EU, as all the Member States reviewed impose different limitations, children's rights are undermined. For example, it has been shown that children in Sweden are exposed to similarly high levels of HFSS foods advertising as in other states, like Spain and Germany, because the prohibition only
applies to terrestrial channels.\footnote{Kelly et al., “Television Food Advertising to Children: A Global Perspective.”, 1733.} The Danish Code covers the only commercial channel that broadcasts from Denmark (TV2).\footnote{Forum of Responsible Food Marketing Communication, "Code of Responsible Food Marketing Communication to Children."}

However, EU law recognises that free movement is subject to abuse. The AVMS Directive makes provision for co-operation where a broadcaster is based in one Member State but primarily broadcasts to another with a view to circumventing national legislation. When transposing the AVMS Directive, Member States can make provision for co-operation, should an advertiser in another state broadcasting solely to their jurisdiction seek to circumvent their legislation. Accordingly, since 2010, if a TV broadcaster wholly or primarily directed at Sweden, established in another EEA state, transmits advertising directed at children to Sweden, the regulatory authority in Sweden will contact the relevant authority in the other state and request that they comply with Swedish law. If the broadcaster fails to comply, and in the event that he has established himself in order to avoid the stricter rules, the authority may take action after notifying the Commission and relevant EU Member State.\footnote{RTL ch 1615.} Similarly, the Irish Broadcasting Act makes provision for review of the extent to which television broadcasters “in the jurisdiction of another Member State, which are wholly or mainly directed towards audiences in the State comply with broadcasting codes.”\footnote{Broadcasting Act, section 29(5).}

Finally, the European Network collaborates on HFSS food marketing and recognises children’s rights. Its proposed monitoring framework offers the potential to strengthen this approach. From an industry perspective, the European Advertising Standards Authority (EASA) - an alliance of self-regulators from EU member states - passes complaints from individuals to the relevant self-regulator in the country of origin. The complaint is then examined in line with the rules in the country of origin.\footnote{EASA, “Want to Complain?,” EASA, www.easa-alliance.org/about-ad-standards/want-complain.} Further, the UK is party to the Transfrontier Convention, although this only applies to marketing broadcast from non-EU Member States.\footnote{Council of Europe, European Convention on Transfrontier Television ETS No.332. While this allows for some oversight, it is likely to fall flat where standards vary due to regulatory choice, not because a state is trying to circumvent regulation.

6.7.3 ACCOUNTABILITY: MONITORING, COMPLAINTS & SANCTIONS

Different methods of accountability apply for broadcast and non-broadcast media, and state and industry regulation. The Danish self-regulatory system primarily self-monitors children’s exposure to HFSS food marketing. In contrast, under the regulatory system in Denmark and Sweden, the Ombudsman system provides for multi-level monitoring that allows for dialogue between the industry and the Ombudsman, which represents the public interest. In the UK and Ireland, monitoring relies on public complaints. The ASA does not generally investigate without complaints from the public, although it claims to
undertake spot checks. Furthermore, in all the systems it is possible to get non-binding pre-copy advice on whether an advert is compliant, although pre-clearance is not available for internet advertising. In Ireland and the UK the regulations are also monitored through periodic reviews. As expected, the state controlled systems offer greater accountability through regular monitoring including consultations, complaints mechanisms and sanctions. However, neither system enshrines child-friendly complaints.

All the systems reviewed make provision for individual complaints. Yet, there is not much scope for comparing and analysing the relevant bodies’ decisions as they are limited in relation to HFSS food marketing. Further, questions should also be raised regarding the transparency of the industry-led systems. While it is possible to make individual complaints to the Danish self-regulatory system, there is no publicly available database of the complaints adjudicated or received, making it difficult to know what the self-regulator considers a breach and how it decides complaints. The Swedish self-regulatory system makes complaints available online. However, as we saw in 6.6.2, the regulator does not adopt an expansive approach when adjudicating complaints. Further, the ASA is not proactive, for example, where it finds a breach, it does not check the companies’ other promotions to ensure that these are compliant. These complaints systems are problematic as they rest on viewers being adequately informed to make complaints, with children relying on adults. Finally, only the complaints that are resolved by a hearing are available online. Therefore, it is difficult to establish a full picture of how decisions are made by the ASA, which is troubling from an accountability perspective.

Further, there is in general a clear distinction between the sanctions provided by law and those under self-regulation. Under broadcast and marketing legislation, resort to court with the possibility of imposition of fines is possible, but a last resort. In contrast, self-regulatory codes rely on the removal of an advertisement or membership rights as a sanction. The UK is an exception, with decisions of ASA subject to judicial review. In Denmark and Sweden, where one is not satisfied with the self-regulatory response, it is possible to complain to the Ombudsman, although the latter are not bound by detailed rules on HFSS food marketing. Therefore failure to abide by self-regulation mainly relies on reputational sanctions, although no evidence of this impact was found. It may rely on civil society organisations promulgating breaches, as happens in the UK. Evidence of an

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374 Clark and Powell, "Through the Looking Glass a Review of the Topsy Turvy World of the Regulations That Are Supposed to (but Don’t) Protect Children from Online Marketing of Junk Food.,” 2.
376 Children’s Food Campaign in the UK are active in bringing complaints to the ASA, see further: Clark and Powell, "Through the Looking Glass a Review of the Topsy Turvy World of the Regulations That Are Supposed to (but Don’t) Protect Children from Online Marketing of Junk Food."
active civil society community was found in the UK, with some engagement from the Irish Heart Foundation. In Denmark and Sweden, HFSS food marketing does not seem a civil society priority, although the European Network is active.377

As we saw in 5.6, children’s rights indicators highlight child-friendly complaints mechanisms. Following the CRC Committee’s guidance, I consider these to be complaints’ systems that are accessible to children, i.e. known by children, possible for children to access with limited help from adults and open to receiving complaints from children. However, none of the systems reviewed is adequately child-friendly. The online systems are cumbersome for even an adult to use. British civil society report difficulties with complaining to the ASA and the standards applied. For instance, decisions can take up to a year to be made and those that do not go to full hearing are not reported publicly.378 While the Irish complaints mechanism is not designed in a child-specific manner, the Irish self-regulator ASAI confirmed that it has received some complaints (on other matters) from children directly – although it did not specify how many.379 The Ombudspersons in Denmark and Sweden proactively engage in outreach and inform children and adults of their rights. However, these findings are preliminary as children’s views were not gathered on the accessibility or their knowledge of the complaints systems.

The position of children could be strengthened through including them in the adjudication of complaints. Furthermore, complaints’ mechanisms should be made more accessible to children. Another approach would be to educate complaints’ boards on children’s rights and principles. The best interests’ principle should also be given consideration when bodies adjudicate on issues affecting children. Therefore, a provision should be added to the self-regulatory rules to ensure that children’s rights are recognised as a primary concern in light of the CRC.

6.7.4 Clarity

Clarity is taken to mean that both the marketers and the public can easily discern whether marketing is in keeping with prescribed standards. The UK and Irish systems offer detailed guidance on what practices are prohibited. However, they also include vague elements that are open to interpretation, such as “encouraging poor nutritional habits”, “excessive consumption” and “causing harm” (although this has been addressed in the amended UK self-regulation). Under Danish law, marketing should not encourage behaviour prejudicial to health, which is also an unclear standard. Good marketing practice under Danish and Swedish law is by design not specific and could include a number of techniques, although this has not been explored in detail by either Ombudsman in relation to HFSS foods. From an accountability perspective, it may be

377 Correspondence on file.
378 Clark and Powell, “Through the Looking Glass a Review of the Topsy Turvy World of the Regulations That Are Supposed to (but Don’t) Protect Children from Online Marketing of Junk Food.”, 9.
379 Email correspondence on file with author.
difficult for duty bearers to establish whether their advertisements are in compliance with the rules. This is further complicated where complaints are not publicly available. While flexible standards allow for development over time, they depend on the interpreter and may not always provide optimal protection for children. From the complaints surveyed, both regulators and self-regulators do not seem to interpret the text of the code or law expansively in relation to HFSS advertising. Further, industry regulators may fail to prioritise children’s rights, and consider freedom to advertise and the right to information paramount, rather than the rights to health and food.

6.8 **Analysis of Children’s Rights Indicators**

The following aspects of the children’s rights approach are not addressed by the WHO Recommendations and will now be examined separately.

6.8.1 **Consultation with Children**

Children have not been core stakeholders in the drafting of rules related to HFSS food marketing or in ensuring accountability through monitoring and complaints. Children’s views on advertising were however, collected in the regulatory assessments in the UK and Ireland. This is a positive indication of children’s status as rights holders and the need for rules to not be solely dependent on adults’ notions of harm. However, children do not sit on any of the complaints’ bodies analysed or seem to play an overt role in monitoring compliance. The vague standards, when assessed by self-regulators with business interests in mind, may be interpreted to the detriment of children and the advantage of industry.

6.8.2 **Information Provision: Media Literacy**

In 5.1, information was cited as an important right in light of the text of the CRC and the children’s rights approach. Information and education are means by which both duty bearers and rights holders can be empowered. Accordingly, information disclosure in advertising for HFSS food, and media literacy are two potentially empowering techniques to support limiting the impact of HFSS food marketing.

However, in spite of this focus, information provision does not play a major role in the regulations analysed. Only in Ireland are all advertisements for HFSS food required to include information on potential effects of HFSS food. While the effect of advertising disclosures is likely limited, states’ obligations to fulfil rights do not depend on their effectiveness. Instead, as a right, states are bound to respect, protect, fulfil. At the same time, disclosures should not be used to justify a disengaged approach or permit advertising that would otherwise be misleading, as seems to be the case in the Irish Nutella complaints discussed in 6.6.3. Instead, information should promote empowerment and support restrictions.

Further, in Chapter Four, it was highlighted that the CRC Committee and the European Committee of Social Rights emphasise the importance of strengthening children’s media literacy skills, including through education and information provision in schools. Given the move against regulation and in favour of information it should not come as a surprise
that media literacy is further supported by UNESCO, the OECD and European Commission. However, a shared vision of the components of media literacy remains elusive. Still, the AVMS Directive describes media literacy as:

the skills, knowledge and understanding that allow consumers to use media effectively and safely. Media-literate people will be able to exercise informed choices, understand the nature of content and services and take advantage of the full range of opportunities offered by new communications technologies.

However, in spite of the informed consumer paradigm, media literacy is often neglected, thus increasing the burden on the individual to protect herself. In Ireland, media literacy education is not a core subject and is generally limited, in spite of recommendations. Rolling out national media literacy programmes requires educating teachers, finding time in the already busy school schedule and resources. In the UK, media studies is an established although often neglected subject. In Denmark, media education is not mandatory but is provided in a number of forms. The Danish Ombudsman encourages the creation of a mandatory media skills course in schools. Media literacy is included in general formulations in the Swedish school curriculum.

Children’s rights mandate educating both parents and children to ensure they enjoy their rights. From an empowerment perspective, it appears inadequate to simply prohibit techniques. Instead, children should also be supported through media literacy. Empowerment should not end with children but also ensure that parents are competent to support their children. This seems reasonable given that the regulations examined generally see parents as gatekeepers, who are capable of mitigating commercial messages. Accordingly, it is problematic that states fail to adequately discharge these responsibilities.

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380 UNESCO, The Grünwald Declaration on Media Education (Grünwald, Germany, 1982).
381 Commission Recommendation of 20 August 2009 on media literacy in the digital environment for a more competitive audiovisual and content industry and an inclusive knowledge society (2009/625/EC).
385 See further: Julian McDouggall et al., "Media and Information Literacy Policies in the UK," (UK: LSE, 2014).
386 Kirsten Drotner, "Media and Information Literacy Policies in Denmark (2013) " (Denmark: DREAM and Institute for the Study of Culture - Media Studies, University of Southern Denmark, May 2014).
6.8.3 **Gender**

In all of the states reviewed advertisers should avoid stereotyping or discriminating on the basis of gender. The UK and Irish self-regulatory codes mandate that offence should not be caused on grounds of gender\(^{389}\) and gender stereotyping should be avoided.\(^{390}\) Although these principles are not included in statute, the Danish Consumer Ombudsman considers gendered-marketing contrary to good marketing practices.\(^{391}\) Under Swedish marketing law, gender discrimination is not illegal, although a proposal is currently under consideration.\(^{392}\) However, the *Reklamombudsman* (a self-regulatory body) forbids gender discrimination in advertising following the ICC Code, although it does not have the power to issue sanctions.\(^{393}\) No cases related to marketing of HFSS food advertising were found where a gendered element was raised. This aspect warrants further study in light of research suggesting that food advertising is gendered.\(^{394}\) Additionally, there is some evidence from Australia that food advertising has a greater impact on boys than girls.\(^{395}\) However, the rules address overt stereotyping/discrimination - not targeting children due to their gender.

6.8.4 **Family Unity**

All of the rules reviewed recognise parents/guardians as gatekeepers. Therefore as discussed in 5.4.4, in principle, marketing should respect this role and not undermine family unity. Instead, parents should be supported in mediating the effects of advertising on children. While certain techniques do so, regulators have also exhibited a propensity to shift responsibility for protecting children from marketers to the parents. In one case the Danish Ombudsman decided that a campaign which encouraged young people to ask their parents to buy a product was not contrary to the Marketing Act, as it was ultimately the parents’ responsibility to decide whether to buy.\(^{396}\) This undermines the protections from “pester power” afforded to children and parents. The Ombudsman followed the position of the Maritime Court, which is that parents and other educators have a responsibility to guide young people on how to deal with marketing and how to develop critical skills.\(^{397}\) This approach can be criticised for expecting too much of parents and disadvantaging children, who do not have parents with this level of awareness. It limits state responsibility and places the obligations on parents instead, which may not be in


\(^{390}\) "Code of Standards for Advertising and Marketing Communications in Ireland.", 3.18.


\(^{393}\) Section 4, International Chamber of Commerce, "Consolidated Icc Code of Advertising and Marketing Communication Practice."; Reklamombudsmannen, "Home".


\(^{395}\) Cancer Council Australia, "Teenage Boys More Vulnerable to Junk Food Ads".

\(^{396}\) Forbrugersonombudsmand, "Samlekort-Kampagne Var I Orden," (Denmark, 2015).

the child’s best interests. It neglects children’s rights under the CRC in favour of companies’ rights.

Further, if parents cannot rely on states to limit marketing that is contrary to their children’s rights, they may find it necessary to prohibit or severely limit their child’s access to media. In 2.4, parents’ mediatory roles were discussed with active mediation suggested as more effective than restrictive approaches. Equally, the latter are troublesome from a children’s rights perspective. As we saw in 5.3, children do not only have rights of protection, but also rights to express themselves, to information and to play. Access to media has an important role in empowering children. Restrictive approaches by parents are likely to interfere with a child’s right to an open future as children may be limited in using their capabilities progressively and therefore lack the media skills that are increasingly necessary in the “digital world”. Accordingly, as I have already stated, the regulatory environment is a state obligation outside the control of parents.

6.9 CONCLUSION

The regulations surveyed impose legal and self-regulatory limits on HFSS marketing to children. Although comparatively strict, the analysis demonstrates that gaps and inconsistencies remain in relation to WHO Recommendations. Further, the restrictions neglect children’s rights and principles, which could be employed to strengthen limits on commercial conduct. This analysis suggests that even in the states that have taken express action, the approach focuses on carefully respecting companies’ rights, to the detriment of enhanced and effective protection for children from harmful marketing. Food lobbies campaign vigorously against new measures, while children’s voices are rarely represented in public discourse. As explored in the next chapter, states are unsurprisingly careful, given that they are bound by the principle of proportionality under EU law. Still, while states act in accordance with principles of better regulation, they should also honour their obligations to children under the CRC and EU law. Accordingly, states’ obligations are neglected, with this vacuum filled by inadequate, voluntary standards that fail to recognise the full spectrum of children’s rights.
Chapter 7
Balancing Children’s Rights with Competing Regimes/Obligations

The Convention of the Rights of the Child (CRC) is situated within a pluralist legal regime that lacks an established international arbitrator to determine states’ obligations among various treaties. States parties to the CRC have entered into numerous treaties under international and regional law, not only those that pursue children's rights or public health. Following established principles of international law and the methodology invoked in this dissertation, children’s rights cannot be invoked in isolation. Therefore, states’ obligations to children must be considered in light of the competing requirements under international human rights law, and other systems of law, in particular in this case those that protect companies’ economic liberties.

However, a challenge is that where economic freedoms and health rights interact, there is no clear means of interpreting the range of obligations that states have entered into. International law is often created without consideration for how states’ obligations interact where their aims and objectives collide. Therefore, the manner in which children’s rights interrelate with these norms is not always readily clear and requires greater exploration. States’ abilities to prevent obesity are constrained by regional and international law. This may lead to tensions between human rights, public health, trade and free movement. This chapter aims to explore to what extent states parties can pursue children’s right to freedom from obesogenic food marketing, while simultaneously respecting their obligations under competing legal regimes.

Firstly, tensions exist within human rights, between economic rights and individual liberties, and positive obligations to ensure socioeconomic rights and children’s best interests. Accordingly, the right to freedom of commercial expression is explored under the International Covenant on Civil and Political Rights (ICCPR), European Convention on Human Rights (ECHR) and the Charter of Fundamental Rights of the European Union (EU Charter). Given that the above treaties, together with the CRC, form part of a normative system for the promotion and protection of human rights, it is submitted that rights should be interpreted in a manner that is complementary. Therefore, it is reasonable to speculate that companies’ rights should be shaped so that they are compatible with children’s rights.

1 For example, although there is a well-recognised potential for conflict between tobacco control and trade, this issue is not adequately clarified in the WHO Framework Convention for Tobacco Control.

Secondly, however, states adopting food marketing restrictions can be sued through the World Trade Organisation (WTO), under European Union (EU) law or other multilateral agreements. It has been claimed that this is probable as regulations aimed at preventing obesity are often exploratory and lack strong evidence. Further, it can be difficult to establish the causality of a single measure as obesity prevention requires multiple laws and policies. Even where a state successfully defends a law, the costs of the lawsuit may have a chilling effect on states with fewer resources to engage in expensive litigation. For example, Australia spent $50 million fighting litigation brought in response to its adoption of plain packaging of cigarettes. The former regimes are institutionally stronger as they are backed by sanctions and enforcement bodies, while there are no sanctions and enforcement bodies in international law for children's socioeconomic rights. Accordingly, international norms interact in a haphazard and unclear manner with, it is argued, children's rights often neglected.

Further, normative systems, such as EU law, cannot be presumed compatible with children’s rights as they primarily pursue economic aims, not human rights. The interplay between competing international legal regimes is not decided, although human rights has been suggested as superior to other normative systems given its inclusion in the UN Charter. However, children's rights are undermined by the fact that states' obligations under trade and EU law are monitored by courts and panels that can adjudicate binding rulings, while children's rights and socioeconomic rights generally are not subject to binding international enforcement mechanisms. For instance, as noted in 1.10.1, the strongest international human rights system – the ECHR – does not primarily protect socioeconomic rights to the same scale as envisaged under international law. Further, as already discussed in 3.7.2, Member States' competence to regulate on the basis of children's rights is limited by their obligations to uphold the internal market. However, as will be explored, the EU increasingly recognises children’s rights and the EU's health

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See further, Chapter 3, McGrady, Trade and Public Health: The WTO, Tobacco, Alcohol, and Diet.

For example, the Commission launched an investigation into the legality of the 2011 Danish tax on foods with a saturated fat percentage of 2.3 or more, suggesting that certain products were receiving illegal assistance. European Commission, “Taxation of Saturated Fat in Certain Food Products Sold in Denmark,” news release, 2015, http://ec.europa.eu/competition/state_aid/cases/243577/243577_1637882_36_2.pdf. Law available here: Lov om afgift af mættet fedt i visse fødevarer (fedtafgiftsloven) Lov nr 247 af 30/03/2011, available at: www.retsinformation.dk/FORMS/R0710.aspx?id=136314. This decision has been criticised from a public health perspective http://epha.org/epha-comment-on-european-commission-investigation-into-danish-fat-tax/


Alemanno and Garde (eds.), Regulating Lifestyle Risks in Europe: Tobacco, Alcohol and Unhealthy Diets, 2.


Guy Taylor, "Big Tobacco Lost to Australia over Plain Packaging - but That Doesn't Mean That Corporate Courts 'Work'," Global Justice Now (29 May 2016).

obligations. Therefore, there is scope for a reasonable balance between these competing rights and interests, although it may require a fresh approach.\(^3\)

7.1 Outline

The chapter separately explores two competing normative systems: companies' rights to commercial expression and EU free movement law, and their interaction with children's right to freedom from obesogenic marketing. The first question addressed is:

To what extent do companies' rights to freedom of commercial expression limit children's rights to freedom from HFSS food marketing?

The scope and content of companies' rights to commercial expression is analysed primarily in light of European Court of Human Rights (ECHR) case law. The ECHR is of particular importance, as commercial freedom of expression does not have a long history and has found its way into European legal systems through this Convention.\(^7\) Therefore, European States are likely to be heavily influenced by the approach of the ECtHR.

The standard of review applied by the ECtHR and the margin of appreciation afforded to Member States is outlined. The analysis demonstrates that the ECtHR has regard for both the type and medium of expression, although it has not established a comprehensive doctrine. Regard is also given to guidance from the Human Rights Committee (HRC) and case law from the Court of Justice of the European Union (CJEU) regarding companies' rights. As the ECHR does not protect the right to health, I further analyse two cases where national courts have been called upon to balance the right to health with commercial freedom of expression in relation to tobacco marketing restrictions. While there is a number of cases related to companies' rights and tobacco control, these cases were selected as the legal systems in question recognise the right to health specifically, and pursue a balance between these two norms.\(^7\) These cases offer some guidance as to how a balance can be achieved between competing rights. The discussion is largely exploratory, as the eventual decision of a court will depend on the specific legal system and the quality of the evidence presented.

Afterwards, the analysis shifts to EU free movement law. It explores the limits that the internal market places on EU Member States' scope to regulate unhealthy food marketing. It seeks to address:

To what extent does EU free movement law affect states' discretion to ensure children's right to freedom from HFSS food marketing?

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\(^3\) International trade law is not given consideration, see further: McGrady, Trade and Public Health : The Wto, Tobacco, Alcohol, and Diet.
This analysis allows for a more detailed and concrete evaluation in light of the CJEU’s previous case law on alcohol marketing regulations. Furthermore, EU law increasingly recognises children’s rights and the right to health, placing an obligation on the CJEU to navigate an appropriate balance. Therefore, EU law has the potential to bridge the gap between normative systems protecting “socially focused” health and children’s rights, and economic integration.

7.2 The Role of Courts in Reviewing Legislation

The decision of a state to adopt legislation is not the end of the legal process – instead, national and regional courts increasingly review the legality of legislation from both a procedural and substantive standpoint. Legislation on HFSS food marketing – which was explored in the previous chapter – can be subject to judicial review by courts at national, regional and international level. Although it seems that there have not been previous judicial reviews of regulation of HFSS food, in future the food industry may follow the approach of tobacco and alcohol companies and challenge legislation designed to limit HFSS food consumption. The approaches of the ECtHR and the CJEU are important to the entire Council of Europe/ European Union region as domestic courts are influenced by their interpretations.

In reviewing legislation, European courts are increasingly guided by the principle of proportionality. Both the ECtHR and the CJEU employ the principle in deciding the acceptability of state action. Proportionality relates to three/ four sub-principles that a government must prove in relation to the impugned measure. Accordingly, it must be established that the measure:

- pursues a proper purpose, i.e. a legitimate aim
- is suitable: the means are rationally connected to the pursued aim
- Necessary: there must be no less restrictive measure available to achieve the aim
- Proportionate *stricto sensu*: the benefit from realising the objective exceeds the harm to the right.

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15 Christoffersen states that proportionality in German law is far from ECHR proportionality Jonas Christoffersen, "Fair Balance: A Study of the Principles of Proportionality, Subsidiarity and Primarity in the European Convention of Human Rights" (Univeristy of Copenhagen, 2008), 33.

Accordingly, proportionality highlights that “public authorities shall take no action, the overall costs of which are excessive in relation to its overall benefits”. An appropriate balance between the harm to the individual right and the communal benefit pursued should be achieved.\(^\text{8}\)

Further, commentators observe increasing “judicialisation” – deeper and stricter judicial review - in European regional and national courts.\(^\text{9}\) European courts, including the ECtHR and CJEU, increasingly review both the content of legislation and the process by which the decision was reached.\(^\text{20}\) The CJEU, when examining restrictions on freedom of movement, has moved from expecting a low level of justification towards a focus on the extent to which adequate risk assessment was conducted.\(^\text{21}\) Similarly, the ECtHR has considered whether consultation was carried out, and whether adequate scientific evidence was presented.\(^\text{22}\) This approach requires courts to look beyond legal sources and also examine non-legal sources.\(^\text{23}\) Accordingly, it could be expected that courts called upon to adjudicate on children’s right to obesogenic food marketing restrictions will look not only at the balance between the rights invoked, but also the manner in which the decision to limit these rights was made (see 6.3.1).

At the same time, courts should respect the separation of powers and avoid overturning well-founded decisions of the legislature.\(^\text{24}\) Politicians have a democratic mandate, whereas courts do not. Further, politicians are guided by assessments and consultation, whereas judges may be ill-equipped to weigh scientific evidence. Therefore, an appropriate balance must be attained not only between competing systems but between competing duty bearers, i.e. courts and politicians.

This balance is further complicated in a multi-level legal system, where regional courts should have regard for the national variances among Member States. It must be recalled that the ECtHR is a court of review, not appeal. Therefore, its objective is “not to promote governmental efficiency but to preclude the exercise of arbitrary power”.\(^\text{25}\) Accordingly,

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\(^{17}\) Emiliou, The Principle of Proportionality in European Law, 6.


\(^{24}\) Ibid, 308.

the ECtHR employs the *margin of appreciation* based on the assumption that what is necessary varies between states, and the national authorities are in a better position to make findings of fact due to their superior understanding of the issues in their jurisdiction.\(^{26}\) Therefore, states should have a “certain leeway in choosing the appropriate regulatory response.”\(^{27}\) Similarly, the CJEU affords Member States a measure of discretion in political, economic and social measures. Equally, while in infringement actions the CJEU decides the proportionality of a measure, in a preliminary reference, this is normally left to the national court.\(^{28}\) However, the margin of appreciation is not unlimited: “the domestic margin of appreciation thus goes hand in hand with a European supervision”.\(^{29}\) Accordingly, the ECtHR notes that its standard of review is not limited to whether the State “exercised its discretion reasonably, carefully and in good faith.”\(^{30}\) Although this discretion is normally framed as justified based on the supra-national nature of regional courts, as we will see, national courts also recognise the discretion of the legislature in seeking to respect the separation of powers. Indeed, it has been suggested that the national courts often apply a similar level of deference to the ECtHR.\(^{31}\)

In this chapter, it will be argued that when determining proportionality, courts should interpret decisions related to children in light of their rights, such as best interests, given that all European states have ratified the CRC, and in the case of EU law are bound by Article 24 EU Charter. The best interests’ principle offers a basis for upending the power balance to ensure that children’s rights are considered in determinations affecting their rights and interests.

### 7.3 Freedom of Commercial Expression under ECHR/ICCPR

Before embarking on an analysis of the commercial expression, this analysis is framed in light of the objects and purposes of protecting expression under human rights law. Freedom of expression is centrally premised on individual fulfilment and the pursuit of democracy.\(^{32}\) Freedom of expression is so central to the human rights project that the ECtHR regards the right as one of the foundational values of the Council of Europe, an "essential foundation" of a democratic society and a basic condition of societal progress and development.\(^{33}\) Similarly, in its General Comment on freedom of expression and

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\(^{29}\) *Handyside v. United Kingdom* (Application No. 5493/72) 7 December 1976, (*Handyside*), paras 48-49.  
\(^{30}\) *Sunday Times v. United Kingdom* (Application No. 6538/74) April 1979, para 59.  
\(^{31}\) Popelier and Van De Heyning, "Procedural Rationality: Giving Teeth to the Proportionality Analysis.", 243.  
\(^{33}\) *Handyside*, para 49.
opinion, the HRC acknowledged freedom of expression as one of the essential “indispensable conditions for the full development of the person”.\(^{34}\)

Accordingly, although all types of speech are protected under the ECHR, the range of restrictions that states may impose is narrowest for political speech.\(^{35}\) This is due to the Convention’s goal of maintaining democracy, as underlined by the ECtHR’s seminal judgments:

> [Freedom of expression] is applicable not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of pluralism, tolerance and broadmindedness without which there is no ‘democratic society’. This means, amongst other things, that every ‘formality’, ‘condition’, ‘restriction’ or ‘penalty’ imposed in this sphere must be proportionate to the legitimate aim pursued.\(^{36}\)

This foundation should be recalled when analysing commercial expression as it underpins the scope of valid limitations.

In spite of this focus on democracy and fulfilment, the protection of commercial speech has made its way into the ECHR \(via\) US case law. Since the 1970s US courts have increasingly recognised commercial speech as protected under the US Constitution.\(^{37}\) The doctrine derives from judicial interpretation of the First Amendment to the US Constitution whereby “Congress shall make no law... abridging the freedom of speech”.\(^{38}\)

While the ECtHR has avoided a clear definition of commercial speech, in \textit{Central Hudson Gas & Elec. Corp.}, the U.S. Supreme Court defined commercial speech as relating to the economic interests of both the speaker and its audience.\(^{39}\) In the same case, the Court offered a test for assessing the constitutionality of restrictions on commercial speech. Firstly, in order to be subject to constitutional protection, commercial speech must concern lawful activity and not be misleading. The government interest in the restriction must be “substantial.”\(^{40}\) The restriction must “directly advance[]” this interest and be “[no] more extensive than necessary to serve that interest.”\(^{41}\) Although this standard does

\(\text{\footnotesize \textit{Handyside}, para 49; Hertel v. Switzerland (Application No. 25181/94) August 1998, para 46.}\)

not require empirics and could appeal to “history, consensus and simple common sense”, US case law applies a stricter standard of review than European courts. Since its emergence in the US, a number of jurisdictions have attributed rights of commercial expression to companies, although the scope of protection offered varies among legal systems.

Turning to the international system for the protection of human rights, freedom of expression, including commercial speech, is protected under the ICCPR, wherein “everyone has a right to freedom of expression, including imparting and receiving ideas of all kinds”. The HRC has accordingly recognised that all forms of speech are protected, including commercial speech. In one complaint, although the Canadian government argued that Article 19 ICCPR did not include commercial speech, the HRC held that the right:

must be interpreted as encompassing every form of subjective ideas and opinions capable of transmission to others, which are compatible with article 20 of the Covenant, of news and information, of commercial expression, of works of art, etc; it should not be confined to means of political, cultural or artistic expression.

However, as per the treaty text, freedom of expression is not absolute; restrictions must be “provided by law” and “necessary inter alia for respect of the rights or reputations of others” or “public health. Although the “jurisprudence” of the HRC is more limited, as noted in 5.1, it has issued a General Comment on Freedom of Expression. Therein it emphasised that restrictions on Article 19 ICCPR must be compatible with the “provisions, aims and objectives of the Covenant” and not violate the prohibition against discrimination. The Siracusa Principles (although drafted by experts not states) add that limitations’ clauses should be strictly interpreted and in the light and context of the right concerned. Limitations must be (1) prescribed by law, (2) based on a legitimate objective, (3) strictly necessary in a democratic society, (4) the least restrictive and

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42 Central Hudson, 555 (quoting Florida Bar v. Went For It,Inc., at 628).
43 For example Lorillard Tobacco Co. v. Reilly.
45 For a study on the difference of the protection of freedom of commercial expression in Denmark, Sweden, Norway, Germany and the US, see: Heide-Jørgensen, Advertising Law: Marketing Law Commercial Freedom of Expression, especially, 150-1, 162.
48 UN Human Rights Committee, “General Comment No. 34, Article 19, Freedoms of Opinion and Expression.”
49 Ibid., para. 26.
intrusive means available,\textsuperscript{54} and (5) not arbitrary, unreasonable\textsuperscript{53} or discriminatory.\textsuperscript{54} Further, following the principles of \textit{lex specialis} and \textit{lex posterior}, where the right to freedom of commercial expression interacts with socioeconomic or children’s rights, it should be interpreted in light of the aims of socioeconomic rights and children’s best interests.

Turning to European regional law, under the ECHR “everyone has the right to freedom of expression,” including the right to impart information and ideas without interference.\textsuperscript{55} According to the ECtHR “everyone” includes companies.\textsuperscript{56} The Court has recognised commercial expression in a number of cases, although it has not formulated a definition of commercial speech or a coherent theory. Further, under Article 10(2) ECHR, the right to freedom of speech can be limited if (1) prescribed by law, (2) pursuing one or more of the legitimate aims set out in the second paragraph of Art 10 ECHR, and (3) necessary in a democratic society to achieve such aims. The ECHR includes a wider range of acceptable aims than the ICCPR, including both for the protection of health or morals, and the rights of others.

Accordingly, a number of features have emerged in the ECtHR’s decisions on regulations that limit freedom of commercial speech. Firstly, the ECtHR, in determining the suitability of a restriction, will assess whether the limitations were based on “relevant” and “sufficient” reasons.\textsuperscript{57} Secondly, “necessity” requires that the national authorities “make the initial assessment of the reality of the pressing social need” implied.\textsuperscript{58} In cases of freedom of expression, the ECtHR’s jurisprudence highlights that the state’s margin of appreciation varies depending on the type of speech protected. Political speech or questions of public interest are afforded a narrow margin, whereas states have a wide margin in relation to morals\textsuperscript{59}, religion\textsuperscript{60} and commercial speech.\textsuperscript{61} As will be discussed, the ECtHR has recognised commercial expression in a number of cases to which it attributes a wide margin of appreciation.

The ECtHR and, previously the European Human Rights Commission (HR Commission) has recognised commercial expression in a number of cases. In \textit{Markt Intern Verlag}, the HR Commission confirmed that the provisions of Article 10 ECHR were applicable to commercial expression. National authorities were granted a wide margin of appreciation,

\begin{itemize}
  \item \textsuperscript{54} \textit{Ibid}, I.A.11.
  \item \textit{Ibid}, I.B.16.
  \item \textit{Ibid}, I.A.9.
  \item Article 10 ECHR.
  \item For example \textit{Sunday Times v. UK}.
  \item \textit{Murphy v. Ireland} (Application No. 44179/98) [2003] ECHR 352 (10 July 2003), para 68.
  \item \textit{Handyside}, para 48.
  \item For example, \textit{Murphy v. Ireland}, para 67.
  \item \textit{Casado Coca v. Spain} (24 FEB 1994) [1994] ECHR 8, 15450/89, - commercial freedom of expression may sometimes be restricted, especially to prevent unfair competition and untruthful or misleading advertising.
\end{itemize}
in particular when compared to the narrow margin afforded to states in relation to political speech.\textsuperscript{62} The HR Commission held that this was necessary in important commercial matters, particularly unfair competition, which it considered “complex and fluctuating”.\textsuperscript{63} Therefore, the HR Commission held that the correct standard of review in such cases is whether national measures were “justifiable in principle and proportionate”.\textsuperscript{64} This required “reasonable grounds” – a much more flexible standard than the HR Commission’s usual insistence on a “pressing social need.” Janis et al. consider the approach in Markt Intern as a “particularly differential version of the margin of appreciation”.\textsuperscript{65} Harris et al. agree that the HR Commission’s resort to whether the restriction was necessary on “reasonable grounds” lowered the standard of proportionality to “the most lax level”.\textsuperscript{66} Therefore, while commercial speech is protected under Article 10 ECHR, the Court may be reluctant to afford it vigorous protection in favour of allowing the Member States’ discretion.

Further, although the ECHR does not primarily protect children’s rights, the HR Commission also recognised the legitimacy of state actions with this express aim in an earlier case related to advertising directed at children.\textsuperscript{68} The applicant broadcaster complained that its freedom of expression had been interfered with by a prohibition on commercial publicity as a licensing condition. The applicant had breached this condition by producing a programme that included product placement for Coca-Cola, and accordingly a fine was imposed. The applicant complained that this provision lacked clarity and precision, a legitimate aim and was not necessary in a democratic society. The HR Commission dismissed this claim, finding that the provision pursued a legitimate aim, i.e. the protection of the rights of others, in particular the rights of children to be “protected against indirect advertisement”. Given the wide margin applicable to the state, the HR Commission held that it should confine its review to whether the measure was justifiable in principle and proportionate. The HR Commission rejected the case as manifestly unfounded, finding that:

in view of the target audience of these programmes, the specific position of the applicant in the Netherlands broadcasting system and the respective amounts of the fines imposed, the interference at issue cannot be said to be beyond the Netherlands margin of appreciation or to be unreasonable or disproportionate.

\textsuperscript{63} Ibid, para 33.
\textsuperscript{64} Ibid, para 33.
\textsuperscript{65} Ibid, para 37.
\textsuperscript{68} Nederlandse Omroepprogramma Stichting v. the Netherlands Application No. 16844/90 13 October 1993.
Although this is an old decision on admissibility by the now defunct HR Commission – not on the merits of the complaint – it is still significant as children’s rights were recognised as a legitimate aim for limiting commercial expression. The HR Commission did not draw on the CRC, as the Netherlands had not ratified the CRC at the time.69 Were the case to be decided today, the Court would likely interpret the case in light of the CRC, including children’s best interests. Although the ECHR is not a children’s rights treaty, the ECtHR has used the CRC in interpreting cases involving children.70 The Council of Europe furthermore recognises children’s rights and best interests in a number of documents, which highlight the universality and inter-relatedness of rights.71

Further, in Casado Coca, the ECtHR (not the HR Commission) determined for the first time that advertising, as a form of commercial speech, was protected under Article 10 ECHR regardless of whether its aim was for profit or not.72 The ECtHR noted the important role of advertising for the individual as a “means of discovering the characteristics of services and goods offered to him”.73 Nevertheless, it considered that advertising may be restricted where it is contrary to fair competition, or untruthful or misleading. Objective and truthful advertisements could also be restricted to secure the rights of others, or due to special circumstances of certain business activities and professions.74 In assessing the proportionality of the measure, the ECtHR had regard to the lack of European consensus on the issue. This, it determined, indicated the complexity of the matter and therefore suggested that the national authorities were in a better position to determine whether the right balance had been struck between the competing interests.75 The ECtHR concluded that no breach of Article 10 ECHR had occurred.76 Accordingly, Janis et al. attribute the lesser protection of commercial speech to two factors. Firstly, regulation of commercial speech poses less threat to the democratic process. Secondly, economic regulation is well established, for example in the form of existing regulations on marketing.77 The ECtHR’s approach can thereby be seen as in line with the overarching aim of freedom of expression.

On the other hand, the ECtHR determined in another instance that although states have a wide margin of appreciation, this is not unlimited. In Krone Verlag v. Austria, the applicant complained that its rights to freedom of expression had been infringed, as it was prohibited from comparing the sales’ prices of two local newspapers without

69 Signature: 1993, Ratification/Accession: 1995
72 Casado Coca, para 34.
73 Ibid, para 51.
74 Ibid, para 51.
75 Ibid, para 55.
76 Ibid, para 57.
indicating differences in their reporting styles. The ECtHR noted that the margin of appreciation was “particularly essential” in complex and fluctuating areas such as unfair competition and advertising. The ECtHR also expanded upon its views on advertising:

For the public, advertising is a means of discovering the characteristics of services and goods offered to them. Nevertheless, it may sometimes be restricted, especially to prevent unfair competition and untruthful or misleading advertising. In some contexts, even the publication of objective, truthful advertisements might be restricted in order to ensure respect for the rights of others or owing to the special circumstances of particular business activities and professions. Any such restrictions must, however, be closely scrutinised by the Court, which must weigh the requirements of those particular features against the advertising in question; to this end, the Court must look at the impugned penalty in the light of the case as a whole.

Here the ECtHR found that the injunction imposed was too broad as it impaired “the very essence of price comparison”. Further, its practical implementation was extremely difficult. Therefore, Austria had overstepped its margin and imposed a disproportionate restriction.

Furthermore, the ECtHR imposes a more rigorous standard of review where the speech is not only commercial in nature but includes matters of public interest. For example, in Barthold v. Germany, the ECtHR held that an injunction preventing a veterinarian from reporting to the press was in breach of Article 10 ECHR. The ECtHR emphasised the central role of freedom of the press and held that “discouraging members of the liberal professions from contributing to public debates” on important topics for the mere fact that they might amount to advertising” was not proportionate. The ECtHR has come to similar conclusions in Stambuk v. Germany, which concerned an advertising ban on the medical profession. In this case, there was not a lack of consensus or diversity of moral concepts that justified a wide margin. Thus, following Barthold, the Court found that a fair balance between the interests had not been achieved and that the strict interpretation of the ban on advertising was incompatible with freedom of expression. The case can be distinguished from Casado in that again the speech had a purpose beyond economic gain and instead sought to protect health by informing patients of a

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78 Krone Verlag Gmbh & Co. Kg v. Austria (no. 3) (Application no. 39069/97) 11 December 2003, para 18.
79 Ibid, para 30.
80 Ibid, para 31.
81 Ibid, para 33.
82 Ibid, para 34.
83 Ibid, para 58.
84 Stambuk v. Germany (application no. 37928/97) 17 October 2002, para 39.
85 Ibid, para 43.
86 Ibid, paras 50-2.
new technique. Similarly, in *Hertel*, the Court found a violation on the applicant’s freedom of commercial expression, as the restriction not only related to commercial matters but included issues of general interest concerning public health. Therefore, the type and public value of the speech have important ramifications on the scope of protection offered.

### 7.3.1 Medium of Speech

Further, when determining the proportionality of limitations on political speech, the ECtHR does not only have regard for the type of expression but also the medium of expression. In a case related to a ban on political advertising, the ECtHR held that internet and social media do not have the same impact or influence as audio-visual media. Therefore the ban was logical in not applying to the internet. Further, the fact that other media was open to the applicant was vital to the proportionality of the restriction. The ECtHR has emphasised the same point in other cases. Further, in *Mouvement Raelien Suisse v. Switzerland*, the fact that the applicant could still transmit his ideas through a website and any other means meant that the measure was not disproportionate. Moreover, restrictions should be extended to the most influential and expensive media in order to address the precise risk and result in the minimum impairment of the right. Accordingly, the ECtHR considers audio-visual media, such as television and radio, to have a more “immediate”, “invasive” and “powerful effect” than print. In *Delfi v. Estonia*, the ECtHR found that a national decision on the liability of an online news website for failing to remove hate speech from its comments had not breached Article 10 ECHR. Interestingly, in reaching its decision, the ECtHR distinguished between the legal principles relevant to traditional media and those that apply to internet based communication, meaning that the publisher of an internet news site had different responsibilities to a print publishers. However, this case related to professional online news, not internet or social media generally.

Interestingly, also in relation to political advertising, the ECtHR highlights the need for plurality and effective market access to guarantee diversity of opinion and programming, which could have implications for commercial speech generally. In *Centro v. Italy*, the Court determined:

> A situation whereby a powerful economic or political group in society is permitted to obtain a position of dominance over the audio-visual media

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87 *Hertel*, para 47.
88 *Animal Defenders v. UK* (Application No. 48876/08) 22 April 2013, para 119.
90 *Murphy v. Ireland*, para 74
91 *Mouvement v. Switzerland* (application no. 16354/06) 13 July 2012, para 75.
92 *Animal Defenders*, para 117.
93 *Jersild v. Denmark* (application no. 15893/89) 1 September 1994, para 31.
95 *Centro Europa 7 S.r.l and Di Stefano v. Italy* (application no. 38433/09) ([2012] ECHR 974), para 129.
and thereby exercise pressure on broadcasters and eventually curtail their editorial freedom undermines the fundamental role of freedom of expression in a democratic society as enshrined in Article 10 of the Convention, in particular where it serves to impart information and ideas of general interest, which the public is moreover entitled to receive.\textsuperscript{96}

Similarly, in \textit{TV Vest}, the ECtHR emphasised that political advertising could be distorted by financially powerful groups with more marketing opportunities than others.\textsuperscript{97} In \textit{Centro}, the ECtHR held that states have a positive obligation to put appropriate legislative and administrative frameworks in place to guarantee effective pluralism.\textsuperscript{98} This has been echoed by the HRC.\textsuperscript{99} In \textit{Animal Defenders International}, the ECtHR again recognised the authorities' desire to "protect the democratic debate and process from distortion by powerful financial groups with advantageous access to influential media."\textsuperscript{100} Although this point has been made in relation to political advertising which is subject to more rigid protection, there may be scope for applying these principles to commercial advertising in light of the right to adequate food.

\textbf{7.3.2 Analysis of Freedom of Expression ECHR}

This analysis observes that ECtHR case law recognises the right to freedom of commercial speech, although states have a broader discretion than with other types of speech. Should a complaint be brought that HFSS food marketing restrictions interfere with the right to freedom of commercial expression, the ECtHR is expected to examine the limitation in light of its suitability, necessity and proportionality. A number of factors could be relevant following this review of ECtHR case law: the type of speech, the aim of the restriction, the content of the advertising, the scope of the restriction and the medium employed.

Restrictions on marketing are likely to be suitable as long as there is a rational connection between the measure and its aim, and the law is accessible and foreseeable.\textsuperscript{101} The case law suggests that children's rights provide a strong basis for restrictions. While the ECtHR tends to not conduct an in-depth analysis of the suitability of the measure imposed, it may look at whether "relevant and sufficient" reasons were given.\textsuperscript{102} Therefore, the presence of an impact assessment and consultation should dispose of this question. Further, as limitations must be prescribed by law, self-regulatory rules could usually not be challenged as they lack a legal basis. The fact that self-regulation avoids legal challenges is one of its attractions. However, it is worrisome from a democratic point of view that private arrangements exercise control while avoiding rights' scrutiny. It

\textsuperscript{96} Ibid, para 133.
\textsuperscript{97} \textit{TV Vest AS v. Norway} (application no. 21132/05) 11 December 2008, para 79.
\textsuperscript{98} \textit{Centro}, para 134.
\textsuperscript{99} UN Human Rights Committee, "General Comment No. 34, Article 19, Freedoms of Opinion and Expression.", para 40.
\textsuperscript{100} \textit{Animal Defenders v. UK}, para 112.
\textsuperscript{101} \textit{Sunday Times v. United Kingdom}, para. 49.
suggests a governance gap that allows private standards to escape scrutiny in light of children's rights.

Further, when examining the necessity of the measure, the ECtHR will afford a wide margin of appreciation given that the state is better positioned to determine complex, fluctuating economic issues, such as marketing regulations. Even though advertising serves a public function, it can be limited to respect the rights of others. However, there are limits to this margin – meaning that the law should not impair the essence of the right. In deciding the margin of appreciation, it may also consider whether there is European consensus on the issue. Although there is wide agreement at policy level that unhealthy food marketing should be limited, there is no European consensus on how the specifics of this should be achieved. Further, the ECtHR's necessity test has been criticised as not sufficiently developed.\(^{103}\) The Court does not impose an obligation to use less restrictive measures.\(^{104}\) Therefore, the Court is unlikely to engage in the same level of scrutiny as the CJEU (see 7.10.4).

Further, the jurisprudence of the ECtHR related to political speech suggests that the media limited by law should be tailored to its aim. For instance, if the aim of the regulation is to control the most powerful media, then this should include broadcast advertising. Print, on the other hand, is considered to have a less powerful effect, suggesting that greater justification is required for imposing limitations. The HRC also suggests that states parties ensure that legislative and administrative frameworks for regulating media take the differences and similarities between print and broadcast advertising into account.\(^{105}\) Further, depending on the evidence, restrictions need not include all advertising to be proportionate. The case law suggests that the proportionality of a measure will be more easily met where avenues of expression are left open. However, it is unclear to what extent this is necessary, particularly as this case law relates to political speech over which the Member States exercise a narrower margin of discretion. Therefore, the ECtHR is unlikely to engage to the same extent or at all in relation to commercial expression.

Finally, the international and European regional systems have not adjudicated freedom of expression and the right to health side by side, as socioeconomic rights are not afforded the same standing. Instead, public health is defined as a general interest, not a right. However, there is scope for recognition of children's socioeconomic rights under the "rights of others". Further, the ECtHR should interpret the ECHR in light of the CRC to achieve coherency, given that all Council of Europe Members have ratified the CRC, and the ECtHR considers the ECHR to be a "living document".\(^{106}\) In the next section I firstly analyse how the CJEU has balanced health obligations and companies' rights, and

\(^{103}\) Arai-Takahashi, "Proportionality.", 458.
\(^{104}\) Christoffersen, "Human Rights and Balancing: The Principle of Proportionality.", 22.
\(^{105}\) UN Human Rights Committee, "General Comment No. 34, Article 19, Freedoms of Opinion and Expression.", para 39.
subsequently evaluate two constitutional cases from states that recognise the right to health, in order to illustrate the factors considered in deciding the balance. A number of legal systems in the Global South recognise the right to health as a justiciable right, and may provide guidance on the balance between rights. 

7.4 **Companies’ Rights & EU law**

The EU Charter recognises children’s rights, health and companies’ rights to freedom of expression and information, to conduct a business and the right to property. Accordingly, the CJEU has been called upon to balance companies’ rights and health in a number of cases concerning EU legislation limiting tobacco promotion. These competing rights should be interpreted in harmony given that the EU Charter stipulates:

> Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States’ constitutions.

Accordingly, this provision means that companies’ rights should not be interpreted in such a way as to deprive children’s rights of substance. Further, following Article 52(3) of the EU Charter, as freedom of expression stems from the ECHR, its meaning and scope is the same as in the ECHR although EU law is free to provide more extensive protection. Therefore, the cases explored above are also applicable to the CJEU.

Unlike under the ECHR, the tension between health and companies’ rights has been addressed in CJEU case law, although companies have so far been unsuccessful with rights’ claims. In *Deutsches Weintor*, the CJEU included Article 35 EU Charter in its proportionality assessment for the first time. The Court was asked to provide a preliminary ruling on whether a German wine that was labelled “easily digestible”

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110 Article 53 EU Charter.

111 "In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection." The Right to Property is found in Article 1 of the Additional Protocol of the ECHR. The right to conduct a business is not recognised under international human rights law.

112 Case C-376/98, while the Tobacco Directive was annulled, it was not on the basis of freedom of expression.
amounted to a health claim under the Regulation on Nutrition and Health Claims.\textsuperscript{113} Although the referring court had only mentioned the rights to work and freedom to conduct a business under the EU Charter, the Court drew on the requirement that a “high level of human health protection be ensured in the definition and implementation of all the EU’s policies and activities”.\textsuperscript{114} The Court highlighted the special nature of alcohol and the link between it and harm, which it found raised public health concerns.\textsuperscript{115} The Court held that freedom of occupation and business is not absolute, and may be restricted so long as the restriction corresponds to the aim pursued, and does not amount to a “disproportionate and intolerable inference, impairing the very substance of those rights”.\textsuperscript{116} The Court accordingly held that the Regulation was designed to protect public health (a legitimate aim), and was proportionate as it was limited to a clearly defined area, and did not impair the substance of the freedom to choose an occupation or conduct a business.\textsuperscript{117}

In a series of recent cases in relation to the Tobacco Products Directive 2014, the complainants argued that their rights to commercial expression, to conduct a business and to property under the EU Charter were infringed.\textsuperscript{118} In Pillbox, the CJEU noted that commercial operators’ right to conduct a business was not an “unfettered prerogative, but must be examined in light of its function in society”.\textsuperscript{119} As a result, Member States can limit economic activity in the public interest, subject to the principle of proportionality.\textsuperscript{120} The limitation must be provided for by law and not “affect the essence of the freedom to conduct a business”.\textsuperscript{121} Accordingly, provisions related to regulating electronic cigarettes under the 2014 Directive did not exceed the principle of proportionality.\textsuperscript{122}

The CJEU’s decisions demonstrate its willingness to accept health as a justification, including as a norm that outweighs businesses’ interest in providing (even truthful) information.\textsuperscript{123} In Philip Morris, the CJEU held that prohibiting truthful information on

\textsuperscript{114} Case C-544/10, Deutsches Weintor eG v. Land Rheinland-Pfalz, EU:C:2012:526 (hereafter Deutsches Weintor), para 45. 
\textsuperscript{115} Ibid, paras 48-9. 
\textsuperscript{116} Ibid, para 54. 
\textsuperscript{117} Ibid, para 55-59. 
\textsuperscript{119} Pillbox, para 157. 
\textsuperscript{120} Ibid, para 158-9. 
\textsuperscript{121} Ibid, para 161. 
\textsuperscript{123} Philip Morris, para 156.
tobacco packaging was valid in light of Article 11 EU Charter and the principle of proportionality. The EU’s obligation to ensure a high level of human health required that tobacco consumers (who are vulnerable due to nicotine addiction) should not be encouraged to consume tobacco through factual information relating nicotine levels, smells, taste or flavourings. This information could mistakenly convince consumers that certain tobacco products were less harmful than others. While the measure constituted an interference with companies’ freedom of expression and information, it had a valid legal basis and did not affect the essence of the right, in that not all information was prohibited, but rather, labelling was simply controlled in a clearly defined area. Therefore, in light of the effects of tobacco, the protection of human health outweighed the claimants’ interests in freedom of expression and information.

The judgments point out that companies’ freedoms are not absolute and will only outweigh public health where the “essence” of their rights is impaired. Thus, the CJEU interprets companies’ freedoms restrictively where they conflict with health. Garde and Alemano accordingly submit that manufacturers are unlikely to be successful on the basis of fundamental rights claims, such as freedom to conduct business and property rights, in regard to lifestyle measures. Stuyck agrees that freedom of expression will not “easily” lead to a “more incisive appraisal of the appropriateness or proportionality of advertising restrictions”. Instead, it has been suggested that the legislature is best placed to strike a balance between these conflicting interests and politically sensitive issues. Accordingly, provided regulation is appropriately targeted and not disproportionately broad, companies’ rights are not nullified but instead can be legitimately limited to ensure children’s antecedent right to health. Further, the CJEU’s approach suggests that companies’ rights should be considered in light of their function in society. As food and non-alcoholic beverage companies’ purpose is to provide food and beverages, these functions should be shaped in the context of the right to adequate food. However, as the EU and ECtHR are yet to fully enshrine these rights, this interpretation is dependent on national courts invoking all international instruments that they have ratified. Further, the CJEU may apply a less generous approach to measures relating to HFSS food, as there is not the same evidence of causality and harm as in relation to tobacco.

124 Ibid, paras 139-145.
125 Ibid, para 151.
126 Ibid, para 156.
129 Jules Stuyck, “Case C-262/02, Commission V. France and Case C-429/02, Bacardi France Sas and Télévision Française 1 Sa (Tf1) Et AL., Judgments of the Grand Chamber of the Court of Justice of 13 July 2004,” Ibid 42 (2005), 798.
COMMERCIAL EXPRESSION AND RIGHT TO HEALTH IN DOMESTIC LAW

Following the analysis of regional and international human rights law, this section analyses two domestic cases that explore the interplay between companies’ rights to advertise, and the right to health. The cases cannot be directly applied to the European food marketing context; they relate to tobacco control which, as previously noted, must be distinguished from “unhealthy” food. They also emanate from South Africa, where the Constitution recognises a right to health-care, and Colombia, where the Constitutional Court has been active in recognising the right to health. The courts adopt different standards of review; in the case of Colombia, the court applies a “minor test” to economic rights. The South African Constitution combines the elements of proportionality in a non-hierarchical manner which reduces the status of necessity. Despite these caveats, the cases reveal a number of principles which I argue can inform our understanding of attaining a reasonable balance between the rights.

Firstly, while both courts determined that advertising is protected under constitutional law, they adopted a different understanding of the scope of protected commercial speech. In *Caceres Corrales v. Colombia*, the plaintiff challenged a prohibition on advertising, broadcasting and promotion of tobacco on the grounds that it conflicted with the rights to free private initiative and freedom of enterprise as provided under the Colombian Constitution. The Colombian Court recognised that, while economic freedom includes advertising, freedom of commercial expression is only applicable to the informative aspects of advertising (such as public health campaigns). In *British American Tobacco South Africa v. Minister of Health*, the South African Court heard an appeal regarding the constitutionality and proportionality of a prohibition on advertising and promoting tobacco in light of the appellant’s right to freedom of expression and the consumer’s right to receive information as protected under the South African Constitution. The South African Court recognised that the right to freedom of expression included the right to communicate information and ideas. Both courts acknowledged that prohibiting advertising impacts consumers’ rights to information and companies’ rights to participate in the market.

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134 *Caceres Corrales*, para 3.
135 Ibid, part VI, para 16.
137 Ibid, para 13.
138 *Caceres Corrales*, para 3.3; *BAT South Africa*, para 13.
Secondly, the courts recognised that freedom to advertise is not absolute but subject to limitations due to the harmful nature of tobacco. The Colombian Court concluded that the regulation was compatible with freedom of enterprise and private initiative, as the hazardous nature of tobacco and the clear damage caused provided compelling reasons. The regulation did not affect the essential core of economic freedoms as it was compatible with the production and commercialisation of tobacco, preserved consumers’ rights to information and developed the Colombian state’s obligations in relation to tobacco control. The South African Court held that all rights under the Bill of Rights were capable of being limited provided the “limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account relevant factors, including the nature of the right, and the nature and extent of the limitation”. Accordingly, the South African Court held the limitation was justified by the compelling public health considerations.

Thirdly, the courts acknowledged that the legislature has discretion in determining the suitability of the measure. For example, the Colombian Court acknowledged that the legislature had a broad margin which the courts should not seek to replace. A wide margin of appreciation was recognised in the context of public health. At the same time, proportionality will vary depending on the context and case. While restrictions on companies’ rights are possible, they must not violate the essential core of the right. The cases also highlight that absolute certainty of the effectiveness of measures is unlikely and should not be the legal standard. In the Colombian case, this relationship had to be plausible or reasonable, although it did not need to be proven that the objective was accomplished. Therefore, like regional courts, domestic courts are slow to trespass into the law-making domain and seek to respect the separation of powers.

Fourthly, the Framework Convention on Tobacco Control (FCTC) and the right to health were significant in the respective courts’ decisions. The right to health served as a means of crystallising states’ obligations in relation to tobacco control. According to the Colombian Court, the right to health placed duties on the state including, inter alia, to inform on the implications of tobacco consumption, to adopt actions to protect individuals from tobacco, prevent people from starting to smoke and promote quitting. The South African Court noted the right of access to health-care under the Constitution

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939 Caceres Corrales, para 35.
940 BAT South Africa, para 15, citing Glenister v. President of the Republic of South Africa 2011 (3) SA 347 (CC) para 203.
941 BAT South Africa, para 22.
942 Caceres Corrales , para 34.
943 Ibid.
944 Ibid.
945 BAT South Africa, 16.
946 Caceres Corrales.
947 Ibid, 29.3.
948 Caceres Corrales , part VI, para 18.
as a further factor supporting limitations on tobacco advertising. The courts also highlighted that the FCTC signals international agreement on the harmful effects of tobacco, and states’ rights and obligations to regulate advertising. The Colombian Court interpreted the Constitution in light of the FCTC, finding that its provisions developed principles and values, such as promotion of public health and rights of children, adolescents and pregnant women. The South African Court held that, in light of the position of international law under the South African Constitution, the government had international legal obligations to limit advertising as a signatory to the FCTC. Likewise, the Court gave weight to the FCTC when determining the balance between the rights, and held that the “seriousness of the hazards of smoking far outweigh the interests of the smokers as a group”. Therefore, international law norms played important roles in both courts’ decisions.

Finally, the courts highlighted the special nature of tobacco as “intrinsically hazardous”. Given the incontrovertible link between tobacco and health damage, the standard for justifying tobacco marketing restrictions is more easily met than in the case of HFSS food marketing. Furthermore, the fact that nicotine is addictive was also an important factor. This standard and level of certainty does not apply to limiting all types of unhealthy food. That being said, tobacco cases also suggest that evidence on effectiveness develops over time and through a mix of innovative measures.

7.6 PROPORTIONATE LIMITATIONS ON COMMERCIAL SPEECH

The cases discussed in this chapter, while illustrative, do not address the situation where a legislature limits unhealthy food marketing in order to protect children’s rights. Could the CRC - as a normative standard-setting instrument on children’s rights - renegotiate the power balance between children’s socioeconomic rights and companies’ freedoms? Following the principle of proportionality, states must demonstrate that they are pursuing a legitimate aim, have chosen a suitable means of achieving that aim, and that the measure is necessary. When it comes to establishing a balance between children’s and companies’ rights, the best interests’ principle suggests that the means which serve the child best should be chosen. However, it is argued that this should conform to the reasonableness criterion, meaning that speech should not be extinguished.

Whether the ECtHR, CJEU or a national court is called upon to interpret a balance between commercial speech and children’s rights to freedom from obesogenic marketing, the analysis above has suggested a number of factors are important. The approach of the courts will vary depending on factors such as the basis of the regulation, the level of

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149 Ibid, para 26.
150 Ibid, para 20.
151 BAT South Africa, para 22.
152 Ibid, para 23.
153 Ibid, para 25.
154 Caceres Corrales, para. 31.
155 BAT South Africa, para 22.
156 Caceres Corrales, part V.
evidence, consultation and assessment *ex ante*, and the breadth of the restriction. In this section I will apply an approach suggested by Greer (which is inspired by Alexy’s defence of German constitutional law) that allows for a structured balancing of interests.\(^5\) This is pursued through three questions:

1. *Is the means – regulating HFSS food marketing on the chosen medium or platform – capable of contributing to children’s rights?*

Greer suggests that once (in my example) a company establishes that its rights have been violated, the state must display convincing and compelling reasons for the restrictions through providing concrete evidence.\(^6\) Regulation must be adequately targeted to address the conduct that impacts upon children’s rights. Remembering the domestic cases discussed in 7.5, it is suggested that the evidence base outlined in Chapter Two, the WHA-endorsed recommendations and the scope of the challenge of childhood obesity, should be considered. Accordingly, limitations such as the ones discussed in the previous chapter, are clearly capable of contributing to children’s rights.

2. *If a variety of ways of limiting HFSS food marketing are available, does this approach cause only minimum interference to companies’ rights to freedom of expression?*

The narrowness of the restrictions is a matter of political discretion, which must be decided by balancing the available evidence on the scale of childhood obesity, the impact, power and exposure of children to HFSS food marketing, and the constitutional protection of commercial expression and children’s rights. The alternative means available to the state will likely be considered in light of the complainants’ submissions and therefore are hard to predict. However, the level of interference caused should be interpreted in light of children’s rights, including their best interests, which could serve to shift the balance in favour of regulation.

As noted in the next section it is unclear what alternatives courts will consider. One approach could be to look at the alternatives raised in the legislative consultation. For example, in the Irish consultation discussed in 6.5.2, the Broadcasting Authority of Ireland put forth three options: 1) No regulation 2) state-led regulation 3) self-regulation.\(^7\) Would these be the alternatives considered? Alternatively, the court may look at the specific measures raised by the complainants. In the recent EU tobacco cases above, the court examined necessity in terms of whether (as suggested by Poland and Romania that opposed the regulation) increasing the age limit, labelling, and information campaigns were equally suitable measures.\(^8\) For instance, would a court examine whether information could have been provided as an alternative to limitations?


\(^6\) Greer, “‘Balancing’ and the European Court of Human Rights: A Contribution to the Habermas-Alexy Debate.”, 432-434.

\(^7\) Broadcast Authority of Ireland, “Draft BAI General and Children’s Commercial Communications Codes: Consultation Document.”, 6-7.

\(^8\) Poland, para 93-5; C-547/14 Philip Morris, para 182.
Here, the court should tread carefully by confining itself to a procedural review, where it looks at whether the impact of the measures was considered including the impact on children's rights, whether stakeholders (including children) were consulted and whether the essence of competing rights is unjustifiably impacted. This could include whether the company has other avenues of promotion available. Further, the court could consider whether the law will be ex ante evaluated and reviewed to ensure that the appropriate balance was achieved.

3. Does the importance of fulfilling children’s rights justify detriment to companies’ rights?

This final question suggests that the balance between companies’ and children’s rights may depend on society's conception of the importance of these rights. Therefore, it is problematic that the ECtHR and many Member States prioritise companies' rights over children's – as children's rights are subsumed within the broader common good, not rights protected by the ECHR. This tension develops as the ECHR does not specifically recognise children's socioeconomic rights. It reflects the fragmentation of human rights regimes, whereby children are afforded greater protection under the CRC than the ECHR, which has greater power through the Court that delivers binding judgments. Thus, although the ECHR is not a child-specific instrument, the ECtHR should have regard to the CRC in its interpretation of matters related to children. This is consistent given that the CRC is lex posterior and all CoE Member States have ratified the CRC. States should take their obligations to children seriously and promote an appreciation of children that values their rights and best interests. Therefore, the issue may become a matter of how seriously the link between unhealthy food marketing and childhood obesity is considered.

One approach can be to look to the core of the rights. Accordingly, where there are conflicts between children’s and companies' rights, the non-core elements of their respective rights should yield to the core. Cores can never conflict and instead require redefinition to ensure harmony. As already suggested in 5.4.1, the core of the right to health includes measures to prevent disease and may include protection from unhealthy food marketing depending on the situation in the relevant state. The core of the right to adequate food includes the “availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals”. Therefore, it must be asked, what is the core of the right to freedom of commercial expression? It is my assertion that HFSS food advertising to children cannot form part of the core of commercial expression, when

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64 Greer, ““Balancing” and the European Court of Human Rights: A Contribution to the Habermas-Alexy Debate.”, 415-6, drawing on Alexy, "Constitutional Rights, Balancing, and Rationality.", 136.
65 Greer, ““Balancing” and the European Court of Human Rights: A Contribution to the Habermas-Alexy Debate.”, 433.
interpreted in light of children’s rights under the CRC. Following the Colombian Court, the core of commercial speech could be defined as information. Its finding that tobacco advertising was not information is contrary to the mainstream assertion that advertising is necessarily informative and amounts to protected speech. Instead, it is, I consider, a more realistic and reasonable approach that recognises the limited informative value of modern advertising.

Accordingly, if we focus on the informative aspects of advertising, a great deal of modern advertising techniques fall outside the scope of core protection. Shiner agrees that advertising has little to do with information and instead appeals to emotion. The difference, according to Shiner, is whether factual information is directly given. He contends that advertising may simply serve to legitimate lifestyles, not broaden horizons. In the context of food advertising, as discussed in Chapter Two, the majority of food marketing appears to be for unhealthy food which may legitimate unhealthy lifestyles, instead of exposing consumers to information on a variety of foods. If the core content of commercial speech is information, much advertising should fall outside the scope of core of protection and therefore yield to the core of children’s rights.

Further, ECtHR jurisprudence related to political expression highlights the value of media plurality. The idea that food advertising should protect and pursue plurality has already been promulgated as the basis for UK regulation. Although the ECtHR’s remarks were in relation to political advertising, in the context of food, plurality suggests that advertising should not be dominated by one type of food which promulgates an unhealthy, monocultural diet. Multinational corporations have, like many political machines, a much larger budget to advertise with than smaller producers or departments of health. The level of HFSS marketing can mean an erosion of choice leading to misinformation. Large multinationals dominate television advertising because of their spending power. These companies’ advertising budgets are much larger than those of many governments or unprocessed food companies’, resulting in the widespread proliferation of HFSS food (as we have seen in Chapter Two).

If states were to interpret freedom of commercial expression in light of the right to adequate food, the obligation of plurality could be extended from political rights only to socioeconomic rights like the right to adequate food. The predominance of HFSS food advertising distorts children’s views of a healthy diet. HFSS foods are awarded a central position in their consciousness from a young age. Accordingly, Ireland limits the percentage of advertising that can promote HFSS foods. This form of control does not

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66 Ibid., 316.
67 Ibid., 321.
69 For example, Investopedia, "A Look at Coca-Cola's Advertising Expenses," Investopedia.
prohibit all unhealthy food marketing, but places limitations on the amount that the
community is cumulatively exposed to. Alternatively, it could be used to argue against
blanket bans and in favour of maintaining balance, meaning that HFSS companies should
still be allowed to promote their products in defined spaces.

The question must finally be asked, why protect commercial speech at all? At the start of
this chapter, I stated that the central basis for protecting free speech has classically been
the furtherance of democratic participation and individual self-fulfilment. Redish argues
that free speech lacks a coherent underpinning, which should be found in “individual
self-realization”. In an outdated and romanticised manner, Redish contends that self-
fulfilment underpins the protection of commercial speech:

When the individual is presented with rational grounds for preferring one
product or brand over another, he is encouraged to consider the
competing information, weigh it mentally in the light of the goals of
personal satisfaction he has set for himself, counter-balance his
conclusions with possible price differentials, and in so doing exercise his
abilities to reason and think; this aids him towards the intangible goal of
rational self-fulfilment.173

This, I submit, is an inaccurate characterisation of modern marketing. Much of
advertising does not encourage consumers to weigh up products objectively. In fact (as
discussed in Chapter Two) advertising, particularly when directed at children, often seeks
to bypass critical reflection and instead appeal to one’s subconscious. While Redish
contends that advertising should be protected as it aids individuals in life-affecting
decisions, I argue the opposite for the same reasoning. If food advertising promotes
unhealthy products, it encourages habits that are contrary to children’s best interests and
health, not their self-fulfilment. In fact, advertising may promote impulsive decisions,
instead of considerations in one’s long-term best interests.

As noted in a number of cases above, the ECtHR suggests that, instead of self-fulfilment,
the basis for protecting commercial expression is that individuals have an interest in
receiving information on products. This line of argument was originally asserted in the US
in Virginia State Board of Pharmacy, where the Court ruled that information enabled the
consumer to gain information to make informed decisions, which “may be as keen, if not
keener by far, than his interest in the day’s most urgent political debate”.174 This rationale
suggests that marketing allows individuals in a market economy to discover new products
and services. It must be asked in light of this approach, how much factual information
does a consumer really gain from modern advertising? Barendt finds this reasoning
unconvincing, with little application to “lifestyle” advertising that does not provide facts

173 Martin H. Redish, “The Value of Free Speech,” The University of Pennsylvania Law Review 130,
no. 3 (1982), 593.
174 Ibid., 630.
(1976).
Modern advertising is often not informative, selling instead a particular lifestyle not the features of a product. However, Barendt finds that commercial advertising should still not be deprived of protection as it would be troublesome for courts to adjudicate in every case. He does not approach this topic from the perspective of children; it is an even more pressing question for children, who may not fully understand the informative/persuasive intent of an advertisement. How can marketing inform a child who does not understand that the aim is to sell a product to her or her family? Further, how can marketing be justified on the basis of companies’ rights where it impacts upon children’s rights? Therefore, I seriously question the extent to which advertising directed at children should be afforded protection as a right. This is in keeping with the fact that misleading advertisements are not given rights’ protection.

The ECtHR has not ruled on any freedom of commercial expression cases regarding advertising of products detrimen
tal to health. It could reject this type of protection, as it has in Holocaust denial cases. This approach could find support in Article 17 ECHR whereby:

Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

While this provision suggests that companies may have to be proven to have the intent to undermine children’s rights, the Article could also be applied to support the scope of valid limitations. However, again, this would require the ECHR to draw on the CRC, given that children’s rights to health and food are not expansively protected under the ECHR.

Finally, as Munro points out “… creative endeavours lie behind the images and the words in many advertisements, even when the results are less distinguished or less celebrated.” Thus, advertising campaigns can be the source of artistic and creative endeavour. In particular, branded features, such as advergames, could fall into the category of artistic speech. At the same time, artistic endeavour can also be limited. The Court should look to the function of the speech, which is to encourage consumption of HFSS food.

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174 Ibid., 405.
7.6.1 CONCLUSION

The right to freedom of commercial expression should neither be over-emphasised nor ignored. This analysis has focused on the ECtHR and CJEU as although companies may take their complaints straight to the Member State, national courts’ decisions will be shaped by the approaches of the CJEU and ECtHR to commercial expression. It should be recalled that the international and regional systems are primarily designed for the protection of human rights, not companies’ rights. Accordingly, the right to commercial speech is subject to limitations, including on the basis of respect for children’s rights and protection of health. Further, under the CRC, states have obligations to provide an enabling environment for children’s rights, including through limiting the actions of companies. The necessity and proportionality of limitations should be interpreted in line with children’s best interests. As we have seen in the previous chapter, states tend to regulate with companies’ rights in mind – not children’s. This calls for a paradigm shift in relation to children.

7.7 THE LIMITS IMPOSED BY EUROPEAN UNION LAW

The aim of this section is to analyse the extent to which EU law limits Member States’ abilities to regulate HFSS food marketing to children and, conversely, the extent to which children’s rights provide a justification for limiting free movement. As discussed in 6.4, minimum harmonisation of audio-visual media services leaves EU Member States free to regulate aspects of marketing subject to the limits of EU law, and with due regard to the constraints imposed by EU free movement law. On the one hand, EU law limits Member States’ discretion to impose restrictions on marketing due to its focus on furthering the internal market. On the other hand, EU law (and the CJEU in its judgments) recognises that protecting health and children’s rights is a valid and weighty justification for limiting free movement. The EU is committed to a children’s rights perspective that recognises children as rights holders (discussed in 3.7.2, 6.3.2). Therefore, children’s best interests should be given greater consideration when interpreting internal market considerations. While the CJEU has given some acknowledgment to children’s rights, there is scope for a more principled clarification of children’s position in terms of the internal market.

As there have not been any cases before the CJEU on restrictions of marketing of HFSS food directed at children, I analyse selected cases relating to alcohol marketing

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restrictions, with the aim of deriving guidance from the CJEU’s approach to Member States’ restrictions for the protection of health. Alcohol and unhealthy food are different products in terms of their use and existing restrictions. Therefore, the comparisons drawn are not directly transferrable but offer guidance as to the CJEU’s approach. Similarly, decisions related to children are included in exploring the CJEU’s approach to their rights. As the case law is voluminous, only a selection of cases is discussed.

The cases present potential challenges and opportunities when regulating HFSS food marketing. On the one hand, given that the CJEU recognises the power and impact of advertising, and in light of the evidence presented in Chapter Two, it may determine that restricting unhealthy food marketing is suitable, necessary and thereby proportionate to pursuing the legitimate aim of protecting public health, or children’s rights. On the other hand, the cases show that the state’s discretion is not unlimited and restrictions must be justified even where measures are not directly discriminatory. The decisions highlight considerations that the CJEU is likely to examine, but as in 7.6, the final decision will depend on the facts of the case, including the specifics of the restriction, the scientific evidence presented by the Member State, and the arguments submitted by the parties.

7.7.1 Basis of the Internal Market: Information & Marketing

Further, restrictions on marketing must be understood in light of the EU’s broader focus on information as a means of accessing the internal market. Early EU law was based on the assumption that increased access to the internal market would indirectly benefit consumer welfare through access to greater choice. Accordingly, the right to information is central to EU consumer law and policy as it is fundamental to the functioning of the internal market. Consumers must be empowered through knowledge. This economic rationale considers that individuals should be provided with honest and truthful information to enable them to evaluate and choose which products to buy. By this reasoning, individuals decide to buy a product on rational grounds,

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79 Hans-Wolfgang Micklitz Norbert Reich, Peter Rott, Klaus Tonner, European Consumer Law, 2nd ed. (United Kingdom: Intersentia, 2014), 9
80 Article 169 TFEU.
including the characteristics conveyed in advertising or marketing. Without this knowledge, a consumer will not know what products are available or their characteristics. This proposition is based on an assumption that marketing facilitates more choice, as individuals will find out about new and varied products instead of maintaining existing habits. Therefore, marketing should encourage competition between economic entities which is fundamental to the functioning of market economies.

The CJEU has reinterpreted this position - considering advertising as an important means by which consumers can learn about new products. For example, the Court has noted that “freedom for consumers is compromised if they are deprived of access to advertising available in the country where purchases are made”. The CJEU accordingly held that the provision of information to the consumer is paramount, and legislation denying access to information could not be justified by claims of consumer protection. In a later opinion, Advocate General Jacobs reiterated the fundamental role of advertising in a market economy as it encourages consumers to buy new products and therefore furthers competition. However, he acknowledged that in spite of this qualification, Member States can still regulate for the protection of, inter alia, public health and consumer protection. Hervey and McHale suggest that while Member States enjoy “a margin of discretion” in adopting measures to combat risk factors such as obesity, this “autonomy centred consumer information approach has reduced national discretion to adopt more paternalistic harm reduction approaches”. The CJEU’s approach to marketing restrictions should be considered with this autonomy-focused approach in mind. In particular, the CJEU may prefer less restrictive measures, such as labelling, over restrictions on information in the form of marketing bans. However, as will be seen, the CJEU’s approach in terms of public health has evolved and it has found measures that restrict information proportionate in certain cases.

7.8 The impact of EU free movement law

Where an EU Member State imposes restrictions to limit food marketing to children on television, print, radio or internet, these rules may limit free movement of goods and services. Firstly, restrictions on marketing may amount to measures having equivalent effect to a quantitative restriction (MEQR) under Article 34 TFEU. Quantitative restrictions include restrictions on imports, exports or goods in transit. Secondly, broadcast or internet advertising restrictions may limit freedom of services, with the CJEU recognising a market access test. Where a restriction relates to both free

84 Ibid, para 18.
86 Ibid, 187.
87 Tamara K. Hervey, European Union Health Law: Themes and Implications, 419.
88 Article 34 TFEU.
movement of goods and services, the Court is likely to scrutinise the measure under the most pertinent basis if one freedom is secondary."\(^{191}\)

However, even where restrictions limit free movement, this freedom is not absolute. States may impose distinctly and indistinctly applicable restrictions if justified under stipulated grounds, including (most importantly for our purposes) the protection of health.\(^{192}\) This is subject to the proviso that restrictions must not amount to "arbitrary discrimination or a disguised restriction on trade".\(^{193}\) Distinctly applicable rules can only be justified under Article 36 TFEU, while indistinctly applicable measures may be restricted on the basis of other legitimate aims including consumer protection, or the interests of others, which encompasses children's rights following the *De Agostini* case (discussed in 6.4.1).\(^{194}\) Therefore, a wider range of defences is open to a state that has not engaged in protectionist, directly discriminatory practices.

### 7.9 Free Movement of Goods

In relation to MEQRs three types of restrictions are problematic from the perspective of regulating marketing: discriminatory rules, rules imposing product requirements and rules affecting market access. As analysed in 7.10, an MEQR will be contrary to EU law, unless it can be justified under an exception and is proportionate.

#### 7.9.1 Distinctly Applicable Rules

The basic rule is that restrictions should not be discriminatory, i.e. promote or favour domestic products over imports. In *Commission v. Ireland*, the Irish government had sought to encourage individuals to purchase domestic products through distinctive advertising, labelling and publicity of domestic products.\(^{195}\) The CJEU held that the campaign amounted to an MEQR as it sought to promote sale and purchase of Irish products in Ireland.\(^{196}\) Even though the campaign was run by industry, the CJEU found that the measures could be attributable to the state given its support and role in overseeing the scheme.\(^{197}\) The promotions were a reflection of the state's intention to promote domestic products and limit the sale of imports.\(^{198}\) Accordingly, as the measures intended to promote purchase of domestic products only, they amounted to an MEQR.\(^{199}\) Therefore, the CJEU concluded that Ireland had failed to respect its treaty obligations.\(^{200}\)

Accordingly, restrictions of HFSS food marketing should not directly or indirectly favour domestically produced food. This raises a problem for my earlier assertion that states

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\(^{191}\) *Omega*, para 26.
\(^{192}\) Article 36 TFEU; Article 62 TFEU.
\(^{193}\) Article 36 TFEU.
\(^{194}\) *Cassis de Dijon*, para 8.
\(^{196}\) *Ibid*, para 8.
\(^{197}\) *Ibid*, para 15.
\(^{198}\) *Ibid*, para 23.
\(^{199}\) *Ibid*, para 20.
\(^{200}\) *Ibid*, para 30.
should limit food advertising on the basis of cultural rights (section 4.4.2.3). Thus, a state party of the ICESCR/ CRC seeking to promote its national food culture through promotional campaigns could fall foul of EU law for directly discriminating against imports. This could further occur where a nutrient profiling system arbitrarily prefers national products and restricts imports on the basis of non-scientific criteria. However, private schemes run by industry escape Article 34 TFEU provided the state does not have a role in the scheme. Furthermore, states could argue that pursuing their right to adequate food obligations are based on a legitimate aim and proportionate in light of the ICESCR/ CRC. This would require the CJEU to pursue greater engagement with international socioeconomic rights.

7.9.2 INDIRECT DISCRIMINATION

Discrimination includes indirectly discriminatory rules that de facto result in a differential impact on foreign goods compared to domestic goods. In Commission v. France, the Commission claimed that a French ban on advertising alcohol above a certain percentage was discriminatory and therefore an obstacle to trade under Article 34 TFEU. The CJEU recognised the legality of regulating alcohol advertising from the standpoint of public health, as “advertising acts as an encouragement to consumption”. However, while the legislation was in principle justified, it resulted in arbitrary discrimination of trade. National products could be advertised, whereas comparable products from other Member States were restricted or prohibited, and therefore at a disadvantage. Thus, the Court concluded that advertising restrictions only comply with Article 36 TFEU to the extent to which they apply equally to products regardless of their origin. Therefore, states wishing to limit HFSS food advertising must do so on the basis of a scientific nutrient profile, not arbitrary grounds that de facto discriminate against products from other Member States. This could be supported with reference to the right to adequate food.

7.9.3 PRODUCT REQUIREMENTS

Furthermore, Article 34 TFEU also applies where there is no discrimination but a rule limits the flow of goods between Member States based on product requirements. In Cassis de Dijon, the plaintiff company sought to market and import French liqueur to Germany. However, fruit liqueur could only be marketed as such in Germany if it contained a minimum alcohol content of 25 per cent, whereas in France such liqueur was normally 15-20 per cent alcohol. While the measure was not discriminatory, it still inhibited trade as producers in other Member States could not market their products without restriction. However, the Court held that indistinctly applicable national rules which inhibited trade due to differences in production/ characteristics from the country of origin could be justifiable if they were in pursuit of a reasonable special interest (rule of

203 Ibid, para 18.
204 Ibid.
Therefore, national disparities “must be accepted in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer.” Thus, the case introduces reasonable grounds for limiting free movement where rules are indistinctly applicable.

However, the CJEU held that in this case the measure could not be justified on the basis of protecting consumers from health effects, abuses and unfair practices. It did not meet its purpose as it could promote alcoholic drinks of higher alcohol content, contrary to this aim. Further, the interests of consumers could be pursued by less restrictive means such as labelling. Craig and de Búrca consider the case significant, as it reverses the onus onto the host state to accept the rules of the home state instead of the other way round. It places an onus on the state that has introduced the measure to defend its regulatory autonomy, not the reverse. Therefore, the case risks a race to the bottom whereby minimum standards will apply, not higher standards that are within regulatory discretion. However, it should also be stated that Cassis created more incentives for EU harmonisation to alleviate the risk of race to the bottom.

7.9.4 Market Access

Later case law suggests that market access has emerged as an overarching principle in determining whether a national measure is contrary to free movement. This means that restrictions that apply indistinctly may still amount to an MEQR where they impede foreign products’ access to the internal market to a greater extent than domestic products. Case law suggests that in order to avoid falling under Article 34 TFEU, a restriction must not impose a differential impact on domestic and imported products by impeding access to products from other Member States more than domestic products. The “market access” test is not qualified and therefore offers extremely broad interpretation of the measures falling under Article 34 TFEU. Craig and de Búrca point out that market access does not have a clear meaning. Accordingly, market access includes a wide range of measures, such as marketing restrictions.

The CJEU has moved between defining MEQRs widely and narrowly. In its early case law it defined MEQRs broadly: “all trading rules... which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade”. In Keck, the CJEU refined its

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205 Case 120/78, Rewe Zentral AG v. Bundesmonopolverwaltung fuer Branntwein EU:C:1979:42 (hereafter Cassis de Dijon).
206 Ibid, para 102.
207 Craig and De Búrca, Eu Law: Text, Cases and Materials, 666.
211 Craig and De Búrca, Eu Law: Text, Cases and Materials, 693-695.
approach, in light of frequent challenges brought by traders where rules were not directly discriminatory. There the CJEU differentiated between rules relating to the goods themselves and "selling arrangements". The former rules were likely to impede market access as they imposed a double burden on non-domestic traders. However, the latter rules imposed an equal burden regardless of territory and therefore did not fall under Article 34 TFEU, as long as they affected both domestic and imported goods in the same way. Therefore, marketing restrictions that applied equally to domestic and imported goods would not amount to MEQRs.

However, the market access approach gained salience in the Gourmet case. Following a case taken by the Consumer Ombudsman, the Swedish Court referred to the CJEU asking whether national rules creating an absolute prohibition on alcohol advertisements in print amounted to an MEQR under Article 34 TFEU, and if so whether such rules could be lawful under Article 36 TFEU. In Sweden, all print advertising of alcohol had been prohibited under the Alcohol Act. The CJEU highlighted that a ban like the one in question "is liable to impede access to the market by products from other Member States more than it impedes access by domestic products, with which consumers are instantly more familiar". Therefore, regulation amounted to an obstacle to trade under Article 34 TFEU as it could affect marketing of products from other Member States more severely than domestic products. The Court’s proportionality assessment is discussed in 7.10.4.

The Gourmet case was significant as it highlighted that even marketing rules (i.e. selling arrangements) that are not expressly discriminatory may be caught by Article 34 TFEU, if differential in impact for domestic producers and importers. The case has met with a mixed reaction. On the one hand, it has been heralded as a “more realistic approach” to national restrictions on advertisements. On the other hand, it has been suggested that the CJEU may be ill placed to apply an economic analysis based on market access and that such law-making should be left to the legislature. It has been pointed out that the “market access” test is not qualified and therefore offers extremely broad interpretation of the measures falling under Article 34 TFEU.

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214 Ibid, para 16.
215 KO v. Gourmet, para 19.
216 Ibid, para 21.
217 Ibid, para 25.
218 KO v. Gourmet, para 18. See further, for example, Gert Straetmans, "Case C-475/98, Konsumentombudsmannen (Ko) V. Gourmet International Products Ab (Gip), Judgment of the Court (Sixth Chamber) of 8 March 2001," Common Market Law Review 39, no. 6 (2002).
220 Yeo, "Discrimination or Market Access? Re-Evaluating the Eu's Organisation of Its Internal Market.", 323.
221 Spaventa, "Leaving Keck Behind?The Free Movement of Goods after the Rulings in Commission V Italy and Mickelsson and Roos."
Gourmet suggests that marketing restrictions may de facto impose a differential impact on non-domestic products as they affect new foreign products more adversely than new national products. However, it would be inaccurate to assume in every case that a new product made by a domestic company would access the market more easily without advertising than a new product by an imported brand. Broberg and Holst-Christensen posit that it may have been more apt to instead compare known and unknown products regardless of origin. Considering the globalisation of food and drink, it would be speculative to conclude without regard to evidence that individuals are more familiar with national brands, at least in the case of unhealthy foods. The Gourmet case can be seen as specific to the circumstances, considering the presence of an alcohol monopoly in Sweden. Furthermore, the fact that Swedish brewers were still able to promote their products as they sold both light and dark beers, whereas brewers of dark beers only from other countries could not, may also have swayed the Court. Accordingly, the current approach seems to result in “even ancillary restrictions which are not impeding market access as such” coming under free movement.

7.10 Proportionality

Once the complainant establishes that the Member State has imposed a restriction that amounts to an MEQR, the Member State may still justify the measure. The Court adopts a strict three-prong proportionality test in relation to free movement given its centrality to the EU. Firstly, in order for a measure to be suitable, it must be appropriate to its aim, meaning a causal relationship between the measure and the objective pursued. Secondly, necessity requires that the least restrictive means is used to accomplish the objective of the legislation. Thirdly and lastly, if raised by the parties to the case, the Court will examine whether the measure is proportionate in relation to the burden imposed on the individual when weighted with the benefit to the public interest. Harbo considers the first two elements to be “efficiency tests”, whereas the last encompasses conflicting interests and considerations. Proportionality stricto sensu requires that individual and collective interests are balanced and that no excessive burden is imposed on the individual. In preliminary rulings, the CJEU will establish whether the restriction is justifiable, although the complete proportionality assessment is often left to the

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223 Kaczorowska, “Gourmet Can Have His Keck and Eat It!”, 488.
226 Ibid, 23.
227 Craig, Eu Administrative Law, 591-2.
228 Harbo, The Function of Proportionality Analysis in European Law 22.
229 Ibid. 37.
national referring court. Finally, restrictions seem to be easier to justify where they impose an equal burden on imported and domestic goods.²³⁹

This section examines aspects of the proportionality test that are considered particularly important in terms of the research question, namely public health as a legitimate aim, including the role of evidence in establishing the suitability of the measure, the place of fundamental rights in the CJEU’s decision making and the Court’s approach to necessity. Finally, these findings will be applied to the question of HFSS food marketing to children with a view to analysing how the CJEU might approach such a case.

### 7.10.1 Public Health as a Justification Ground

The protection of health is one of the broadest legal bases (and therefore most frequently invoked) to justify even directly discriminatory barriers to trade. States are afforded a wide, although not unlimited, margin of discretion.²³¹ The case law of the CJEU establishes that the Court has found marketing restrictions to be suitable measures to protect public health in a number of cases relating to alcohol. However, despite this, restrictions should be adequately targeted to the aim.

In *Aragonsa*, the CJEU confirmed that it is for Member States to determine the protection they wish to afford public health, although this must be within the limits of EU law and comply with the principle of proportionality.²³² The Government of Catalonia had restricted advertising of alcohol of over 23 per cent strength on mass media, streets and highways, cinemas and public transport. The CJEU held that the measure amounted to an MEQR as it could reduce trade. However, firstly, the measure could be justified as restricting alcohol advertising could be a suitable public health measure. Secondly, restricting advertising on the basis of alcohol strength did not seem manifestly unreasonable.²³³ The prohibition was not disproportionate to its aim as it only prohibited advertising in specific places such as public highways and cinemas. These sites were particularly visible to motorists and children who were of special importance to the policy.²³⁴ Finally, the CJEU held that the legislation did not amount to arbitrary discrimination or disguised restriction on intra-Community trade as it did not distinguish between products’ origin.²³⁵

The CJEU has also found that restrictions on free movement of services relating to alcohol can be justified on public health grounds. In 2002, the Commission again pursued France

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²³³ Ibid., para 17.
²³⁴ Ibid., para 18.
²³⁵ Ibid., para 25.
regarding its revised alcohol advertising restrictions. French law prohibited direct and indirect television advertising for alcoholic beverages over 1.2 per cent, while alcohol advertising was allowed in the press, radio, and on posters and signs. In light of the law, French television channels drew up a Code of Conduct which required, inter alia, that French broadcasters of sporting events taking place abroad must remove advertising for alcoholic beverages prior to transmission. The Commission and the UK complained that this restriction was contrary to Article 56 TFEU as it restricted freedom to provide advertising and television broadcasting services. It was further argued that although the rules pursued the legitimate aim of protecting public health, they were disproportionate to this aim.

The Court held that the ban amounted to a restriction on freedom to provide services under Article 56 TFEU. Still, the CJEU found that the prohibition was directed at protecting public health and appropriate to this aim. The measures did not go beyond what is necessary, as they reduced the occasions when viewers might be encouraged to drink alcohol. Finally, with regard to the technical means and excessive cost, there was no other less restrictive measure to limit advertising. Therefore, the rules were not disproportionate. The Court reiterated that it is up to the Member State to decide the degree of protection afforded to public health and the measure taken to achieve this protection. Thus, the rules are not per se disproportionate because some Member States impose less strict restrictions.

On the same day, the CJEU upheld the same regulation in a preliminary reference case brought by a French court. Stuyck suggests it is for this reason that the Court did not leave the proportionality assessment to the national court. The Court held that the rules pursued a legitimate aim of protecting public health as they sought to restrict advertising to combat alcohol abuse. The rules were appropriate to this aim as they only applied to television advertising and thereby did not go beyond what was necessary. Although the measure did not cover all forms of television advertising, the Court held that it was up to the Member State to decide on the degree of protection and

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237 Ibid, para 18.
238 Ibid, para 26.
239 Ibid, para 31.
240 Ibid, para 34.
241 Ibid, para 32.
242 Ibid, para 33.
243 Ibid, para 37.
244 Case C-429/02, Bacardi France SAS v. Télévision Française, EU:C:2004:432 (hereafter, Bacardi v. France).
245 Stuyck, "Case C-262/02, Commission V. France and Case C-429/02, Bacardi France Sas and Télévision Française 1 Sa (Tf1) Et AL., Judgments of the Grand Chamber of the Court of Justice of 13 July 2004," 783.
246 Ibid, para 37.
247 Ibid, para 38.
the means of achieving it." Therefore, in a number of cases the CJEU has been willing to allow states a broad discretion in the protection of health and found limitations on advertising appropriate.

7.10.2 EVIDENCE

However, while it is clear that the CJEU requires proof of "precise", evidence-based law making, the extent of the evidence required has not been conclusively specified. Stuyck submits that the state's margin is broad in public health as the EU does not have powers of harmonisation. At the same time, Nic Shuibhne and Maci argue that "there has been a market shift in recent case law towards positive expression of and engagement with the standard of proof, which contrasts with negative guidance more prevalent before." Thus, it seems that the CJEU expects more of Member States than it previously did, perhaps in light of the "better" regulation agenda and increasing use of regulatory impacts. At the same time, it does not explicitly require states to accept the results of regulatory impact assessments.

In the Vitamins case, the European Commission complained that a prohibition on marketing of food with added vitamins, unless proof of nutritional need in the population was provided, was contrary to free movement. The CJEU reiterated that Member States' discretion is "particularly wide" where uncertainties exist in scientific research. However, this discretion is subject to the principle of proportionality, whereby states can only prohibit marketing where "the real risk alleged for public health appears sufficiently established on the basis of the latest scientific data". Therefore, states should carry out risk assessments to examine the degree of probability of harmful effects. At the same time, the CJEU added that Member States can take protective measures following the precautionary principle where scientific uncertainty emerges due to the insufficiency, inconclusiveness or imprecision of results. However, this was not the case in this instance as a detailed, case-by-case assessment of the effects of adding vitamins and minerals had not been conducted.

Based on this case, a Member State seeking to limit HFSS food marketing must present an adequate risk assessment. Chalmers et al. suggest that on the basis of EU case law, regulation of food aimed at combating obesity could be justified, although difficult to

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248 Ibid, para 40.
249 Popelier, "Legal Implications of Better Regulation: A Special Issue.", 460.
250 Stuyck, "Case C-262/02, Commission V. France and Case C-429/02, Bacardi France Sas and Télévision Française 1 Sa (Tf1) Et Al., Judgments of the Grand Chamber of the Court of Justice of 13 July 2004.", 797.
251 Shuibhne, "Exceptions to the Free Movement Rules.", 978.
252 Popelier, "Legal Implications of Better Regulation: A Special Issue.", 462.
253 Case C-392/01, Commission v. Kingdom of Denmark, EU:C:2003:492 (Vitamins), para 43.
254 Ibid, para 48.
256 Ibid, paras 49, 52.
257 Ibid, para 55-6.
adopt coherently and consistently. Therefore, it would be best achieved through an EU sanctioned nutrient profile. As this seems unlikely to be forthcoming, the CJEU should confine itself to examining the extent to which there is a real risk to public health and whether the measures are designed to address this specific risk.

7.10.3 Fundamental Rights as a Justification

In light of the research question, it should further be observed that the CJEU has employed a less intense proportionality analysis in cases relating to fundamental rights. In *Omega*, the German Constitutional Court asked the CJEU whether the prohibition of a laser game on the grounds that it offended the values of the German Constitution was compatible with the provisions of freedom of services and free movement. The German Constitutional Court considered that a “killing game” was contrary to human dignity as protected by the German Constitution. The CJEU reiterated that Member States are free to adopt different measures from country to country and must be afforded a margin of discretion. It held that since the EU and its Member States must respect fundamental rights, their protection is a legitimate interest which can justify restrictions even where free movement is at issue. Accordingly, the CJEU held that the measure did not go beyond what was necessary to achieve the objective of protecting human dignity in light of the German Constitution.

Similarly, in *Dynamic Medien*, the CJEU interpreted the proportionality of an MEQR in light of children’s rights under the EU Charter and the CRC. The case related to a German law whereby pre-recorded videos could only be sold to young people aged under 15 years if they had been authorised and labelled by the relevant authority in Germany. Firstly, the CJEU held that the measure amounted to an MEQR as it made importation from another Member State more difficult and expensive. In its decision, the CJEU used children’s rights as a means of determining that the Member States have a margin of discretion in choosing a suitable measure. The CJEU interpreted the proportionality test in light of children’s rights under international human rights law and the EU Charter. In particular, it drew on Article 17 CRC in determining that protecting the rights of the child was a legitimate interest. This shows that the CJEU is willing to look to the provisions of the CRC to elucidate children’s rights.

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262 *Ibid*, para 35.
266 *Ibid*, para 34-5.
267 *Ibid*, para 44.
Other important points in terms of the research question were highlighted. The Court reiterated that there does not have to be a shared acceptance of the degree of protection afforded to children and the measures necessary to achieving this aim. Accordingly, it is legitimate for one Member State to adopt stricter standards than others. Further, the CJEU highlighted that the measure did not go beyond what is necessary as it did not preclude all forms of marketing; it was still possible for adults to purchase the products. Although the CJEU left the final decision to the national court, it essentially all but decided the proportionality. On the one hand, the case is important from a children's rights perspective as it shows that the Court will interpret free movement in light of children's rights. On the other hand, the CJEU could have invoked children's best interests as a means of resolving the conflict between protection and participation, as provided for under the EU Charter.

7.10.4 Necessity
Where the CJEU has found a measure suitable to pursue a legitimate aim, it will consider whether the provision is necessary to attain that aim. This leads the Court to assess whether there is a less restrictive measure available. This poses challenges as the effectiveness of a single measure, as part of a broader public health strategy, is difficult to establish. The necessity limb is further complicated in the case of “lifestyle” diseases, as the analysis is ill suited where multiple measures are required to prevent risk factors such as obesity. Alemanno and Garde ask “which policy options should be considered? How should they be measured and compared and with reference to what benchmark?” Therefore, it is important that the Member State adequately articulates to the CJEU the multifaceted nature of its strategy that requires multiple measures. Further, in light of the earlier discussion on the role of information, the CJEU may be slow to accept restrictions as necessary and instead suggest that information can provide a less restrictive and as effective an approach as marketing limitations. According to Craig, the CJEU’s standard of review will vary, depending on how “seriously” it takes the state's claim of necessity.

Returning to the Gourmet case (see 7.9.4), although the CJEU held that the marketing restriction impaired market access, it recognised that the measure could be justified for the protection of public health under Article 36 TFEU if proportionate to the objective and not a means of arbitrary discrimination or disguised restriction on trade. However, the Court found that the evidence put forth by the state regarding an increase in the consumption of imported products, such as of wine and whiskey, was inadequate as it did not take beer consumption into account. Still, the CJEU noted that Articles 34 TFEU and 56 TFEU do not preclude complete advertising prohibitions, unless the protection of

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269 Ibid, para 44.
270 Ibid, para 48.
271 Ibid, para 51.
272 Garde, "The Emergence of an EU Lifestyle Policy: The Case of Alcohol, Tobacco and Unhealthy Diets.", 1775.
273 Craig, EU Administrative Law, 629-631.
274 Ibid, para 28.
275 Ibid, para 22.
public health can be achieved by measures less restrictive to trade. 276 The CJEU left the assessment of the particulars of the ban to be established by the national court.

In its subsequent decision, the Swedish Market Court found the ban contrary to EU free movement law as the evidence produced was uncertain regarding whether the advertising encouraged alcohol consumption.277 The advertising restrictions formed one part of a series of measures including age limits, pricing policies, monopoly, limited hours for purchasing alcohol, and health education. The Swedish Court held that marketing was less effective than these instruments and that the same objective could be reached by a means less restrictive to trade.278 The Court hinted that a ban on advertising spirits would be more appropriate but the current approach was far too extensive and therefore disproportionate.279 The fact that the Court refused to see marketing restrictions as part of a broader public health strategy is troubling from a public health perspective. It highlights that restrictions should be adequately targeted. Following the decision, the legislature changed the law to allow for print advertising of alcohol content of less than 15 per cent. Advertisements may only include images of goods or materials used in the product, brand or trade mark.280

A recent decision of the CJEU reignites the difficulty in establishing the necessity of public health measures.281 The case derives from the Scottish Parliament’s decision to introduce minimum unit pricing for alcohol with the aim of, in particular, reducing alcohol consumption by harmful drinkers, and also reducing alcohol misuse and over-consumption.282 The measure was challenged by the Scottish Whiskey Association on a number of grounds, including that the legislation constituted an MEQR under Article 34 TFEU that could not be justified under Article 36 TFEU.283 Following the request of the petitioners, the Scottish Court referred a number of questions to the CJEU in the form of a preliminary reference. In examining the necessity of the measure, the CJEU stated that although suitable for its aim, the measure would not be necessary where a provision less restrictive to trade could achieve the objective as effectively.284 The Court drew on tobacco control and suggested that increased pricing can be pursued by taxation without interfering with the free formation of prices.285 It implied that taxation is less restrictive to trade than imposing minimum pricing, as it does not restrict the ability of companies to determine selling prices and thus amount to an obstacle to accessing the market and fair

276 Ibid, para 34, 42.
278 MD 2003:5, 27.
279 MD 2003:5, 29.
280 Alkohollag (2010:1622), 7:5.
282 Policy Memorandum accompanying the Bill, para 3.
283 Para 6, Court of Session.
284 Scotch Whisky, para 41.
285 Ibid, para 44.
In spite of this clear inference, the CJEU left the final decision with the Scottish Court as to whether a measure such as increased taxation can protect human life and health as effectively, while being less restrictive to trade.

The CJEU's strict interpretation of least restrictive means neglects public health considerations. On the one hand, the CJEU held that, while the Member State must provide evidence and analysis as to the appropriateness and proportionality of the measure, it cannot be expected to prove that no other measure could achieve the objective. On the other hand, the significance of this assertion is unclear given that the CJEU's overall approach seemed to favour taxation. Bartlett is critical of the CJEU's reasoning from a public health perspective. For instance, he suggests that it is far from certain that the industry will transfer the cost of taxation to the customers, leading to the intended (and necessary in light of evidence) price increase. Bartlett further criticises the Court for applying experience from tobacco control without scrutiny in light of the differences relevant to alcohol. While tobacco use is harmful per se, it is in the interest of public health that states target particular types of alcohol which are more harmful or high risk than others.

However, the Scottish Court of Session's decision was not the death knell to minimum pricing that had been expected. It reiterated EU Member States' margin of appreciation in determining the level of protection it wishes to afford to health. In regard to the question of necessity, the Scottish Court concluded that the government had provided ample information that taxation would not achieve the same or similar objective. Tax increases would not have the same effect, as supermarkets could still sell alcohol below cost. Further, minimum pricing targets "harmful and hazardous drinkers" who purchase cheap alcohol, which tax increases could not do as they apply a uniform rate. Interestingly, the Scottish Court also commented on the experimental nature of the legislation, stating: “the only way in which minimum pricing can be tested is by trialling it; which is what the Government seeks to do”. Therefore, the national Court displayed a much more nuanced and health-focused stance on the potential of law to address NCDs. Thus, even where the CJEU applies a restrictive approach, where the final proportionality assessment is left to the national court, it may adopt a different stance.

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86 Ibid, para 46.
87 Ibid, para 49.
88 Ibid, para 54-5.
90 The Scotch Whiskey Association v. The Lord Advocate and Advocate General [2016] CSIH 77 P762/12, para 187.
91 Ibid, para 206.
92 Ibid, para 196.
93 Ibid, para 199.
So far, although some Member States have adopted restrictions on unhealthy food marketing to children, these have not led to challenges before national courts or the CJEU. Ideally, well-drafted legislation designed through impact assessments and consultation will avoid legal challenges. States seek to avoid expensive litigation, as even if a measure is upheld as legitimate, the case can bring a “chilling effect”, meaning that other Member States are hesitant to adopt restrictions for fear of litigation.295 Furthermore, as has occurred in tobacco and alcohol cases, litigation can delay implementation of enacted laws.296 The section below will discuss the situation where the Commission, a Member State or a preliminary reference from a national court calls upon the CJEU to determine whether a marketing restriction of HFSS food is contrary to free movement. The observations are exploratory, as the eventual decision will depend on the facts specific to the case.

Should a case on regulation of HFSS food marketing come before the CJEU, the complainant will firstly have to establish that the measure is an MEQR or a restriction on services. This will depend on the design of the measure, and the approach of the CJEU. Discriminatory rules and product restrictions are clear MEQRs. Further, even where a restriction is not discriminatory in terms of origin, the court may determine that the measure is an MEQR as it interferes with access to the internal market. On the other hand, the Court may follow Keck and distinguish marketing restrictions as selling arrangements. However, if the Court finds that the measure amounts to an MEQR or restriction of services, the case law discussed above suggests a number of issues are pertinent, including the quality of the evidence produced by the Member State, the scope and aims of the measure, and the rights and interests at hand.

Firstly, it is crucial that states present adequate evidence to demonstrate the suitability of the proposed measure. Member States can only limit marketing of lawfully manufactured and marketed products on the basis of protecting health, if “the real risk alleged for public health appears sufficiently established on the basis of the latest scientific data available”.297 Alemanno and Garde highlight three challenges facing legislation on lifestyle measures: the inherent uncertainty surrounding the intervention, the difficulty in establishing a causal link/correlation between the measure and outcome, and scientific uncertainty surrounding measures.298 The state cannot be expected to definitively prove the effect of the measure. In the case of HFSS food marketing to children, there is a strong body of evidence showing a modifiable risk. Further, the CJEU should recognise that a range of measures is necessary to prevent obesity in children (depending on the aim of

296 For example in Scotland the Alcohol (Minimum Pricing) (Scotland) Act 2012 has not become law as of 2016 due to legal challenge.
297 Vitamins.
the legislation). This evidence, coupled with states’ obligations to uphold children’s rights, suggests that food marketing restrictions are likely to be considered suitable measures to protect children’s health.

Secondly, measures must avoid arbitrary discrimination by targeting the content to be limited. The CJEU has been critical of measures that did not target harmful behaviour or products. For example, in *Gourmet*, the rules were disproportionate as they applied to all alcohol without distinction as to its strength and effect on public health. Therefore, it would be difficult to justify prohibiting all food marketing on the basis of health. Therefore, HFSS food should be adequately profiled to ensure that it is based on scientific criteria and not protectionist. Legislation that fails to profile food may be too broad and found disproportionate. Furthermore, measures that are not based on objective distinctions may be discriminatory. For example, under Irish food marketing regulations, cheese is excluded while comparable products are not. Could this amount to a protectionist measure to appease the dairy lobby?  

Alternatively, as we have seen with Sweden, a lack of nutrient profile could be disproportionate where marketing that is directed at a specific age group of children is limited. The *De Agostini* case suggests that Member States can be justified in restricting advertising to children on the basis of their rights. The *Dynamic Medien* case also suggests that the CJEU may decide the necessity of a measure broadly where it is designed to protect children’s rights. The fact that other Member States do not regulate or regulate restrictively does not render the measure disproportionate. Still, advertising bans aimed at teenagers, or broad bans that affect adults’ information rights, will be scrutinised more closely in light of competing rights to information. However, the fact that advertising is available in other media could be decisive in the CJEU's decision. Therefore, it is argued that the CJEU should respect states’ obligations under the CRC to provide adequate protection for children’s rights, provided this is achieved with due regard for competing rights.

Thirdly, with regard to whether the measure is necessary, the CJEU may look at whether there is a less restrictive means to achieve the same aim. The Member State should be ready to justify why it adopted one regulatory approach over another and why this measure is more suitable if more restrictive. On the one hand, given the fundamental position of information in EU consumer law, the CJEU may find marketing restrictions disproportionate in favour of information provision. Some of the CJEU’s jurisprudence reflects liberal ideology, which suggests that restricting marketing will limit a company’s ability to penetrate the market with a new product. This focus on information provision may place an undue burden on the child consumer and fly in the face of behavioural economics, which suggests that consumers often make irrational choices in overriding long-term health risks. Given that it is well established that children have limitations in

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processing information, providing information alone is unlikely to be as effective as limiting some forms of marketing.

Further, EU law already recognises that the right to advertise or receive information is not absolute, as unfair or harmful advertising is prohibited.\textsuperscript{300} Furthermore, it has been alleged that:

\begin{quote}
It can be inferred from the CJEU case law and the prohibition of providing particular information that the protection of the consumer's health is a greater aim than the policy of informing consumers...\textsuperscript{301}
\end{quote}

Accordingly, as already discussed, in the recent Tobacco Directive 2014 cases, the CJEU offered a health-focused analysis that recognised the limits of autonomy-centred consumer information. It analysed the less restrictive measures put forward by Poland and Romania, such as age limits and information provision, finding that they were not as effective as the more restrictive measures contained in the Directive.\textsuperscript{302} Thus, the court recognised that restricting the level and frequency of advertising is not necessarily disempowering but can empower consumers through ensuring more choice. This can be achieved by ensuring that advertising does not disproportionality promote one product class. Therefore, in spite of the focus on information, the CJEU has upheld advertising restrictions in a number of cases. Furthermore, the CJEU should have particular regard for children's rights and best interests, and states corresponding obligations to adopt regulatory measures.

Accordingly, the CJEU should interpret free movement in light of national parliaments' competing obligations to regulate on the basis of their international human rights law. The fact that national measures to protect health and other rights must be justified if they impair free movement (and not the reverse) has led some to argue that "freedom of movement and competition are the rule; health protection or health promotion are exceptions."\textsuperscript{303} However, the EU's obligations in relation to health and children's rights, and the CJEU's recognition of the CRC, could serve to realign this power balance.\textsuperscript{304}

Where measures are designed to protect health, the obligation to ensure a high level of human health should be considered as a weighty legitimate aim.\textsuperscript{305} The CJEU has already

\begin{enumerate}
\item Philip Morris, para 182.
\item Tamara K. Hervey, European Union Health Law: Themes and Implications, 44.
\item Article 9 TFEU, Article 168(1) TFEU.
\item Article 35 EU Charter.
\end{enumerate}
shown a willingness to engage with the CRC in *Dynamic Medien*, where it interpreted the child’s right to information as encompassing a right to be protected from harmful information in light of the CRC. In spite of this, Garde submits that the CJEU has “so far failed to adopt a reasoned approach to arguments based on the best interests of the child.” Therefore, in cases involving regulation on the basis of children’s rights, their right to protection and best interests should be taken into account in this interpretation.

Thus, there is scope for greater clarity and analysis with regard to children’s rights standards. Hervey and McHale argue that while interpreting free movement in terms of rights will change the discourse, it is unlikely to amend the decision as human rights rarely provide “clear cut solutions”.

It is true that children’s rights are not a panacea, nor should they be. Children’s rights should not be used to avoid balancing interests and pursuing coherent reasoning. Instead, greater regard for children’s rights requires engagement with the impact of regulation on children, which has long been overshadowed by the market. It requires the complainant to engage with rights in her arguments against preventative legislation instead of focusing on economic consequences. This could serve to rebalance the current situation whereby “the norms of global trade law, like those of EU trade law, enjoy a privileged legal status - they are the standard, the rule against which health protection must be accepted as a permissible exception.” This change in discourse should not be dismissed simply because it may not automatically produce a clear result.

Accordingly, the outcome of litigation on HFSS food marketing will depend on the national legal system, including the position afforded to children’s socioeconomic rights vis-à-vis economic operators. Therefore, as argued in 6.3.2, the regulator should consider children’s best interests, rights and views in impact analyses so that their rights are integrated throughout.

### 7.1.1 Summation of EU Free Movement

This section has suggested that food marketing restrictions may amount to measures equivalent to quantitative restrictions on trade, where they are discriminatory, impose a differential burden on importers, or limit foreign goods’ access to the market. However, even where a company or Member State establishes that a measure amounts to an MEQR, it is possible for states to justify provisions where they are suitable, necessary and (where the matter is raised) proportionate *stricto sensu*. Following the CJEU’s

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307 Article 24 EU Charter.
309 Ibid., 522.
jurisprudence, both health protection and children's rights appear to provide strong justifications for preserving regulatory autonomy. Garde agrees that the CJEU is unlikely to "curtail too drastically national discretion". The CJEU should exercise caution with the specifics of Member State policy that is based on adequate assessments and consultations. However, states’ discretion is not unfettered. Therefore, states must design evidence based, justified and targeted restrictions. Such measures may be supported through highlighting both the EU’s mainstreaming obligations and the states’ obligations under the CRC.

7.12 CONCLUSION

Both European Courts recognise that states have a wide discretion in the scope they afford in the protection of public health and children’s rights. States accordingly have latitude in determining how to regulate HFSS food marketing. However, this is not unlimited; courts expect Member States to produce evidence of both the appropriateness of the measure and its effectiveness. This may include whether there is a less restrictive means available. The ECtHR does not engage with the least restrictive means to the same extent as the CJEU – although it may consider whether alternative measures are open to the company to promote its message. While in both instances the courts avoided balancing stricto sensu, the CJEU has touched on this, suggesting that companies’ rights should be seen in light of their social functions.

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Chapter 8
Conclusions

The central aim of this thesis was to analyse the scope and content of children’s rights and states’ corresponding obligations to limit HFSS food marketing, in view of the increasing rates of childhood obesity. It was hypothesised that children’s rights provide a basis for and potentially an obligation to limit HFSS food marketing. This analysis was pursued through particular emphasis on the findings of the CRC Committee – with states’ duties shaped in terms of the children’s rights approach. Children’s right to freedom from obesogenic food marketing was underscored by the rights to health, adequate food and freedom from exploitation under the CRC, ICESCR and ESC. States’ implementation of children’s rights was assessed through evaluating domestic regulations in terms of WHO Recommendations and children’s rights indicators. The scope of states’ obligations was interpreted in light of competing obligations under international human rights law, such as children’s rights to play and information, and companies’ right to freedom of expression. Finally, a coherent account was pursued through an analysis of the extent to which EU free movement law limits these rights and obligations.

In this final chapter the results of the analysis are outlined. Subsequently, future avenues for strengthening children’s rights in relation to HFSS food marketing are proposed, including the potential for a new treaty, obligations of companies and international complaints.

8.1 Findings
Conclusion of central research question: to what extent do children have a right to freedom from obesogenic marketing and to what extent are duty bearers bound to fulfil this right?

The analysis demonstrates that children have a right to freedom from obesogenic marketing under the Convention on the Rights of the Child, and states parties have a corresponding obligation to ensure the enjoyment of this right. Based on the interpretations of the CRC Committee, this right is subsumed into the rights to health, adequate food and the freedom from exploitation. However, neither the right nor states’ obligations are absolute.

Firstly, this right must be interpreted in harmony with children’s rights to information and play; states should avoid unreasonable burdens on children’s autonomy-based rights when ensuring their socioeconomic rights. Secondly, states have reasonable discretion in fulfilling children’s rights. In the case of socioeconomic rights, this discretion is limited by the scope of states’ available resources. However, this should not rid obligations of practical intent, but instead mean that states have flexibility in terms of timing and
implementation. At the same time, it has been argued that regulating HFSS food marketing does not interfere with parents’ rights, rather it supports and strengthens their primary role as caregivers. Furthermore, states’ obligations of international co-operation call for renewed focus on their duties to pursue rights’ fulfilment beyond their borders. This is necessary in our globalised world where marketing is not limited by borders.

Thirdly, states have competing obligations, including in relation to companies’ rights to freedom of expression and EU free movement law. Therefore, states should adopt proportionate, reasoned restrictions that respect the full spectrum of rights and obligations. This requires states to have regard to evidence and justify their decisions to limit rights. At the same time, it was considered whether courts in the future should take a more restrictive view of the right to commercial expression.

Fourthly, a gap was identified – while companies are powerful actors with an impact on children’s rights, they are not legally obligated to respect their rights. Therefore, rights – which should be universal – are reduced to corporate promotion. Accordingly, it is submitted that states cannot outsource their obligations to companies without maintaining appropriate oversight.

Clearly, childhood obesity cannot be prevented by regulating marketing only. However, this thesis has argued that through greater recognition of children as rights holders, existing power structures that impact on their health can be transformed. It is insufficient to consider children’s interests as ancillary to business regulation. Thus, the final conclusion calls on states to take their obligations to children more seriously, and pursue a children’s rights approach in obesity prevention. Children’s right to an open future underscores limits on companies’ unbridled pursuit of profit. The answers to the individual research questions are outlined below.

**Is HFSS food marketed to children in a manner that impacts on their rights?**

Based on available evidence, food is marketed to children in a manner that impacts upon their rights to health, adequate food and freedom from exploitation. This impact occurs because unhealthy food marketing is widespread, with children often unable to identify and resist marketing. Firstly, food marketing impacts on children’s food choices (including nutritional knowledge and perception of a healthy diet), which affects their right to adequate food. Secondly, exposure to unhealthy food marketing can increase food-intake and thus an impact on the right to health. Finally, food marketers adopt techniques that are of concern from an exploitation perspective, such as appealing to children’s sense of loyalty and their emotions. The influence of television advertising is best understood, whereas internet advertising has emerged as of concern as it targets children in diverse ways. Due to these impacts, HFSS food marketing has emerged as a global concern in our digital age, placing obligations on states to protect children’s rights.

None the less, international governance remains weak. At international level, states and companies are subject only to voluntary, non-binding norms in relation to unhealthy
food marketing to children. Accordingly, the CRC highlights states' legal obligations to regulate corporate conduct with a children's-rights perspective in mind. At present, a coherent interpretation of children’s rights is not applied in international standards on food marketing – with the exception of the right to information.

**Who are the duty bearers of a right to freedom from obesogenic food marketing?**

The analysis reiterated that states are the central duty bearers of children’s right to freedom from HFSS food marketing under the CRC. States are not only responsible for children’s rights in their own jurisdiction, but also have international obligations to assist states with limited resources, ensure that companies under their control do not violate rights in third states, and pursue global solutions where feasible. Parents and companies also have responsibilities, although they are not accountable under the CRC. Furthermore, WHO has responsibilities for children’s health and has adopted non-binding recommendations on food marketing to children. Finally, the EU is responsible for ensuring the functioning of the internal market, including through giving consideration to children’s best interests. However, to date its role in HFSS food marketing regulation has been limited.

**Do children’s rights encompass a right and corresponding obligation on duty bearers to freedom from obesogenic marketing?**

Children’s rights underscore that states have obligations to limit food marketing which interferes with their rights, namely marketing that affects their health, their relationship with food and exploits their limited capacities. Firstly, under the right to health, children have a right to the highest attainable standard of health, while correspondingly states have obligations to adopt public health measures to prevent disease and promote good health. The role of information in health promotion is emphasised, although regulatory measures are also necessary following states’ responsibility to protect. Secondly, under the right to adequate food, children have rights to accessible, acceptable and safe food. This, according to my interpretation, imposes obligations on states to establish nutrient profiles, promote empowerment through restrictions and protect cultural rights to adequate food. Thirdly, the right to freedom from exploitation means that states should limit companies’ use of exploitative techniques. However, the right remains under-explored in the context of marketing, where an informed consumer paradigm is preferred.

At the same time, children have autonomy-based rights to information and play. Accordingly, states should not impose arbitrary restrictions on these rights when regulating marketing. The limitations should be targeted at limiting harmful techniques employed by companies, not minimising children’s access to beneficial information. The appropriate balance should be determined with reference to children’s best interests. This includes gathering children's views on risks and opportunities posed by media.
Following this analysis, states are the primary duty bearers for children’s right to freedom from HFSS food marketing. Limiting unhealthy food marketing is outside the scope of parents’ sphere of influence as they cannot control the regulatory landscape. Therefore, states should support parents’ abilities to fulfil this role through education and capacity building, and limitations on marketing that interferes with their responsibilities to guide their children.

Finally, companies should respect children’s rights – although they are not at present bound to do so. Accordingly, the analysis showed that major food and beverage companies have avoided engagement with the rights to health, adequate food and freedom from exploitation, even though these rights go to the heart of their products.

**Do states fulfil WHO Recommendations and the children’s rights approach in their regulations on HFSS food marketing?**

Regulations on HFSS food marketing in the UK, Ireland, Denmark and Sweden were analysed in light of WHO Recommendations and the children’s rights approach. The analysis demonstrates that regulatory design is important as protection will vary depending on how key considerations are phrased. (1) Childhood was defined differently depending on the state and the media – ranging from 12 to 18 years. (2) The regulations applied different content and scheduling rules – scheduling rules (varying from 25 per cent of under 16s/ 50 per cent of under 18s) were used to determine when children and young adults watch television or access media in the highest numbers. In all states, marketing of HFSS food products is prohibited during, before and after children’s programmes on television. However, children watch television and access other forms of media that are not specifically produced for them. Therefore, content rules are also used to establish whether media is directed at children, i.e. whether techniques are used that appeal to children in particular. (3) Each of the systems profiles food in a different manner – or in the case of Sweden does not adopt a nutrient profile at all. (4) Different rules apply to broadcast and non-broadcast media due to their historically separate regulation, with stricter broadcast rules attached. However, the UK has recently introduced self-regulatory rules that closely resemble broadcast regulations, suggesting that this form of media may be increasingly limited. However, none of the systems analysed expressly limit HFSS food marketing in relation to sponsorship, point of sale advertising or packaging. (5) Many of the techniques identified in 2.3 should not be used to market HFSS food to children, such as exhortations to buy, health and nutrition claims. The UK and Irish rules also prohibit certain techniques such as advertising free gifts, discounts and advertising by celebrities popular with children (also prohibited in Sweden), and encouraging excessive consumption.

Moving to the qualitative criteria, (6) in all the examples, the state undertook basic obligations to ensure that children were protected from marketing, usually with a focus on broadcast media. However, in all cases, regulation of non-broadcast media was supplemented by industry codes, in line with political support for industry self-regulation. Therefore, states encourage companies to occupy a regulatory space that they
should fill under their obligations to children (7) Cross-border co-operation was limited, non-binding and conducted without regard for obligations under socioeconomic rights. Further, the pursuit of free movement under EU law limits states' abilities to regulate media coming from other Member States. Therefore, it is argued that global standards are needed to bridge these gaps. (8) Monitoring varied depending on whether the system was regulatory or self-regulatory, as do the provision of sanctions, with weaker monitoring and sanctions attached to self-regulation. (9) All of the rules include certain unclear terms that can affect the protection afforded to children. Evolving standards require engaged adjudicators.

Finally, the rules are ineffective in terms of children's rights indicators. States and industry should go further in enshrining children's rights in marketing, not only adult-defined protection. Firstly, this should be pursued through greater engagement with children's views and standards. While children were consulted prior to drafting legislation in the UK and Ireland, they were not stakeholders in drafting the content of the legislation. None of the monitoring bodies decide complaints based on children's best interests or ensure that complaints' systems are child-friendly, such as through including children in adjudication. Secondly, the right to adequate food should be harnessed, which could provide for greater engagement with the level of HFSS food marketing, the promotion of cultural traditions that are being eroded by multinational companies and the adequacy of nutritional profiles. Thirdly, while children's vulnerability is recognised, there is a need for more coherent age definitions to ensure that children are effectively protected in light of the cross-border nature of marketing. Finally, in terms of the family, states' failure to provide effective regulations can have a harmful effect on families, as they may need to monitor their children's media use in a manner that interferes with their right to privacy.

What is the scope of states' obligations in light of competing international legal obligations?

Firstly, in light of the right to commercial expression, states have a wide margin of discretion when determining the extent to which restrictions can limit companies' speech. Should the ECtHR pursue a more incisive appraisal as it has done in political speech cases, it may look at the medium of expression, including whether avenues were left open to companies to communicate the message. Further, CJEU case law shows that in spite of the EU's economic aims, in the case of tobacco control at least, health considerations can outweigh commercial expression due to the degree of harm. Further, two domestic cases yield findings that could be applied to the balance between companies' and children's rights. Accordingly, companies' rights to commercial expression require that limits are suitable, necessary and do not impose an unreasonable burden. While the specifics will depend on the individual case, regulators should justify their decisions and ensure that they are well-founded.

Secondly, following the CJEU's current approach, food marketing restrictions are likely to be considered limits on the internal market. However, children's rights and public health
constitute strong justifications for imposing limits. While Member States need to provide evidence of public health impacts and the suitability of the measure to achieve this aim, this does not need to be conclusive. Restrictions on marketing of alcohol have been recognised as appropriate to promote public health, when adequate evidence was provided. Accordingly, states should adopt targeted nutrient profiling to avoid discriminating against imported goods. However, when it comes to establishing the necessity of the measure, it is unclear to what extent the CJEU will consider measures as effective but less restrictive. Therefore, it is suggested that Member states should make clear that multiple measures are necessary to pursue public health goals. Accordingly, the CJEU should respect states’ obligations to children and honour its duty to mainstream children's best interests, as it has done in previous cases.

**Contribution of the research to the field**

This thesis contributes to existing analyses of children’s socioeconomic rights in relation to obesity prevention, high-income states and HFSS food marketing specifically. It is the first comprehensive analysis of the children's rights to health and adequate food, and states’ corresponding obligations in relation to HFSS food marketing. It is also the first content analysis of the CRC Committee’s General Comments. Further, the right to health under the oft-neglected ESC was analysed, which it is hoped will promote engagement with these Euro-centric obligations.

Accordingly, this review has detailed the guidance provided by the CRC Committee. Suggestions have been made for how the Committee and advocates can pursue greater entrenchment of children’s rights in relation to obesity and food marketing. Further, companies’ responsibilities and engagement with their customers’ rights to health and adequate food was also explored – which has also been neglected in the literature. A clear and coherent narrative underscored by children’s rights was attempted, which at the same time seeks to ensure respect for corresponding duties.

Finally, a comprehensive review of regulations in the UK, Ireland, Sweden and Denmark showed that, while these states have taken steps to reduce marketing to children, gaps remain. This review has reiterated that narrow restrictions on food marketing directed at children are insufficient to limit children’s exposure. The CRC has been cited as a framework to achieve the paradigm shift.

**How successful were the methods?**

Firstly, the content analysis provided a detailed insight into the CRC Committee's General Comments. It allowed the CRC Committee's experience to guide the analysis, subject to the limits of coherency, reasonableness, and good faith. Therefore, a wholly subjective interpretation was mitigated. The CRC Committee's focus has included health and empowerment – with three General Comments centring on health. While this health-centred focus worked for my purposes, the approach may not be amenable to all
subject matters. In this manner, Tobin’s methodology provided a workable method for interpreting and exploring children’s rights and the corresponding obligations.

While, the selection of cases elucidated interesting findings, a more detailed analysis of administrative decisions is necessary to explore limitations in the domestic settings. However, this was outside the scope of the current research project.

8.2 FURTHER RESEARCH

This analysis has focused on European states. When the project started, they were to the forefront of efforts to limit promotion of HFSS food. However, in recent years, states like Mexico and Chile have come to the fore with restrictions to prevent rising obesity rates. A similar analysis from a Latin American perspective would be beneficial as socioeconomic rights are constitutionally stronger in this region. Further, the analysis excluded international trade and investment law. This legal arena is increasingly important and ill-understood from a health perspective. Therefore, further analysis is required of the findings of this dissertation in light of this separate normative system. At the same time, the analysis of EU law provides a starting point for discussion.

Additionally, while I focused on HFSS food marketing in relation to children, the approach could be expanded to consider adults’ rights and other forms of obesity prevention. For example, taxes on carbonated beverages have recently emerged as an important legal approach. Initial assessments of a soda tax introduced in Mexico have been positive. A number of taxes are expected to be introduced in 2017 in countries and regions such as the UK, Ireland, Catalonia, San Francisco, Oakland, Boulder and Albany. The response of the food and beverage industry should be followed closely – it may preserve the industry’s reputation as a stakeholder. Alternatively, it could lead to the industry being labelled the “new tobacco”.

Finally, this thesis has only touched on companies’ obligations given their present fledging status. There is scope for greater analysis of their duties in this area. Accordingly, a selection of indicators is annexed as a potential next step in clarifying companies’ responsibilities.

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1 Department of public health, ministry of health (Chile), On The Nutrient Composition Of Food And Its Advertising (07-06-2012) available at: www.leychile.cl/N?i=1041570&f=2012-07-06&p= ;
6 In the UK, the industry has a diverse position: Children’s Food Campaign, “Food and Drink Federation Urged to Stop Opposing Sugary Drinks Tax, as Survey Finds Top UK Brands Less Hostile to the Measure.”

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8.3 NEW APPROACHES

A power shift is necessary to better enshrine children’s socioeconomic rights in food marketing regulation and obesity prevention. Currently, states parties fail to internalise their obligations when choosing to adopt regulation. This is aided by the institutional strength of companies’ economic rights vis-à-vis children’s socioeconomic rights. While companies and states can take cases to the CJEU if their rights are violated, children are dependent on adults to claim their rights. For instance, the rights that protect freedom from obesogenic food marketing are often not justiciable, although emerging practice from the developing world is encouraging in this regard. A paradigm shift could be achieved through negotiating new treaties that limit companies’ powers or impose obligations on them to respect children’s rights, or by harnessing international complaint mechanisms.

Firstly, inspired by the success of the FCTC, academics and civil society seek to better enshrine health norms in international law through a new global health treaty. The most advanced proposal is the Framework Convention on Global Health (FCGH). The FCGH takes a right to health perspective that aims to clarify and strengthen normative standards, and ensure funding and accountability with the goal of global health equity. The proposed Convention pursues a bottom up approach and has already gained broad support among academics and civil society. The proposal is still in draft form and focuses on financing, marginalisation of health, lack of accountability and coherence.

At the same time, Consumers International and World Obesity propose a Global Convention on Healthy Diets with suggested measures such as:

- Education, skills, communication, and public awareness (Article 7)
- Provision of nutrition information (Article 8)
- Ensuring responsible food and beverage advertising, promotion and sponsorship (Article 9)
- Controls on advertising, promotion and sponsorship to children (Article 10)
- Interventions to influence positive consumption patterns (Article 11)

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6 FCGH Platform, “Platform for a Framework Convention on Global Health (Fcgh),” http://www.globalhealthtreaty.org/
Although the two proposals are not interlinked, the supporters of the FCGH suggest that a Global Convention on Health Diets could fall under the Framework Convention.\(^9\)

While a new treaty could strengthen states’ obligations, it also raises a number of questions. Firstly, can the international community agree on a sufficiently robust treaty? Looking at recent efforts to find agreement on global health standards, such as the US objection to sugar guidelines, agreement will be hard fought.\(^9\) The treaty will achieve little if it fails to enshrine normative standards. Secondly, even if a treaty was agreed, would a sufficient number of states ratify it? The failure of most states to ratify the Migrant Rights Convention demonstrates that agreeing on treaty text is insufficient and will not be automatically followed by widespread ratification, particularly by the states which fear they will incur the greatest burden.\(^9\) Thirdly, are treaties really more effective than soft law commitments? Both require political will, mobilisation and resources.\(^4\)

Where a dualist state ratifies a treaty, it also needs to incorporate the treaty into national law to ensure that its obligations take effect. Thus, as will be discussed, obligations might be more effective if directed at companies.

However, companies are not currently obligated to respect the rights. Still, some argue firstly, that companies’ responsibilities should be seen as binding in light of existing norms.\(^5\) Firstly, some commentators consider that companies’ social functions now go beyond profit making for shareholders.\(^6\) Bilchitz maintains that companies are obligated


\(^10\) Lawrence O. Gostin et al., "A Framework Convention on Obesity Control?," The Lancet 378, no. 9899.


\(^12\) Currently only 48 states have ratified the CMW to date, see Ratification Status for CMW - International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, available here: http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?Treaty=CMW&Lang=en.


to avert social damage in their actions, as society confers benefits on companies (such as separate legal personality and limited liability). Another approach is to impose human rights as a contractual term. However, this would only provide remedies for the parties to the contract, not the individuals whose human rights are breached. Furthermore, over time and with consistent state practice and *opinio juris*, soft standards could harden into customary international law. Another approach is to adopt a treaty that imposes obligations on companies. A group of civil society organisations, guided by legal experts has recently issued a proposal for a treaty text on business and human rights. The proposal mirrors existing soft law instruments and the UNGP but seeks to clarify the obligations and place them on a legal footing. Therefore, although proposals are in their infancy, the prospect of a binding treaty on business and human rights is closer than ever.

While more stringent standards are awaited, one approach would be to develop indicators. De Felice recommends drafting business and human rights indicators to allow for greater standardisation and measuring of companies' progress. He suggests that companies should not only focus on factors that have the greatest financial impact. Instead, children's rights should be viewed from the perspective of the children affected or a representative sample. De Felice recommends use of structural, process and output indicators, as in the case of states' obligations. Structural indicators examine the extent to which companies have made commitments, whereas process indicators can assess the inputs, such as financial and human resources. Finally, output indicators assess the extent to which companies have met the aims. He suggests that it may be more effective to compare companies over time not with each other. Therefore, in light of the discussion above, indicators are annexed to the thesis.

A final strategy could be to bring an international complaint on states' failure to adequately protect children's rights in relation to food marketing. The new CRC complaints mechanism allows children, or those acting on their behalf, to complain

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where their rights are violated. Should a complaint be decided on the merits, it would pose an opportunity for the CRC Committee to better outline the scope of states’ obligations. One flagrant example is where companies enter unexploited markets in the developing world. In one example, Nestlé uses a boat to reach remote communities along the Amazon River to introduce and sell their products to a new market. If most of the food marketed and sold by this boat is HFSS, as it seems, children or those representing them should bring a complaint that such practices are in violation of children’s rights to health and adequate food. This could be grounded on the basis that the state is failing to protect children from the proliferation of inadequate food and the displacement of their indigenous food culture, thus impairing their rights to health and adequate food. The CRC Committee’s decision, while non-binding, would highlight the neglect of children’s rights.

However, the likelihood of such a complaint is hampered at present. Firstly, the CRC Committee can only accept complaints relating to states that are party to the Optional Protocol. At present only 29 of the 190 States Party to the CRC have ratified the Third Optional Protocol. Secondly, children may need help to lodge a complaint, which requires a mobilised civil society. As noted throughout, this mobilisation is limited in relation to childhood obesity. Thus, for the moment, the impact of the international system of protecting children’s rights may be limited.

Accordingly, children’s rights offer unexplored potential in relation to obesity prevention. These rights should be harnessed, through greater political will and external pressure, to ensure children’s rights to an open future.

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Summary

Over the last thirty years, childhood obesity rates have risen alarmingly worldwide, impacting adversely on children's health and wellbeing. Although childhood obesity is a multifactorial concern, the impact and power of high fat, salt and sugar (HFSS) food marketing is a causal factor. In light thereof, the World Health Organisation (WHO) has agreed on principles to guide states in limiting HFSS food marketing to children. However, states' responses to date have been inadequate.

Accordingly, the thesis analyses the extent to which children have a right to freedom from obesogenic marketing, and the ensuing implications of such a right. It explores the Convention on the Rights of the Child (CRC) as the primary source of rights and obligations. The thesis pursues a reasoned and coherent narrative of children's rights, through employing a children's rights methodology inspired by the work of the CRC Committee. The International Covenant on Civil and Political Rights (ICCPR), European Convention on Human Rights and European Union law are also analysed to ensure a balanced account.

The impact, power and exposure of children to HFSS food marketing are outlined and their connection with children's rights to health, adequate food and freedom from exploitation is established. An analysis of these rights establishes a mandate for state-led action under the CRC. Firstly, under the right to health, states should limit HFSS food marketing as part of their obligations to pursue measures to promote public health. Secondly, the right to adequate food asserts that limiting HFSS food marketing promotes empowerment through maximising choices, and supporting parents in educating their children on a healthy diet free from interference. Obligations to provide for nutrient profiling systems and the protection of cultural rights are also analysed. Techniques, such as using celebrities and characters, are deemed contrary to children's right to freedom from exploitation. Children's right to privacy is seen as a basis for protecting them from marketing techniques that gather their data.

Children's competing rights to information and play are analysed to establish a coherent picture of their rights and states' obligations. It is asserted that states must avoid arbitrary and untargeted restrictions with an appropriate balance determined with reference to children's best interests. Following the recommendations of the CRC Committee, commercial information can be limited, while access to beneficial information remains intact. Restrictions should be pursued progressively with stricter obligations on wealthier states. Where states lack the resources to impose limitations on marketing, they should seek assistance from states with greater resources, or pursue industry self-regulation with adequate oversight. The CRC Committee should play a greater role in guiding states on obligations, including through reference to the WHO recommendations. Finally, food and
beverage companies' nascent responsibilities are explored in light of existing practice. Because of companies' limited engagement with the rights to health, adequate food and freedom from exploitation, it is suggested that companies should pursue greater regard for their obligations to consumers.

The findings of this analysis and WHO recommendations are used to evaluate existing regulations in the United Kingdom, Ireland, Denmark and Sweden. The results suggest that gaps and inconsistencies remain with children's rights indicators neglected. For instance, marketing directed at children is regulated, but marketing aimed at both adults and children often escapes scrutiny. Accordingly, the present power balance tilts in favour of adults' and companies' rights to information and expression, neglecting children's rights to protection from marketing.

The interplay between states' obligations towards children and competing regimes is explored. Firstly, companies' right to freedom of expression is analysed. It is asserted that states retain an obligation to limit HFSS food marketing, although this should be consistent with the core of freedom of expression. Whether the core can include a right to promote HFSS food to children is challenged. Further, in light of obligations under the right to adequate food, states should ensure plurality in food promotion to avoid distortion of children's understanding of a healthy diet. Secondly, the interaction between EU free movement law and states' obligations to children is analysed. It is argued that restrictions on marketing should be evidence based, targeted and justified to avoid being struck down. At the same time, the Court of Justice of the European Union should have regard for children's best interests when determining the proportionality of Member States' restrictions.

Finally, in the conclusion, alternative approaches are proposed, such as increased obligations for companies, the prospect of an international treaty and the potential of new international complaints mechanisms to underscore states' obligations.


Markedsføringens indflydelse, magt og eksponering over for børn gennemgås, hvorefter børns ret til helbred, tilstrækkelig mad og frihed fra udnyttelse fastslås. Analysen af rettighederne fastslår heretter mandatet for aktion ført an af stater under Børnerettighedskonventionen. For det første, under henvisning til retten til helbred, skulle stater begrænse markedsføringen af fødevarer med højt indhold af fedt, salt og sukker til børn på baggrund af deres pligt til at bestræbe sig på at sikre tiltag, der fremmer helbred. For det andet følger det af retten til tilstrækkelig mad, at begrænsningen af markedsføringen af fødevarer med højt indhold af fedt, salt og sukker til børn fremmer konsumenternes bemundigelse gennem maksimeringen af valgmuligheder og støtter forældre i opdragelsen af deres børn omkring sund kost fri for indflydelse. Tillige analyseres forpligtelser til at oplyse om næringsindhold og beskyttelse af retten til kultur. Afhandlingen finder, at markedsføringsteknikker såsom anvendelsen af kendte figurer (berømmelser eller figurer kendt fra tegneserier og lignende) i markedsføringen af fødevarer med højt indhold af fedt, salt og sukker rettet mod børn strider mod børns ret til at være fri for udnyttelse. Børns ret til privatliv findes at være et grundlag for at beskytte dem mod markedsføringsteknikker, der indsamler deres oplysninger.


Endelig foreslås alternative tilgange, såsom forøgelse af virksomheders forpligtelser, udsigten til en international traktat, og potentialet for nye internationale klagemuligheder for at underbygge staters forpligtelser.
Annex I: Potential Indicators for Companies’ Responsibilities

Respect & Support

- Has the company made a formal commitment to respect and support the rights to health and adequate food?
- Does the company consider these rights to be in their sphere of influence? If not, why?
- Does the company consider children’s right when making decisions relating to its business?
- Do companies engage in a best interests’ assessment when determining their marketing strategy?
- Do companies assess their responsibilities in light of WHO Recommendations?
- Are there assessments monitored and scoped with input from independent third parties, including civil society?
- What percentage of food marketed in each market is for HFSS food?
- Does the definition of healthy/unhealthy comply with the relevant WHO/national profile? Why not?
- Does the marketing strategy align with the state's individual food policy/nutrition strategy?
- Does the company map its potential impact on the sustainability and adequacy of the local diet before entering a market?
- Does the company seek to avoid displacing indigenous food culture?
- Does the company avoid making health and nutrition claims contrary to nutrient guidelines in the market?
- Does the company market directly to children?
- What platforms do the company use to market to children?
- Do the techniques used have regard for children’s rights to freedom from exploitation?
- Does the company assess its impact on the market ex ante?
- Does the company support parents in making healthful choices for their families?
- Does the company consult with the community before entering a market?

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Complaints

- Does the company provide a mechanism for child-friendly complaints?
- Are complaints mechanisms assessed to ensure they are accessible to children?
- Are children's best interests considered in decisions affecting them?
- Legitimacy: are children or children’s rights professionals represented in decisions?
- Accessibility: are complaints available and adequately publicised?
- Predictability: Are like cases decided similarly?
- Transparency: Is it clear how decision makers weigh facts and make decisions?
- Does the company have a global responsible-marketing and advertising policy in place that prohibits harmful and unethical advertising related to children?
- Does the company set clear standards for privacy and the collection of personal data on or from children?
- Is there a process in place to identify, assess and monitor risks to and impacts on children’s rights related to content and visuals used in the company’s advertising?
- Has the company established guidelines for the use of children in advertising and marketing?
- Does the company follow evolving best practices with regard to marketing and advertising, including participation in voluntary marketing codes and standards?
- Does the company support and promote positive and healthy behaviour among children through marketing, advertising and communication channels? (while avoiding impacting on other rights?)
- Is there a formal mechanism in place for receiving, processing, investigating and responding to complaints from customers and the general public, including children, about content and visuals relating to children? a
- Are age groups defined in light of the CRC?
- Does marketing occur in child-centred institutions such as schools and day care?
- Is HFSS placed away from children’s eye line in shops?
- Does the company use its logo when sponsoring events?
- Does the company require sponsored events to only sell certain food? Is this food profiled?
- Do companies ensure children ask parents for permission to use websites?

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Annex II: Content Analysis

General Comments of the Committee on the Rights of the Child

Committee on the Rights of the Child, General Comment No. 8, The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment (arts. 19; 28, para. 2; and 37, inter alia) (Forty-second session, 2006), U.N. Doc. CRC/C/GC/8 (2006).
Committee on the Rights of the Child, General Comment No. 14, The right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), U.N. Doc. CRC/C/GC/14 (2013).
Committee on the Rights of the Child, General Comment No. 15, The right of the child to the enjoyment of the highest attainable standard of health (art. 12), U.N. Doc. CRC/C/GC/15 (2013).
Committee on the Rights of the Child, General Comment No. 17, The right of the child to rest, leisure, play, recreational activities, cultural life and the arts (art. 31), U.N. Doc. CRC/C/GC/17 (2013).
<table>
<thead>
<tr>
<th>Para no.</th>
<th>General Comment No 1: Aims of Education</th>
<th>Codes</th>
<th>Themes</th>
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<tbody>
<tr>
<td>para 1</td>
<td>The aims of education that it sets out, which have been agreed to by all States parties, promote, support and protect the core value of the Convention: the human dignity innate in every child and his or her equal and inalienable rights.</td>
<td>Human Dignity as a core value</td>
<td>Human dignity</td>
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<td>para 2</td>
<td>The need for education to be child-centred, child-friendly and empowering</td>
<td>Empower/ child friendly</td>
<td>Empowerment</td>
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<tr>
<td>para 2</td>
<td>The education to which every child has a right is one designed to provide the child with life skills, to strengthen the child's capacity to enjoy the full range of human rights and to promote a culture which is infused by appropriate human rights values</td>
<td>Empower child/ support culture of human rights</td>
<td>Empowerment &amp; enabling environment</td>
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<tr>
<td>para 3</td>
<td>An education with its contents firmly rooted in the values of article 29 (1) is for every child an indispensable tool for her or his efforts to achieve in the course of her or his life a balanced, human rights-friendly response to the challenges that accompany a period of fundamental change driven by globalization, new technologies and related phenomenon</td>
<td>Education as empowerment</td>
<td>Empowerment</td>
</tr>
<tr>
<td>para 4</td>
<td>Education should be directed to a wide range of values</td>
<td>Respect for culture</td>
<td>Enabling environment</td>
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<tr>
<td>para 5</td>
<td>Indispensable interconnected nature of the Convention's provisions. It draws upon, reinforces, integrates and complements a variety of other provisions and cannot be properly understood in isolation from them</td>
<td>Rights are interconnected</td>
<td>Interconnected</td>
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<tr>
<td>para 5</td>
<td>the importance of respect for parents, of the need to view rights within their broader ethical, moral, spiritual, cultural or social framework, and of the fact that most children's rights, far from being externally imposed, are embedded within the values of local communities.</td>
<td>Respect for culture</td>
<td>Rights holder</td>
</tr>
<tr>
<td>para 6</td>
<td>Education must be provided in a way that respects the inherent dignity of the child and enables the child to express his or her views freely in accordance with article 12 (1) and to participate in school life</td>
<td>Respect for dignity and child's views</td>
<td>Dignity/ participation</td>
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<tr>
<td>para 7</td>
<td>The participation of children in school life, the creation of school communities and student councils, peer education and peer counselling, and the involvement of children in school disciplinary proceedings should be promoted as part of the process of learning and experiencing the realization of rights.</td>
<td>Supporting children in participating in school</td>
<td>Participation</td>
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<tr>
<td>para 8</td>
<td>the message of child-centred education: that the key goal of education is the development of the individual child's personality, talents and abilities, in recognition of the fact that every child has unique characteristics, interests, abilities, and learning need</td>
<td>Developing child as an individual</td>
<td>Rights holder</td>
</tr>
<tr>
<td>para 9</td>
<td>Discrimination on the basis of any of the grounds listed in article 2 of the Convention, whether it is overt or hidden, offends the human dignity of the child and is capable of undermining or even destroying the capacity of the child to benefit from educational opportunities.</td>
<td>Discrimination as an attack on dignity &amp; education</td>
<td>Dignity/ non-discrimination</td>
</tr>
<tr>
<td>para 10</td>
<td>Education should thus be accorded one of the highest priorities in all campaigns against the evils of racism and related phenomena</td>
<td>Grounds of non-discrimination</td>
<td>Non-discrimination</td>
</tr>
<tr>
<td>para 11</td>
<td>The overall objective of education is to maximize the child's ability and opportunity to participate fully and responsibly in a free and democratic society</td>
<td>Importance of education against racism</td>
<td>Empowerment</td>
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<tr>
<td>para 12</td>
<td>Education as a means of development</td>
<td>Education should support ethical values</td>
<td>Empowerment</td>
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<td>para 13</td>
<td>Education in this regard should take place within the family, but schools and communities must also play an important role.</td>
<td>Multiple duty bearers in education</td>
<td>Duty bearers</td>
</tr>
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<td>para 14</td>
<td>the vital role of appropriate educational opportunities in the promotion of all other human rights and the understanding of indivisibility of rights</td>
<td>Indivisibility of rights</td>
<td>Indivisibility</td>
</tr>
<tr>
<td>Para no.</td>
<td>General Comment No 1: Aims of Education</td>
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<td>para 15</td>
<td>But children should also learn about human rights by seeing human rights standards implemented in practice, whether at home, in school, or within the community.</td>
<td>Creating a human rights environment</td>
<td>Enabling environment</td>
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<td>para 16</td>
<td>even more important for those living in situations of conflict or emergency.</td>
<td>Role of environment</td>
<td>Enabling environment</td>
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<td>para 17</td>
<td>The Committee therefore calls upon all States parties to take the necessary steps to formally incorporate these principles into their education policies and legislation at all levels.</td>
<td>Obligation to render rights effective</td>
<td>Rights fulfilment</td>
</tr>
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<td>para 18</td>
<td>Pre-service and in-service training schemes which promote the principles reflected in article 29 (1) are thus essential for teachers, educational administrators and others involved in child education.</td>
<td>Training duty bearers</td>
<td>Empowerment</td>
</tr>
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<td>para 19</td>
<td>the school environment itself must thus reflect the freedom and the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin called for in article 29 (1) (b) and (d).</td>
<td>Developing a rights promoting environment</td>
<td>Enabling environment (school)</td>
</tr>
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<td>para 20</td>
<td>insufficiently grounded in the absence of widespread dissemination of the text of the Convention itself, in accordance with the provisions of article 42.</td>
<td>Right to information (dissemination)</td>
<td>Empowerment</td>
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<td>para 21</td>
<td>The media, broadly defined, also have a central role to play, both in promoting the values and aims reflected in article 29 (1) and in ensuring that their activities do not undermine the efforts of others to promote those objectives.</td>
<td>Media as duty bearer</td>
<td>Duty bearer (media)</td>
</tr>
<tr>
<td>para 22</td>
<td>The Committee notes the importance of surveys that may provide an opportunity to assess the progress made, based upon consideration of the views of all actors involved in the process, including children currently in or out of school, teachers and youth leaders, parents, and educational administrators and supervisors. In this respect, the Committee emphasizes the role of national-level monitoring which seeks to ensure that children, parents and teachers can have an input in decisions relevant to education.</td>
<td>Monitoring through surveys &amp; views</td>
<td>Accountability</td>
</tr>
<tr>
<td>para 23</td>
<td>The Committee calls upon States parties to develop a comprehensive national plan of action to promote and monitor realization of the objectives listed in article 29 (1).</td>
<td>National action plans as implementation &amp; monitoring</td>
<td>Accountability</td>
</tr>
<tr>
<td>para 24</td>
<td>The design and implementation of programmes to promote the values reflected in this article should become part of the standard response by Governments to almost all situations in which patterns of human rights violations have occurred</td>
<td>Design programmes as redress for human rights violations</td>
<td>Accountability (redress)</td>
</tr>
<tr>
<td>para 25</td>
<td>States parties should also consider establishing a review procedure which responds to complaints that existing policies or practices are not consistent with article 29 (1).</td>
<td>Establishing reviews</td>
<td>Accountability</td>
</tr>
<tr>
<td>para 26</td>
<td>The Committee calls upon United Nations bodies and agencies and other competent bodies whose role is underscored in article 45 of the Convention to contribute more actively and systematically to the Committee’s work in relation to article 29 (1).</td>
<td>UN bodies should support rights realisation</td>
<td>Rights fulfilment</td>
</tr>
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<td>para 28</td>
<td>the Committee urges States parties providing development cooperation to ensure that their programmes are designed so as to take full account of the principles contained in article 29 (1).</td>
<td>Development cooperation</td>
<td>Rights fulfilment (international obligations)</td>
</tr>
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<td>Para no</td>
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<td>Theme</td>
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<tr>
<td>para 2</td>
<td>the Committee calls upon States to review their status and effectiveness for promoting and protecting children's rights,</td>
<td>Review status &amp; effectiveness</td>
<td>Accountability (review)</td>
</tr>
<tr>
<td>para 5</td>
<td>Children's developmental state makes them particularly vulnerable to human rights violations; their opinions are still rarely taken into account...</td>
<td>Children as a vulnerable group</td>
<td>Vulnerability</td>
</tr>
<tr>
<td>para 6</td>
<td>Where resources are limited, consideration must be given to ensuring that the available resources are used most effectively for the promotion and protection of everyone's human rights, including children's, and in this context development of a broad-based NHRI that includes a specific focus on children is likely to constitute the best approach</td>
<td>Effective resource allocation</td>
<td>Rights fulfillment (resources)</td>
</tr>
<tr>
<td>para 7</td>
<td>[NHRI] should be able, independently and effectively, to monitor, promote and protect children’s rights. It is essential that promotion and protection of children's rights is “mainstreamed” and that all human rights institutions existing in a country work closely together to this end.</td>
<td>Mainstreaming children's rights</td>
<td>Accountability (mainstreaming)</td>
</tr>
<tr>
<td>para 8</td>
<td>NHRIs should, if possible, be constitutionally entrenched and must at least be legislatively mandated.</td>
<td>Legal basis for NHRI</td>
<td>Rights fulfillment (law)</td>
</tr>
<tr>
<td>para 8</td>
<td>necessary arrangements, including the enactment or amendment of legislation, should be put in place so as to ensure conformity of the institution’s mandate with the principles and provisions of the Convention.</td>
<td>Law as a means of implementation</td>
<td>Rights fulfillment (law)</td>
</tr>
<tr>
<td>para 9</td>
<td>NHRIs should be accorded such powers as are necessary to enable them to discharge their mandate effectively, including the power to hear any person and obtain any information and document necessary for assessing the situations falling within their competence</td>
<td>Need powers to be effective</td>
<td>Accountability (Redress)</td>
</tr>
<tr>
<td>para 10</td>
<td>The NHRI establishment process should be consultative, inclusive and transparent, initiated and supported at the highest levels of Government and inclusive of all relevant elements of the State, the legislature and civil society.</td>
<td>Inclusive and transparent process</td>
<td>Participation</td>
</tr>
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<td>para 11</td>
<td>the Committee believes that it is the duty of States to make reasonable financial provision for the operation of national human rights institutions in light of article 4 of the Convention</td>
<td>Resource provision</td>
<td>Rights fulfillment (resources)</td>
</tr>
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<td>para 12</td>
<td>NHRIs should ensure that their composition includes pluralistic representation of the various elements of civil society involved in the promotion and protection of human rights.</td>
<td>Inclusion of civil society</td>
<td>Participation</td>
</tr>
<tr>
<td>para 13</td>
<td>NHRIs must have the power to consider individual complaints and petitions and carry out investigations, including those submitted on behalf of or directly by children.</td>
<td>Accountability (redress)</td>
<td></td>
</tr>
<tr>
<td>para 14</td>
<td>NHRIs should have the power to support children taking cases to court</td>
<td>Support children in cases</td>
<td>Accountability (court)</td>
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<tr>
<td>para 15</td>
<td>NHRIs should be geographically and physically accessible to all children.</td>
<td>Accessible to all children</td>
<td>Accountability (access)</td>
</tr>
<tr>
<td>para 16</td>
<td>NHRIs have a key role to play in promoting respect for the views of children in all matters affecting them</td>
<td>Promote respect for children’s views</td>
<td>Participation</td>
</tr>
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<td>para 17</td>
<td>NHRIs should devise specially tailored consultation programmes and imaginative communication strategies to ensure full compliance with article 12 of the Convention.</td>
<td>Consult &amp; communicate</td>
<td></td>
</tr>
<tr>
<td>para 18</td>
<td>must have the right to report directly, independently and separately on the state of children’s rights to the public and to parliamentary bodies</td>
<td>Representing children in public parlament</td>
<td>Accountability (parliament)</td>
</tr>
<tr>
<td>para 20</td>
<td>NHRIs should contribute independently to the reporting process under the Convention and other relevant international instruments and monitor the integrity of government reports to international treaty bodies with respect to children’s rights</td>
<td>NHRIs should contribute to treaty monitoring</td>
<td>Accountability (treaty reporting)</td>
</tr>
<tr>
<td>para 23</td>
<td>The United Nations has a long-standing programme of assistance for the establishment and strengthening of national human rights institutions. This programme, which is based in the Office of the High Commissioner for Human Rights (OHCHR), provides technical assistance and facilitates regional and global cooperation and exchanges among national human rights institutions. States parties should avail themselves of this assistance where necessary.</td>
<td>Technical assistance UN</td>
<td>Rights fulfillment (technical assistance)</td>
</tr>
<tr>
<td>para 29</td>
<td>Children's human rights issues are not constrained by national borders and it has become increasingly necessary to devise appropriate regional and international responses</td>
<td>Global children's rights issues</td>
<td>Rights fulfillment</td>
</tr>
<tr>
<td>Para no</td>
<td>General Comment No: HIV/ AIDS</td>
<td>Code</td>
<td>Theme</td>
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<tr>
<td>para 2</td>
<td>Women, including young girls, are also increasingly becoming infected. Adolescents are also vulnerable to HIV/AIDS because their first sexual experience may take place in an environment in which they have no access to proper information and guidance. Children who use drugs are at high risk</td>
<td>Vulnerable groups include women, adolescents and child drug users</td>
<td>Vulnerability</td>
</tr>
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<td>para 3</td>
<td>Yet, all children can be rendered vulnerable by the particular circumstances of their lives, especially (a) children who are themselves HIV-infected; (b) children who are affected by the epidemic because of the loss of a parental caregiver or teacher and/or because their families or communities are severely strained by its consequences; and (c) children who are most prone to be infected or affected.</td>
<td>All children are vulnerable</td>
<td>Vulnerability</td>
</tr>
<tr>
<td>para 6</td>
<td>Lists all relevant rights</td>
<td>Interdependence</td>
<td></td>
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<tr>
<td>para 7</td>
<td>Discrimination is responsible for heightening the vulnerability of children to HIV and AIDS, as well as seriously impacting the lives of children who are affected by HIV/AIDS, or are themselves HIV-infected.</td>
<td>Discrimination increases vulnerability</td>
<td>Discrimination</td>
</tr>
<tr>
<td>para 8</td>
<td>Of particular concern is gender-based discrimination combined with taboos or negative or judgemental attitudes to sexual activity of girls, often limiting their access to preventive measures and other services.</td>
<td>Discriminatory attitudes to girls limit access to HIV prevention</td>
<td>Gender discrimination</td>
</tr>
<tr>
<td>para 9</td>
<td>Laws, policies, strategies and practices should address all forms of discrimination that contribute to increasing the impact of the epidemic. Strategies should also promote education and training programmes explicitly designed to change attitudes of discrimination and stigmatization associated with HIV/AIDS.</td>
<td>Address discrimination through law, policy, strategies, education and awareness</td>
<td>Rights fulfilment (law, policy, education, awareness)</td>
</tr>
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<td>para 10</td>
<td>The child should be placed at the centre of the response to the pandemic, and strategies should be adapted to children's rights and needs.</td>
<td>Child at the centre of response</td>
<td>Rights fulfilment (child centred)</td>
</tr>
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<td>para 11</td>
<td>Effective prevention programmes are only those that acknowledge the realities of the lives of adolescents, while addressing sexuality by ensuring equal access to appropriate information, life skills, and to preventive measures.</td>
<td>Prevention should empower adolescents</td>
<td>Empowerment (information)</td>
</tr>
<tr>
<td>para 12</td>
<td>Children are rights holders and have a right to participate, in accordance with their evolving capacities, in raising awareness by speaking out about the impact of HIV/AIDS on their lives and in the development of HIV/AIDS policies and programmes.</td>
<td>Right to participate in awareness raising</td>
<td>Participation</td>
</tr>
<tr>
<td>para 13</td>
<td>Experience has shown that many obstacles hinder effective prevention, delivery of care services and support for community initiatives on HIV/AIDS. These are mainly cultural, structural and financial.</td>
<td>Cultural, structural and financial barriers</td>
<td>Rights fulfilment (barriers)</td>
</tr>
<tr>
<td>para 14</td>
<td>Resource constraints should not be used by States parties to justify their failure to take any or enough of the technical or financial measures required</td>
<td>Resources cannot justify failure</td>
<td>Rights fulfilment (Resources)</td>
</tr>
<tr>
<td>para 15</td>
<td>Prevention, care, treatment and support are mutually reinforcing elements and provide a continuum within an effective response to HIV/AIDS.</td>
<td>Prevention, care, treatment and support are necessary</td>
<td>Rights fulfilment (effective)</td>
</tr>
<tr>
<td>para 16</td>
<td>Children should have the right to access adequate information related to HIV/AIDS prevention and care</td>
<td>Right to access adequate information</td>
<td>Empower (information)</td>
</tr>
<tr>
<td>para 17</td>
<td>States parties should support the regular monitoring and evaluation of HIV/AIDS awareness campaigns to ascertain their effectiveness in providing information,</td>
<td>Effectiveness of HIV/AIDs awareness campaigns must be regularly monitored and evaluated</td>
<td>Accountability (monitoring &amp; evaluating campaigns)</td>
</tr>
<tr>
<td>Para no</td>
<td>General Comment No 3: HIV/ AIDS</td>
<td>Code</td>
<td>Theme</td>
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<tr>
<td>para 18</td>
<td>education can and should empower children to protect themselves from the risk of HIV infection.</td>
<td>Empowering children through education</td>
<td>Empower (education)</td>
</tr>
<tr>
<td>para 19</td>
<td>States parties must make every effort to ensure that schools are safe places for children, which offer them security and do not contribute to their vulnerability to HIV infection</td>
<td>Schools as safe places</td>
<td>Enabling environment (schools)</td>
</tr>
<tr>
<td>para 20</td>
<td>children are more likely to use services that are friendly and supportive, provide a wide range of services and information, are geared to their needs, give them the opportunity to participate in decisions affecting their health, are accessible, affordable, confidential and non-judgemental, do not require parental consent and are not discriminatory</td>
<td>Child sensitive services</td>
<td>Enabling environment (services)</td>
</tr>
<tr>
<td>para 21</td>
<td>are not sufficiently accessible to children with disabilities, indigenous children, children belonging to minorities, children living in rural areas, children living in extreme poverty or children who are otherwise marginalized within the society.</td>
<td>Health services accessibility</td>
<td>Rights fulfilment (Accessibility)</td>
</tr>
<tr>
<td>para 22</td>
<td>States parties must refrain from imposing mandatory HIV/AIDS testing of children in all circumstances and ensure protection against it</td>
<td>No mandatory HIV/AIDS testing</td>
<td>Right fulfilment (privacy)</td>
</tr>
<tr>
<td>para 23</td>
<td>The obligations of States parties under the Convention extend to ensuring that children have sustained and equal access to comprehensive treatment and care, including necessary HIV-related drugs, goods and services on a basis of non-discrimination.</td>
<td>Sustained access to treatment, non-discrimination</td>
<td>Non-discrimination</td>
</tr>
<tr>
<td>para 24</td>
<td>Consistent with article 24 of the Convention, States parties must ensure that HIV/AIDS research programmes include specific studies that contribute to effective prevention, care, treatment and impact reduction for children.</td>
<td>States should ensure research child HIV prevention and treatment</td>
<td>Rights fulfilment</td>
</tr>
<tr>
<td>para 25</td>
<td>Reducing vulnerability to HIV/AIDS requires first and foremost that children, their families and communities be empowered to make informed choices about decisions, practices or policies affecting them in relation to HIV/AIDS.</td>
<td>Children, families and communities must be empowered to make informed choices</td>
<td>Empowerment (informed choices)</td>
</tr>
<tr>
<td>para 26</td>
<td>Special attention must be given to children orphaned by AIDS and to children from affected families, including child-headed households, as these impact on vulnerability to HIV infection.</td>
<td>Vulnerable children should be given special attention</td>
<td>Vulnerability</td>
</tr>
<tr>
<td>para 27</td>
<td>States parties must also support and strengthen the capacity of families and communities of children orphaned by AIDS to provide them with a standard of living adequate for their physical, mental, spiritual, moral, economic and social development, including access to psychosocial care, as needed.</td>
<td>Empower families and communities' capacities to provide an adequate standard of living</td>
<td>Empower (families/ communities)</td>
</tr>
<tr>
<td>para 28</td>
<td>States parties are particularly reminded to ensure that both law and practice support the inheritance and property rights of orphans, with particular attention to the underlying gender-based discrimination which may interfere with the fullfilment of these rights.</td>
<td>Support rights of orphans with regard to non-discrimination of gender</td>
<td>Non-discrimination (gender)</td>
</tr>
<tr>
<td>para 29</td>
<td>Orphans are best protected and cared for when efforts are made to enable siblings to remain together, and in the care of relatives or family members.</td>
<td>remain with relatives</td>
<td>Family unity</td>
</tr>
<tr>
<td>para 30</td>
<td>any form of institutionalized care for children should only serve as a measure of last resort, and that measures must be in place to protect the rights of the child and guard against all forms of abuse and exploitation.</td>
<td>Institutionalisation a last resort</td>
<td>Family unity</td>
</tr>
<tr>
<td>para 31</td>
<td>Programmes must be specifically adapted to the environment in which children live, to their ability to recognize and report abuses and to their individual capacity and autonomy.</td>
<td>Programmes must be adapted to individual and environmental</td>
<td>Rights fulfilment (child specific)</td>
</tr>
<tr>
<td>para 32</td>
<td>States parties are called upon to ensure an enabling environment for participation by civil society groups, which includes facilitating collaboration and coordination among the various players, and that these groups are given the support needed to enable them to operate effectively without impediment.</td>
<td>States must create an environment supportive to civil society</td>
<td>Enabling environment (civil society)</td>
</tr>
<tr>
<td>Para no</td>
<td>General Comment No 4: Adolescent Health and Development</td>
<td>Code</td>
<td>Theme</td>
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<tr>
<td>para 2</td>
<td>adolescence also poses new challenges to health and development owing to their relative vulnerability and pressure from society, including peers, to adopt risky health behaviour.</td>
<td>Adolescents’ vulnerability and pressure challenges health and development</td>
<td>Vulnerability</td>
</tr>
<tr>
<td>para 5</td>
<td>children's rights too are indivisible and interrelated</td>
<td>Indivisible &amp; interrelated</td>
<td>Indivisible &amp; interrelated</td>
</tr>
<tr>
<td>para 6</td>
<td>Adolescents who are subject to discrimination are more vulnerable to abuse, other types of violence and exploitation, and their health and development are put at greater risk.</td>
<td>Discriminated adolescents need extra attention and protection</td>
<td>Discrimination</td>
</tr>
<tr>
<td>para 7</td>
<td>The Committee believes that parents or other persons legally responsible for the child need to fulfil with care their right and responsibility to provide direction and guidance to their adolescent children in the exercise by the latter of their rights. They have an obligation to take into account the adolescents’ views, in accordance with their age and maturity, and to provide a safe and supportive environment in which the adolescent can develop. Adolescents need to be recognized by the members of their family environment as active rights holders who have the capacity to become full and responsible citizens, given the proper guidance and direction.</td>
<td>Parents have obligations to fulfil children's rights &amp; take views into account</td>
<td>Duty bearer (parent)</td>
</tr>
<tr>
<td>para 8</td>
<td>public authorities, parents and other adults working with or for children need to create an environment based on trust, information-sharing the capacity to listen and sound guidance that is conducive for adolescents’ participating equally including in decision-making processes.</td>
<td>must create a trusting environment</td>
<td>Enabling environment</td>
</tr>
<tr>
<td>para 9</td>
<td>States parties need to ensure that specific legal provisions are guaranteed under domestic law, including with regard to setting a minimum age for sexual consent, marriage and the possibility of medical treatment without parental consent.</td>
<td>Law should guarantee age protections</td>
<td>Enabling environment (law)</td>
</tr>
<tr>
<td>para 10</td>
<td>The right of adolescents to access appropriate information is crucial if States parties are to promote cost-effective measures,</td>
<td>access appropriate information</td>
<td>Empowerment (information)</td>
</tr>
<tr>
<td>para 11</td>
<td>States parties are also encouraged to respect strictly their right to privacy and confidentiality, including with respect to advice and counselling on health matters</td>
<td>States should respect right to privacy and confidentiality</td>
<td>Enabling environment (privacy)</td>
</tr>
<tr>
<td>para 12</td>
<td>Policies and strategies should be reviewed regularly and revised accordingly</td>
<td>Regular monitoring of policies/ strategies</td>
<td>Accountability (review &amp; revision)</td>
</tr>
<tr>
<td>para 13</td>
<td>Systematic data collection is necessary for States parties to be able to monitor the health and development of adolescents. States parties should adopt data-collection mechanisms that allow desegregation by sex, age, origin and socio-economic status so that the situation of different groups can be followed.</td>
<td>Disaggregated data should be collected</td>
<td>Accountability (disaggregated data)</td>
</tr>
<tr>
<td>para 14</td>
<td>The health and development of adolescents are strongly determined by the environments in which they live. Creating a safe and supportive environment entails addressing attitudes and actions of both the immediate environment of the adolescent - family, peers, schools and services - as well as the wider environment created by, inter alia, community and religious leaders, the media, national and local policies and legislation.</td>
<td>safe and supportive environment conducive to health</td>
<td>Enabling environment</td>
</tr>
<tr>
<td>para 15</td>
<td>The Committee stresses the importance of the family environment, including members of the extended family and community or other persons legally responsible for the child or adolescent</td>
<td>Importance of family environment</td>
<td>Enabling environment (family)</td>
</tr>
<tr>
<td>para 16</td>
<td>States parties to develop and implement, in a manner consistent with adolescents’ evolving capacities, legislation, policies and programmes to promote the health and development of adolescents</td>
<td>Legislation, policies and programmes should promote health and development</td>
<td>Enabling environment (legislation/policy)</td>
</tr>
<tr>
<td>para 17</td>
<td>The school plays an important role in the life of many adolescents, as the venue for learning, development and socialization.</td>
<td>Role of the school for child</td>
<td>Enabling environment (school)</td>
</tr>
<tr>
<td>para 18</td>
<td>special rights of adolescents with disabilities should be taken into account and assistance provided to ensure that the disabled child/adolescent</td>
<td>State must take positive action</td>
<td>Non-discrimination (positive)</td>
</tr>
<tr>
<td>Para no</td>
<td>General Comment No 4: Adolescent Health and Development</td>
<td>Code</td>
<td>Theme</td>
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<tr>
<td>para 22</td>
<td>States parties should provide these adolescents with all the necessary services.</td>
<td>Provision of services</td>
<td>Rights fulfilment</td>
</tr>
<tr>
<td>para 24</td>
<td>States parties should take all effective measures to eliminate all acts and activities which threaten the right to life of adolescents</td>
<td>Positive action to ensure right to life</td>
<td>Right to life</td>
</tr>
<tr>
<td>para 26</td>
<td>It is the obligation of States parties to ensure that all adolescent girls and boys, both in and out of school, are provided with, and not denied, accurate and appropriate information on how to protect their health and development and practise healthy behaviours</td>
<td>Ensure access to information on health</td>
<td>Empowerment (Right to information)</td>
</tr>
<tr>
<td>para 27</td>
<td>States parties should stimulate and support opportunities to build such skills through, inter alia, formal and informal education and training programmes, youth organizations and the media.</td>
<td>Life skills through education and training</td>
<td>Empowerment (Training/education)</td>
</tr>
<tr>
<td>para 28</td>
<td>It is essential to find proper means and methods of providing information that is adequate and sensitive to the particularities and specific rights of adolescent girls and boys. To this end, States parties are encouraged to ensure that adolescents are actively involved in the design and dissemination of information through a variety of channels beyond the school, including youth organizations, religious, community and other groups and the media.</td>
<td>Involve children in gender sensitive information provision</td>
<td>Empowerment (Gender sensitive information)</td>
</tr>
<tr>
<td>para 29</td>
<td>States parties are also urged to combat discrimination and stigma surrounding mental disorders, in line with their obligations under article 2 of the Convention.</td>
<td>Combat stigma and discrimination</td>
<td>Discrimination</td>
</tr>
<tr>
<td>para 30</td>
<td>States parties are urged to develop effective prevention programmes, including measures aimed at changing cultural views about adolescents’ need for contraception and STD prevention and addressing cultural and other taboos surrounding adolescent sexuality; (b) to adopt legislation to combat practices that either increase adolescents’ risk of infection or contribute to the marginalization of adolescents who are already infected with STDs, including HIV; (c) to take measures to remove all barriers hindering the access of adolescents to information, preventive measures such as condoms, and care.</td>
<td>States should develop prevention programmes and legislation that address attitudes &amp; remove barriers to access to information, sex education, and reproductive rights</td>
<td>Enabling environment (Programmes, laws, information, prevention)</td>
</tr>
<tr>
<td>para 31</td>
<td>Before parents give their consent, adolescents need to have a chance to express their views freely and their views should be given due weight, in accordance with article 12 of the Convention</td>
<td>Adolescents must be involved in consent decisions</td>
<td>Participation</td>
</tr>
<tr>
<td>para 32</td>
<td>Both individual behaviours and environmental factors which increase their vulnerability and risk should be taken into consideration.</td>
<td>Vulnerability should be considered</td>
<td>Enabling environment</td>
</tr>
<tr>
<td>para 33</td>
<td>Homeless adolescents are particularly vulnerable to violence, abuse and sexual exploitation from others, self-destructive behaviour, substance abuse and mental disorders.</td>
<td>Vulnerability of homeless to violence</td>
<td>Vulnerability</td>
</tr>
<tr>
<td>para 34</td>
<td>Adolescents who are sexually exploited, including in prostitution and pornography, are exposed to significant health risks, including STDs, HIV/AIDS, unwanted pregnancies, unsafe abortions, violence and psychological distress</td>
<td>Vulnerability to health risks of those sexual exploited</td>
<td>Vulnerability</td>
</tr>
<tr>
<td>para 35</td>
<td>Adolescents experiencing poverty, armed conflicts, all forms of injustice, family breakdown, political, social and economic instability and all types of migration may be particularly vulnerable.</td>
<td>Vulnerability due to circumstances</td>
<td>Vulnerability</td>
</tr>
<tr>
<td>para 36</td>
<td>States parties shall always take fully into account the four general principles of the Convention</td>
<td>General principles</td>
<td>General principles</td>
</tr>
<tr>
<td>para 37</td>
<td>adopt a multisectoral approach</td>
<td>Multisectoral approach</td>
<td>Rights fulfilment</td>
</tr>
<tr>
<td>para 38</td>
<td>seek such cooperation with United Nations specialized agencies, programmes and bodies, international NGOs and bilateral aid agencies, international professional associations and other non-State actors.</td>
<td>Cooperation with UN &amp; international agencies</td>
<td>(International cooperation)</td>
</tr>
<tr>
<td>Para no</td>
<td>General Comment No 5: General Measures of Implementation</td>
<td>Code</td>
<td>Theme</td>
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<tr>
<td>para 1</td>
<td>Needs to engage all sectors of society and, of course, children themselves. Ensuring that all domestic legislation is fully compatible with the Convention and that the Convention's principles and provisions can be directly applied and appropriately enforced is fundamental.</td>
<td>Legislation must be compatible with CRC - should be directly applied and enforced</td>
<td>Enabling environment (law)</td>
</tr>
<tr>
<td>para 5</td>
<td>The Human Rights Committee and the Committee on Economic, Social and Cultural Rights have issued general comments in relation to these provisions which should be seen as complementary to the present general comment and which are referred to below.</td>
<td>ICCPR &amp; ICESCR committees' general comments are complementary</td>
<td>Interrelated</td>
</tr>
<tr>
<td>para 7</td>
<td>States need to be able to demonstrate that they have implemented &quot;to the maximum extent of their available resources&quot; and, where necessary, have sought international cooperation</td>
<td>Resources can affect implementation</td>
<td>Rights fulfilment (Resources)</td>
</tr>
<tr>
<td>para 8</td>
<td>Whatever their economic circumstances, States are required to undertake all possible measures towards the realization of the rights of the child, paying special attention to the most disadvantaged groups.</td>
<td>Must take all possible measures, pay attention to vulnerable</td>
<td>Rights fulfilment (vulnerable)</td>
</tr>
<tr>
<td>para 9</td>
<td>The general measures of implementation identified by the Committee and described in the present general comment are intended to promote the full enjoyment of all rights in the Convention by all children, through legislation, the establishment of coordinating and monitoring bodies - governmental and independent - comprehensive data collection, awareness-raising and training and the development and implementation of appropriate policies, services and programmes</td>
<td>Legislation, coordinating and monitoring bodies, comprehensive data collection, awareness and training, and the appropriate policies, services and programmes</td>
<td>Accountability</td>
</tr>
<tr>
<td>para 10</td>
<td>States must see their role as fulfilling clear legal obligations to each and every child. Implementation of the human rights of children must not be seen as a charitable process, bestowing favours on children.</td>
<td>Rights are legal obligations, not charity</td>
<td>Rights holder</td>
</tr>
<tr>
<td>para 12</td>
<td>The development of a children's rights perspective throughout Government, parliament and the judiciary is required for effective implementation of the whole Convention and, in particular, in the light of the following articles in the Convention identified by the Committee as general principles:</td>
<td>Children's rights perspective</td>
<td>Rights fulfilment (Child rights perspective)</td>
</tr>
<tr>
<td>para 12</td>
<td>The need for data collection to be disaggregated to enable discrimination or potential discrimination to be identified</td>
<td>Disaggregated data as a means of establishing discrimination</td>
<td>Accountability (data)</td>
</tr>
<tr>
<td>para 12</td>
<td>Implementing measures should be aimed at achieving the optimal development for all children.</td>
<td>Goal of optimal child development</td>
<td>Right to development</td>
</tr>
<tr>
<td>para 12</td>
<td>The Committee believes a comprehensive review of all domestic legislation and related administrative guidance to ensure full compliance with the Convention is an obligation</td>
<td>Review legislation/ administrative guidance to ensure full compliance</td>
<td>Accountability (review)</td>
</tr>
<tr>
<td>para 19</td>
<td>States parties need to ensure, by all appropriate means, that the provisions of the Convention are given legal effect within their domestic legal systems</td>
<td>Provisions must be given legal effect</td>
<td>Rights fulfilment (law)</td>
</tr>
<tr>
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<tr>
<td>para 20</td>
<td>The Committee welcomes the incorporation of the Convention into domestic law, which is the traditional approach to the implementation of international human rights instruments in some but not all States</td>
<td>Incorporation of CRC into domestic law</td>
<td>Accountability (incorporation)</td>
</tr>
<tr>
<td>para 21</td>
<td>The test must be whether the applicable rights are truly realized for children and can be directly invoked before the courts.</td>
<td>Rights realisation &amp; justiciability</td>
<td>Accountability (access to court)</td>
</tr>
<tr>
<td>para 22</td>
<td>... the importance of ensuring that domestic law reflects the identified general principles in the Convention</td>
<td>General principles should be implemented into law</td>
<td>General principles</td>
</tr>
<tr>
<td>para 24</td>
<td>For rights to have meaning, effective remedies must be available to redress violations</td>
<td>Effective rights require remedies</td>
<td>Accountability (remedy)</td>
</tr>
<tr>
<td>para 25</td>
<td>the Committee emphasizes that economic, social and cultural rights, as well as civil and political rights, must be regarded as justiciable</td>
<td>All rights should be justiciable</td>
<td>Accountability (justiciability)</td>
</tr>
<tr>
<td>para 27</td>
<td>Rigorous monitoring of implementation is required, which should be built into the process of government at all levels but also independent monitoring by national human rights institutions, NGOs and others.</td>
<td>Governmental and independent monitoring</td>
<td>Accountability (Monitoring)</td>
</tr>
<tr>
<td>para 28</td>
<td>If Government as a whole and at all levels is to promote and respect the rights of the child, it needs to work on the basis of a unifying, comprehensive and rights-based national strategy, rooted in the Convention</td>
<td>Pursue comprehensive national strategy</td>
<td>Accountability (national strategy)</td>
</tr>
<tr>
<td>para 30</td>
<td>Particular attention will need to be given to identifying and giving priority to marginalized and disadvantaged groups of children</td>
<td>Identify and prioritise marginalised and disadvantaged</td>
<td>Discrimination (positive)</td>
</tr>
<tr>
<td>para 31</td>
<td>To give the strategy authority, it will need to be endorsed at the highest level of government.</td>
<td>Government endorsement of strategy</td>
<td>Accountability (national strategy)</td>
</tr>
<tr>
<td>para 32</td>
<td>it must go beyond statements of policy and principle, to set real and achievable targets in relation to the full range of economic, social and cultural and civil and political rights for all children</td>
<td>Real and achievable targets</td>
<td>Accountability (targets)</td>
</tr>
<tr>
<td>para 33</td>
<td>Once drafted the strategy will need to be widely disseminated throughout Government and to the public, including children (translated into child-friendly versions as well as into appropriate languages and forms).</td>
<td>Widely disseminate strategy</td>
<td>Enabling environment (dissemination)</td>
</tr>
<tr>
<td>para 34</td>
<td>The “national plans of action” which States were encouraged to develop following the first World Summit for Children, held in 1990,</td>
<td>Develop national action plans</td>
<td>Accountability (action plans)</td>
</tr>
<tr>
<td>Para 37</td>
<td>encourage further coordination of government to ensure effective implementation: coordination among central government departments, among different provinces and regions, between central and other levels of government and between Government and civil society.</td>
<td>Governmental coordination</td>
<td>Accountability (coordination)</td>
</tr>
<tr>
<td>Para 43</td>
<td>The Committee emphasizes that States parties to the Convention have a legal obligation to respect and ensure the rights of children as stipulated in the Convention, which includes the obligation to ensure that non-State service providers operate in accordance with its provisions, thus creating indirect obligations on such actors.</td>
<td>Non-state actors have indirect obligations</td>
<td>Accountability (non-state)</td>
</tr>
<tr>
<td>Para 44</td>
<td>The Committee proposes that there should be a permanent monitoring mechanism or process aimed at ensuring that all State and non-State service providers respect the Convention.</td>
<td>Permanent mechanism monitoring NSA &amp; state</td>
<td>Accountability (monitoring)</td>
</tr>
<tr>
<td>Para 45</td>
<td>Ensuring that the best interests of the child are a primary consideration in all actions concerning children (art. 3 (1)), and that all the provisions of the Convention are respected in legislation and policy development and delivery at all levels of government demands a continuous process of child impact assessment (predicting the impact of any proposed law, policy or budgetary allocation which affects children and the enjoyment of their rights) and child impact evaluation (evaluating the actual impact of implementation).</td>
<td>Best interests requires impact assessment &amp; evaluation</td>
<td>Accountability (impact assessment &amp; evaluation)</td>
</tr>
<tr>
<td>Para 46</td>
<td>Self-monitoring and evaluation is an obligation for Governments. But the Committee also regards as essential the independent monitoring of progress towards implementation by, for example, parliamentary committees, NGOs, academic institutions,</td>
<td>Independent monitoring of implementation as well as self-monitoring and evaluation</td>
<td>Accountability (Independent monitoring)</td>
</tr>
<tr>
<td>Para no.</td>
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<tr>
<td>para 48</td>
<td>Collection of sufficient and reliable data on children, disaggregated to enable identification of discrimination and/or disparities in the realization of rights, is an essential part of implementation.</td>
<td>State must collect disaggregated, nationally representative data &amp; create indicators</td>
<td>Accountability (data collection)</td>
</tr>
<tr>
<td>para 50</td>
<td>Interviewing children and using children as researchers (with appropriate safeguards) is likely to be an important way of finding out, for example, to what extent their civil rights, including the crucial right set out in article 12, to have their views heard and given due consideration, are respected within the family, in schools and so on.</td>
<td>Interviewing children to gather views</td>
<td>Participation</td>
</tr>
<tr>
<td>para 51</td>
<td>No State can tell whether it is fulfilling children’s economic, social and cultural rights “to the maximum extent of … available resources”, as it is required to do under article 4, unless it can identify the proportion of national and other budgets allocated to the social sector and, within that, to children, both directly and indirectly</td>
<td>Proportion of budget spent on children</td>
<td>Accountability (budget)</td>
</tr>
<tr>
<td>para 53</td>
<td>The Committee emphasizes States' obligation to develop training and capacity-building for all those involved in the implementation process - government officials, parliamentarians and members of the judiciary - and for all those working with and for children.</td>
<td>Build capacities of officials through training</td>
<td>Empower (training)</td>
</tr>
<tr>
<td>para 55</td>
<td>There should be periodic evaluation of the effectiveness of training, reviewing not only knowledge of the Convention and its provisions but also the extent to which it has contributed to developing attitudes and practice which actively promote enjoyment by children of their rights</td>
<td>Periodic evaluation of training and its impact</td>
<td>Accountability (evaluation)</td>
</tr>
<tr>
<td>para 56</td>
<td>The Committee recognizes that responsibilities to respect and ensure the rights of children extend in practice beyond the State and State-controlled services and institutions to include children, parents and wider families, other adults, and non-State services and organizations.</td>
<td>All relevant actors should respect and ensure rights</td>
<td>Duty bearers (state and non-state)</td>
</tr>
<tr>
<td>para 58</td>
<td>The State needs to work closely with NGOs in the widest sense, while respecting their autonomy;</td>
<td>State must work with NGOs</td>
<td>Rights fulfilment (civil society)</td>
</tr>
<tr>
<td>para 60</td>
<td>This article [article 4] and others in the Convention highlight the need for international cooperation.</td>
<td>International cooperation to fulfill rights</td>
<td>Accountability (int cooperation)</td>
</tr>
<tr>
<td>para 61</td>
<td>The Committee advises States parties that the Convention should form the framework for international development assistance related directly or indirectly to children and that programmes of donor States should be rights-based</td>
<td>Convention should frame international development assistance</td>
<td>Rights fulfilment (international)</td>
</tr>
<tr>
<td>para 62</td>
<td>Both PRSPs and Swaps should reflect children’s rights principles, with a holistic, child-centred approach recognizing children as holders of rights and the incorporation of development goals and objectives which are relevant to children.</td>
<td>Child centred international cooperation</td>
<td>Rights fulfilment (child centred)</td>
</tr>
<tr>
<td>para 64</td>
<td>All United Nations and United Nations-related agencies should be guided by the Convention and should mainstream children's rights throughout their activities.</td>
<td>UN should mainstream convention</td>
<td>Rights fulfilment (Mainstreaming)</td>
</tr>
<tr>
<td>para 66</td>
<td>Traditionally in most, if not all, societies children have not been regarded as rights holders. So article 42 acquires a particular importance. If the adults around children, their parents and other family members, teachers and carers do not understand the implications of the Convention, and above all its confirmation of the equal status of children as subjects of rights, it is most unlikely that the rights set out in the Convention will be realized for many children.</td>
<td>Dissemination of CRC</td>
<td>Empower (non-state)</td>
</tr>
<tr>
<td>para 70</td>
<td>The media can play a crucial role in the dissemination of the Convention and knowledge and understanding of it and the Committee encourages their voluntary engagement in the process, which may be stimulated by governments and by NGOs</td>
<td>Media should engage in dissemination</td>
<td>Duty bearer (media)</td>
</tr>
<tr>
<td>para 72</td>
<td>The Convention explicitly requires States to make their reports widely available to the public; this should be done when they are submitted to the Committee</td>
<td>States should make reports widely available</td>
<td>Enabling environment (dissemination)</td>
</tr>
<tr>
<td>Para no</td>
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<tr>
<td>para 6</td>
<td>Its interpretation efforts must be conducted in the context of the entirety of applicable international human rights norms and, therefore, the general comment adopts a holistic approach to the question of the proper treatment of unaccompanied and separated children. This acknowledges that all human rights, including those contained in the Convention, are indivisible and interdependent.</td>
<td>All HR norms should be taken into account as rights are indivisible and interdependent</td>
<td>Indivisible and interdependent rights</td>
</tr>
<tr>
<td>para 13</td>
<td>Such responsibilities are not only limited to the provision of protection and assistance to children who are already unaccompanied or separated, but include measures to prevent separation (including the implementation of safeguards in case of evacuation).</td>
<td>States must take positive measures and should not only protect and assist but also prevent</td>
<td>Rights fulfilment (prevent)</td>
</tr>
<tr>
<td>para 14</td>
<td>States parties to the Convention have to ensure that the provisions and principles of the treaty are fully reflected and given legal effect in relevant domestic legislation.</td>
<td>Domestic implementation</td>
<td>Accountability</td>
</tr>
<tr>
<td>para 15</td>
<td>States parties are also encouraged to ratify other international instruments that address issues relating to unaccompanied and separated children,</td>
<td>States should ratify other human rights treaties</td>
<td>Indivisible and interdependent</td>
</tr>
<tr>
<td>para 18</td>
<td>Measures should also be taken to address possible misperceptions and stigmatization of unaccompanied or separated children within the society.</td>
<td>Positive measures to address stigma</td>
<td>Discrimination (positive)</td>
</tr>
<tr>
<td>para 19</td>
<td>A best interests determination must be documented in preparation of any decision fundamentally impacting on the unaccompanied or separated child's life.</td>
<td>State must carry out best interests assessments</td>
<td>Best interests</td>
</tr>
<tr>
<td>para 20</td>
<td>A determination of what is in the best interests of the child requires a clear and comprehensive assessment of the child's identity, including her or his nationality, upbringing, ethnic, cultural and linguistic background, particular vulnerabilities and protection needs.</td>
<td>Child's identity must be taken into account</td>
<td>Rights holder (identity)</td>
</tr>
<tr>
<td>para 21</td>
<td>Subsequent steps, such as the appointment of a competent guardian as expeditiously as possible, serves as a key procedural safeguard to ensure respect for the best interests of an unaccompanied or separated child.</td>
<td>Procedural safeguards for best interests</td>
<td>Best interests</td>
</tr>
<tr>
<td>para 23</td>
<td>The obligation of the State party under article 6 includes protection from violence and exploitation, to the maximum extent possible, which would jeopardize a child's right to life, survival and development.</td>
<td>Protection from violence</td>
<td>Right to life</td>
</tr>
<tr>
<td>para 24</td>
<td>The Committee is of the view that practical measures should be taken at all levels to protect children from the risks mentioned above.</td>
<td>Protection from risks</td>
<td>Rights fulfilment (protection)</td>
</tr>
<tr>
<td>para 25</td>
<td>To allow for a well-informed expression of such views and wishes, it is imperative that such children are provided with all relevant information.</td>
<td>Information to form views</td>
<td>Participation</td>
</tr>
<tr>
<td>para 29</td>
<td>States parties must protect the confidentiality of information received in relation to an unaccompanied or separated child, consistent with the obligation to protect the child's rights, including the right to privacy (art. 16).</td>
<td>Protecting confidential</td>
<td>Rights fulfilment (privacy)</td>
</tr>
<tr>
<td>para 31</td>
<td>The best interests of the child must also be a guiding principle for determining the priority of protection needs and the chronology of measures to be applied in respect of unaccompanied and separated children.</td>
<td>Best interests as guiding principle</td>
<td>Best interests</td>
</tr>
<tr>
<td>para 31</td>
<td>The assessment must be conducted in a scientific, safe, child and gender-sensitive and fair manner, avoiding any risk of violation of the physical integrity of the child.</td>
<td>Safe assessment</td>
<td>Rights holder</td>
</tr>
<tr>
<td>para 37</td>
<td>At all times children should be informed of arrangements with respect to guardianship and legal representation and their opinions should be taken into consideration.</td>
<td>Informed and opinions considered</td>
<td>Participation (information)</td>
</tr>
<tr>
<td>Para 40</td>
<td>Due regard ought to be taken of the desirability of continuity in a child's upbringing and to the ethnic, religious,</td>
<td>Continuity of background</td>
<td>Rights holder (background)</td>
</tr>
<tr>
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<tr>
<td>Para 41</td>
<td>Such access should be granted without discrimination and in particular, separated and unaccompanied girls shall have equal access to formal and informal education, including vocational training at all levels</td>
<td>Access to education without discrimination</td>
<td>Non-discrimination (access)</td>
</tr>
<tr>
<td>Para 42</td>
<td>All unaccompanied and separated children have the right to maintain their cultural identity and values, including the maintenance and development of their native language.</td>
<td>maintain culture</td>
<td>Rights holder (background)</td>
</tr>
<tr>
<td>para 43</td>
<td>States shall, in particular where government capacity is limited, accept and facilitate the assistance offered by UNICEF, the United Nations Educational, Scientific and Cultural Organization (UNESCO), UNHCR and other United Nations agencies within their respective mandates, as well as, where appropriate, other competent intergovernmental organizations or non-governmental organizations (art. 22 (2)) in order to meet the educational needs of unaccompanied and separated children.</td>
<td>Accept UN &amp; NGO assistance</td>
<td>Rights fulfilment (international assistance)</td>
</tr>
<tr>
<td>para 45</td>
<td>States shall, in particular where government capacity is limited, accept and facilitate the assistance offered by UNICEF, UNESCO, UNHCR and other United Nations agencies within their respective mandates, as well as, where appropriate, other competent intergovernmental organizations or non-governmental organizations (art. 22 (2)) in order to secure an adequate standard of living for unaccompanied and separated children.</td>
<td>Accept UN &amp; NGO assistance</td>
<td>Rights fulfilment (international assistance)</td>
</tr>
<tr>
<td>Para 47</td>
<td>In ensuring their access, States must assess and address the particular plight and vulnerabilities of such children.</td>
<td>address vulnerability</td>
<td>Vulnerability</td>
</tr>
<tr>
<td>Para 49</td>
<td>States shall, in particular where government capacity is limited, accept and facilitate assistance offered by UNICEF, the World Health Organization (WHO), United Nations Joint Programme on HIV/AIDS (UNAIDS), UNHCR and other agencies (art. 22 (2)) within their respective mandates, as well as, where appropriate, other competent intergovernmental organizations or non-governmental organizations in order to meet the health and health-care needs of unaccompanied and separated children.</td>
<td>Accept UN &amp; NGO assistance</td>
<td>Rights fulfilment (international assistance)</td>
</tr>
<tr>
<td>para 50</td>
<td>Unaccompanied or separated children in a country outside their country of origin are particularly vulnerable to exploitation and abuse. Girls are at particular risk of being trafficked, including for purposes of sexual exploitation.</td>
<td>Vulnerability of unaccompanied girls to trafficking</td>
<td>Vulnerability (girls)</td>
</tr>
<tr>
<td>para 59</td>
<td>Reminding States of the need for age and gender-sensitive asylum procedures and an age and gender-sensitive interpretation of the refugee definition</td>
<td>age and gender sensitive asylum procedures</td>
<td>Rights fulfilment</td>
</tr>
<tr>
<td>para 60</td>
<td>States shall develop, where needed, in cooperation with international agencies and NGOs, a comprehensive age-appropriate and gender-sensitive system of psychological support and assistance for unaccompanied and separated children affected by armed conflict.</td>
<td>age &amp; gender appropriate support</td>
<td>Rights fulfilment (support)</td>
</tr>
<tr>
<td>para 63</td>
<td>In the exceptional case of detention, conditions of detention must be governed by the best interests of the child and pay full respect to article 37 (a) and (c) of the Convention and other international obligations.</td>
<td>Detention governed by best interests &amp; rights</td>
<td>Best interests</td>
</tr>
<tr>
<td>para 72</td>
<td>The assessment process should comprise a case-by-case examination of the unique combination of factors presented by each child, including the child’s personal, family and cultural background</td>
<td>Assessment consider child’s background</td>
<td>Rights holder (community)</td>
</tr>
<tr>
<td>para 75</td>
<td>Staff involved in status-determination procedures of children, in particular those who are unaccompanied or separated, should receive training on adopting an application of international and national refugee law that is child, cultural, and gender-sensitive.</td>
<td>training on application of human rights law in a cultural, child, gender sensitive manner</td>
<td>Empower (training)</td>
</tr>
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<tr>
<td>para 79</td>
<td>Following a rights-based approach, the search for a durable solution commences with analysing the possibility of family reunification.</td>
<td>Family reunification</td>
<td>Family unity</td>
</tr>
<tr>
<td>para 81</td>
<td>pay full respect to the obligation of States under article 9 of the Convention to ensure that a child shall not be separated from his or her parents against their will, all efforts should be made to return an unaccompanied or separated child to his or her parents except where further separation is necessary for the best interests of the child, taking full account of the right of the child to express his or her views (art. 12)</td>
<td>family reunion subject to best interests</td>
<td>Family unity</td>
</tr>
<tr>
<td>para 82</td>
<td>Family reunification in the country of origin is not in the best interests of the child and should therefore not be pursued where there is a “reasonable risk” that such a return would lead to the violation of fundamental human rights of the child.</td>
<td>Limits to family reunion</td>
<td>Best interests</td>
</tr>
<tr>
<td>Para 93</td>
<td>The best-interests assessment determination, prior to a decision to resettle, needs also to take into account other factors.</td>
<td>Other rights and circumstances must be considered in the best interests assessment</td>
<td>Best interests</td>
</tr>
<tr>
<td>para 95</td>
<td>Particular attention should be paid to the training of officials working with separated and unaccompanied children and dealing with their cases.</td>
<td>Training of officials</td>
<td>Enabling environment (training)</td>
</tr>
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<tr>
<td>Para 1</td>
<td>the Committee wishes to encourage recognition that young children are holders of all rights enshrined in the Convention and that early childhood is a critical period for the realization of these rights.</td>
<td>children are rights holders</td>
<td>Rights holders</td>
</tr>
<tr>
<td>para 3</td>
<td>young children are holders of all the rights enshrined in the Convention. They are entitled to special protection measures and, in accordance with their evolving capacities, the progressive exercise of their rights.</td>
<td>Young children need special protection</td>
<td>Vulnerability</td>
</tr>
<tr>
<td>para 3</td>
<td>The Committee reaffirms that the Convention on the Rights of the Child is to be applied holistically in early childhood, taking account of the principle of the universality, indivisibility and interdependence of all human rights.</td>
<td>rights are universal, indivisible and interdependent</td>
<td></td>
</tr>
<tr>
<td>para 5</td>
<td>The Committee encourages States parties to construct a positive agenda for rights in early childhood. A shift away from traditional beliefs that regard early childhood mainly as a period for the socialization of the immature human being towards mature adult status is required. The Convention requires that children, including the very youngest children, be respected as persons in their own right.</td>
<td>Rethink perceptions</td>
<td>Rights holder</td>
</tr>
<tr>
<td>para 6</td>
<td>(a) Young children experience the most rapid period of growth and change during the human lifespan, in terms of their maturing bodies and nervous systems, increasing mobility, communication skills and intellectual capacities, and rapid shifts in their interests and abilities;</td>
<td>Rapid growth and change as young children</td>
<td>Evolving capacities</td>
</tr>
<tr>
<td>para 6</td>
<td>(b) Young children form strong emotional attachments to their parents or other caregivers, from whom they seek and require nurturance, care, guidance and protection, in ways that are respectful of their individuality and growing capacities;</td>
<td>Strong bond between parents and child</td>
<td>Family unity</td>
</tr>
<tr>
<td>para 6</td>
<td>(c) Young children establish their own important relationships with children of the same age, as well as with younger and older children. Through these relationships they learn to negotiate and coordinate shared activities, resolve conflicts, keep agreements and accept responsibility for others;</td>
<td>Relationships with other children</td>
<td>Rights holder (community)</td>
</tr>
<tr>
<td>para 6</td>
<td>(d) Young children’s experiences of growth and development vary according to their individual nature, as well as their gender, living conditions, family organization, care arrangements and education systems;</td>
<td>different experiences depending on individual</td>
<td></td>
</tr>
<tr>
<td>para 6</td>
<td>(f) Young children’s experiences of growth and development are powerfully shaped by cultural beliefs about their needs and proper treatment, and about their active role in family and community.</td>
<td>Role of culture</td>
<td>Rights holder (community)</td>
</tr>
<tr>
<td>para 7</td>
<td>Respecting the distinctive interests, experiences and challenges facing every young child is the starting point for realizing their rights during this crucial phase of their lives.</td>
<td>Respecting children as individuals</td>
<td>Rights holder (individual)</td>
</tr>
<tr>
<td>para 8</td>
<td>Young children are best understood as social actors whose survival, wellbeing and development are dependent on and built around close relationships. These relationships are normally with a small number of key people.</td>
<td>Children as social beings &amp; members of society</td>
<td></td>
</tr>
<tr>
<td>para 11</td>
<td>Young children are especially at risk of discrimination because they are relatively powerless and depend on others for the realization of their rights;</td>
<td>Children as social beings &amp; members of society</td>
<td>Discrimination</td>
</tr>
<tr>
<td>para 11</td>
<td>Discrimination may take the form of reduced levels of nutrition; inadequate care and attention; restricted opportunities for play, learning and education; or inhibition of free expression of feelings and views.</td>
<td>Children as social beings &amp; members of society</td>
<td>Discrimination</td>
</tr>
<tr>
<td>para 11</td>
<td>The Committee encourages States parties to monitor the availability of and access to quality services that contribute to young children’s survival and development, including through systematic data collection, disaggregated in terms of major variables related to children’s and families’ background and circumstances. As a second step, actions may be required that guarantee that all children have an equal opportunity to benefit from available services. More generally, States parties should raise awareness about discrimination against young children in general, and against vulnerable groups in particular.</td>
<td>monitor availability, accessibility of services</td>
<td>Accountability (monitoring, awareness, data collection)</td>
</tr>
<tr>
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<tr>
<td>para 15</td>
<td>All decision-making concerning a child’s care, health, education, etc. must take account of the best interests principle, including decisions by parents, professionals and others responsible for children.</td>
<td>Best interests when making decisions</td>
<td>Best interests</td>
</tr>
<tr>
<td>Para 14</td>
<td>They have been powerless within their families, and often voiceless and invisible within society. The Committee wishes to emphasize that article 12 applies both to younger and to older children.</td>
<td>Children are powerless, voiceless, invisible</td>
<td>Participation</td>
</tr>
<tr>
<td>(b)</td>
<td>The right to express views and feelings should be anchored in the child’s daily life at home (including, when applicable, the extended family) and in his or her community;</td>
<td>express views in all settings</td>
<td>Participation</td>
</tr>
<tr>
<td></td>
<td>To achieve the right of participation requires adults to adopt a child-centred attitude, listening to young children and respecting their dignity and their individual points of view.</td>
<td>Adults must be open to listening to children</td>
<td>Participation</td>
</tr>
<tr>
<td>para 15</td>
<td>Under normal circumstances, a young child’s parents play a crucial role in the achievement of their rights, along with other members of family, extended family or community, including legal guardians, as appropriate.</td>
<td>Parents are crucial to the fulfillment of rights</td>
<td>Duty bearer (family)</td>
</tr>
<tr>
<td>para 16</td>
<td>Babies and infants are entirely dependent on others, but they are not passive recipients of care, direction and guidance. They are active social agents, who seek protection, nurturance and understanding from parents or other caregivers, which they require for their survival, growth and well-being.</td>
<td>Babys as individuals and members of communities</td>
<td>Rights holder</td>
</tr>
<tr>
<td>para 17</td>
<td>Article 5 draws on the concept of “evolving capacities” to refer to processes of maturation and learning whereby children progressively acquire knowledge, competencies and understanding, including acquiring understanding about their rights and about how they can best be realized.</td>
<td>Regard must be had to children’s evolving capacities</td>
<td>Evolving capacities</td>
</tr>
<tr>
<td>para 18</td>
<td>The Committee urges States parties to take all necessary steps to ensure that parents are able to take primary responsibility for their children; to support parents in fulfilling their responsibilities, including by reducing harmful deprivations, disruptions and distortions in children’s care; and to take action where young children’s well-being may be at risk.</td>
<td>State should support parents</td>
<td>Empower (parents)</td>
</tr>
<tr>
<td>para 20</td>
<td>Early childhood is the period of most extensive (and intensive) parental responsibilities related to all aspects of children’s well-being covered by the Convention</td>
<td>parental responsibilities</td>
<td>Duty bearer (parents)</td>
</tr>
<tr>
<td></td>
<td>Assistance to parents will include provision of parenting education, parent counselling and other quality services for mothers, fathers, siblings, grandparents and others who from time to time may be responsible for promoting the child’s best interests;</td>
<td>States should provide parenting education/ counselling/ services</td>
<td>Empower (parents)</td>
</tr>
<tr>
<td>para 21</td>
<td>States parties should ensure that parents are given appropriate support to enable them to involve young children fully in such programmes, especially the most disadvantaged and vulnerable groups.</td>
<td>State must support parents</td>
<td>Empower (parents)</td>
</tr>
<tr>
<td>para 22</td>
<td>States parties are urged to develop rights-based, coordinated, multisectoral strategies in order to ensure that children’s best interests are always the starting point for service planning and provision.</td>
<td>Best interests as starting point</td>
<td>Best interests</td>
</tr>
<tr>
<td>para 23</td>
<td>The Committee emphasizes that a comprehensive strategy for early childhood must also take account of individual children’s maturity and individuality, in particular recognizing the changing developmental priorities for specific age groups (for example, babies, toddlers, preschool and early primary school groups), and the implications for programme standards and quality criteria.</td>
<td>Strategies should consider developmental changes</td>
<td>Evolving capacities</td>
</tr>
<tr>
<td>para 24</td>
<td>The Committee calls on States parties to ensure that all young children (and those with primary responsibility for their wellbeing) are guaranteed access to appropriate and effective services, including programmes of health, care and education specifically designed to promote their wellbeing. Particular attention should be paid to the most vulnerable groups of young children and to those who are at risk of discrimination.</td>
<td>Equal access to appropriate and effective services</td>
<td>Rights fulfilment (access)</td>
</tr>
<tr>
<td>Para 26</td>
<td>States parties are urged to implement systematic strategies to reduce poverty in early childhood as well as combat its negative effects.</td>
<td>State must reduce poverty</td>
<td>Enabling environment</td>
</tr>
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<tr>
<td>Para 27</td>
<td>States parties have a responsibility to ensure access to clean drinking water, adequate sanitation, appropriate immunization, good nutrition and medical services, which are essential for young children's health, as is a stress-free environment.</td>
<td>State must ensure adequate environment for realisation of health and development</td>
<td>Enabling environment</td>
</tr>
<tr>
<td>para 29</td>
<td>States parties have a responsibility to implement children’s right to health by encouraging education in child health and development, including about the advantages of breastfeeding, nutrition, hygiene and sanitation.</td>
<td>Education to implement health</td>
<td>Empower (education)</td>
</tr>
<tr>
<td>para 29</td>
<td>(parents are expected to provide appropriate direction and guidance to young children in the exercise of their rights, and provide an environment of reliable and affectionate relationships based on respect and understanding (art. 5).)</td>
<td>parents must provide appropriate guidance and environment</td>
<td>Enabling environment (parents)</td>
</tr>
<tr>
<td>para 29</td>
<td>States parties should take all appropriate measures to enhance parents’ understanding of their role in their children’s early education, encourage child-rearing practices which are child-centred, encourage respect for the child’s dignity and provide opportunities for developing understanding, self-esteem and self-confidence;</td>
<td>States should inform and support parents in their role</td>
<td>Empower (parents)</td>
</tr>
<tr>
<td>para 29</td>
<td>States parties should at all times aim to provide programmes that complement the parents’ role and are developed as far as possible in partnership with parents, including through active cooperation between parents, professionals and others in developing “the child's personality, talents and mental and physical abilities to their fullest potential” (art. 29.1 (a)).</td>
<td>States should complement and involve parents</td>
<td>Enabling environment (support parents)</td>
</tr>
<tr>
<td>para 30</td>
<td>The Committee calls on States parties to ensure that all young children receive education in the broadest sense (as outlined in paragraph 28 above), which acknowledges a key role for parents, wider family and community, as well as the contribution of organized programmes of early childhood education provided by the State, the community or civil society institutions.</td>
<td>States should ensure education that acknowledges parents' role</td>
<td>Empower</td>
</tr>
<tr>
<td>para 31</td>
<td>[SPs] are encouraged to construct high-quality, developmentally appropriate and culturally relevant programmes and to achieve this by working with local communities rather than imposing a standardized approach to early childhood care and education.</td>
<td>States must adapt programmes to cultural context</td>
<td>Rights holder (community)</td>
</tr>
<tr>
<td>para 32</td>
<td>all non-State service providers (“for profit” as well as “non-profit” providers) to respect the principles and provisions of the Convention and, in this regard, reminds States parties of their primary obligation to ensure its implementation.</td>
<td>Respect for CRC</td>
<td>Duty bearers (NSAs)</td>
</tr>
<tr>
<td>para 33</td>
<td>The Committee also recommends that States parties include human rights education within early childhood education.</td>
<td>human rights education</td>
<td>Enabling environment (education)</td>
</tr>
<tr>
<td>para 34</td>
<td>the Committee appeals to States parties, non-governmental organizations and private actors to identify and remove potential obstacles to the enjoyment of these rights by the youngest children, including as part of poverty reduction strategies.</td>
<td>remove barriers</td>
<td>Rights fulfilment (barriers)</td>
</tr>
<tr>
<td>para 35</td>
<td>Article 17 recognizes the potential for both traditional print based media and modern information technology based mass media to contribute positively to the realization of children’s rights... States parties are urged to regulate media production and delivery in ways that protect young children, as well as support parents/caregivers to fulfill their child-rearing responsibilities in this regard</td>
<td>media Regulation</td>
<td>Enabling environment</td>
</tr>
<tr>
<td>para 36</td>
<td>Young children are especially vulnerable to the harm caused by unreliable, inconsistent relationships with parents and caregivers, or growing up in extreme poverty and deprivation, or being surrounded by conflict and violence or displaced from their homes as refugees, or any number of other adversities prejudicial to their well-being.</td>
<td>Young children are particularly vulnerable</td>
<td>Vulnerability</td>
</tr>
<tr>
<td>para 38</td>
<td>States parties are urged to adopt comprehensive, strategic and time-bound plans for early childhood with in a rights-based framework.</td>
<td>Time bound plans</td>
<td>Accountability (plans)</td>
</tr>
<tr>
<td>para 39</td>
<td>The Committee reiterates the importance of comprehensive and up-to-date quantitative and qualitative data on all aspects of early childhood for the formulation, monitoring and evaluation of progress achieved, and for assessment of the impact of policies.</td>
<td>Data is important to the measuring of progress and assessment of policy impact</td>
<td>Accountability (data)</td>
</tr>
<tr>
<td>para 41</td>
<td>States parties are encouraged to undertake systematic child rights training for children and their parents, as well as for all professionals working for and with children, in particular parliamentarians, judges, magistrates, lawyers, law enforcement officials,</td>
<td>train duty bearers on child rights</td>
<td>Empower (training)</td>
</tr>
<tr>
<td>Para no</td>
<td>General Comment No 7: Young People</td>
<td>Code</td>
<td>Theme</td>
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<tr>
<td>para 42</td>
<td>civil servants, personnel in institutions and places of detention for children, teachers, health personnel, social workers and local leaders</td>
<td>UN should support young children’s rights</td>
<td>Rights fulfilment (international support)</td>
</tr>
<tr>
<td>para 43</td>
<td>implement the comprehensive provisions outlined in this general comment, the Committee recommends that donor institutions, including the World Bank, other United Nations bodies and bilateral donors support early childhood development programmes financially and technically, and that it be one of their main targets in assisting sustainable development in countries receiving international assistance. Effective international cooperation can also strengthen capacity-building for early childhood, in terms of policy development, programme development, research and professional training.</td>
<td>Cooperate on establishing institutions</td>
<td>Enabling environment (Institutions)</td>
</tr>
<tr>
<td>para 43</td>
<td>The Committee urges all States parties, inter-governmental organizations, non-governmental organizations, academics, professional groups and grass-roots communities to continue advocating for the establishment of independent institutions on children’s rights and foster continuous, high-level policy dialogues and research on the crucial importance of quality in early childhood, including dialogues at international, national, regional and local levels.</td>
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<tr>
<td>Para no</td>
<td>General Comment No 8</td>
<td>Code</td>
<td>Theme</td>
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<tr>
<td>Para 5</td>
<td>The Committee is encouraged that a growing number of States are taking appropriate legislative and other measures to assert children's right to respect for their human dignity and physical integrity and to equal protection under the law.</td>
<td>Measures to protect children</td>
<td>Rights fulfilment (legislation)</td>
</tr>
<tr>
<td>Para 13</td>
<td>The healthy development of children depends on parents and other adults for necessary guidance and direction, in line with children's evolving capacities, to assist their growth towards responsible life in society.</td>
<td>Child development depends on parental support</td>
<td>Duty bearers (parents)</td>
</tr>
<tr>
<td>Para 16</td>
<td>The dignity of each and every individual is the fundamental guiding principle of international human rights</td>
<td>Dignity as a guiding principle</td>
<td>Dignity</td>
</tr>
<tr>
<td>Para 21</td>
<td>The distinct nature of children, their initial dependent and developmental state, their unique human potential as well as their vulnerability, all demand the need for more, rather than less, legal and other protection from all forms of violence.</td>
<td>Protection from harm</td>
<td>Vulnerability</td>
</tr>
<tr>
<td>Para 26</td>
<td>But interpretation of a child's best interests must be consistent with the whole Convention</td>
<td>Best interests cannot be used to violate other rights</td>
<td>Interdependence</td>
</tr>
<tr>
<td>Para 27</td>
<td>The Convention requires States to respect and support families. There is no conflict whatsoever with States' obligation to ensure that the human dignity and physical integrity of children within the family receive full protection alongside other family members.</td>
<td>State should support whole family</td>
<td>Empower</td>
</tr>
<tr>
<td>Para 29</td>
<td>Freedom of religious belief is upheld for everyone in the International Covenant on Civil and Political Rights (art. 18), but practice of a religion or belief must be consistent with respect for others' human dignity and physical integrity.</td>
<td>Rights should be consistent with dignity</td>
<td>Interdependence</td>
</tr>
<tr>
<td>Para 30</td>
<td>The wording of article 19 of the Convention builds upon article 4 and makes clear that legislative as well as other measures are required to fulfil States' obligations to protect children from all forms of violence.</td>
<td>Legislation as a means to fulfil rights</td>
<td>Enabling environment (law)</td>
</tr>
<tr>
<td>Para 38</td>
<td>This must ensure that the law operates in the best interests of the affected children - in particular when parents or other close family members are the perpetrators.</td>
<td>Law must protect best interests</td>
<td>Best interests</td>
</tr>
<tr>
<td>Para 41</td>
<td>Prosecuting parents is in most cases unlikely to be in their children's best interests.</td>
<td>Prosecution of families at last resort</td>
<td>Family unity</td>
</tr>
<tr>
<td>Para 45</td>
<td>Given the widespread traditional acceptance of corporal punishment, prohibition on its own will not achieve the necessary change in attitudes and practice. Comprehensive awareness raising of children's right to protection and of the laws that reflect this right is required.</td>
<td>Awareness raising</td>
<td>Enabling environment</td>
</tr>
<tr>
<td>Para 46</td>
<td>It is not for the Convention to prescribe in detail how parents should relate to or guide their children. But the Convention does provide a framework of principles to guide relationships both within the family, and between teachers, carers and others and children.</td>
<td>Convention as a guide for family relations</td>
<td>Duty bearers</td>
</tr>
<tr>
<td>Para 47</td>
<td>The Convention asserts the status of the child as an individual person and holder of human rights. The child is not a possession of parents, nor of the State, nor simply an object of concern.</td>
<td>Status of child</td>
<td>Rights holder</td>
</tr>
<tr>
<td>Para 49</td>
<td>The Committee proposes that States may wish to seek technical assistance from, among others, UNICEF and UNESCO concerning awareness-raising, public education and training to promote non-violent approaches.</td>
<td>Technical assistance from UN</td>
<td>Rights fulfilment (technical assistance)</td>
</tr>
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<td>51</td>
<td>emphasizes the need for systematic monitoring by States parties of the realization of children's rights, through the development of appropriate indicators and the collection of sufficient and reliable data.</td>
<td>Rights monitoring through indicators, data</td>
<td>Accountability (monitoring)</td>
</tr>
<tr>
<td>51</td>
<td>Research using interviews with children, their parents and other carers, in conditions of confidentiality and with appropriate ethical safeguards, is essential in order to accurately assess the prevalence of these forms of violence within the family and attitudes to them.</td>
<td>Including children in research</td>
<td>Participation</td>
</tr>
<tr>
<td>52</td>
<td>The Committee also underlines in general comment No. 5 the importance of independent monitoring of implementation by, for example, parliamentary committees, NGOs, academic institutions, professional associations, youth groups and independent human rights institutions.</td>
<td>Independent Monitoring of implementation</td>
<td>Accountability (Monitoring)</td>
</tr>
<tr>
<td>Para no</td>
<td>General Comment No 9</td>
<td>Code</td>
<td>Theme</td>
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<tr>
<td>Para 5</td>
<td>The Committee emphasizes that the barrier is not the disability itself but rather a combination of social, cultural, attitudinal and physical obstacles which children with disabilities encounter in their daily lives. The strategy for promoting their rights is therefore to take the necessary action to remove those barriers.</td>
<td>Remove barriers to children with disabilities</td>
<td>Enabling environment</td>
</tr>
<tr>
<td>Para 8</td>
<td>This explicit mention of disability as a prohibited ground for discrimination in article 2 is unique and can be explained by the fact that children with disabilities belong to one of the most vulnerable groups of children.</td>
<td>Disabled children as vulnerable groups</td>
<td>Vulnerability</td>
</tr>
<tr>
<td>Para 9</td>
<td>(a) Include explicitly disability as a forbidden ground for discrimination in constitutional provisions on non-discrimination and/or include specific prohibition of discrimination on the ground of disability in specific anti-discrimination laws or legal provisions.</td>
<td>Law as protection</td>
<td>Enabling environment (law)</td>
</tr>
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<td></td>
<td>(b) Provide for effective remedies in case of violations of the rights of children with disabilities, and ensure that those remedies are easily accessible to children with disabilities and their parents and/or others caring for the child.</td>
<td>Accessible remedies</td>
<td>Accountability (remedies)</td>
</tr>
<tr>
<td></td>
<td>(c) Conduct awareness-raising and educational campaigns targeting the public at large and specific groups of professionals with a view to preventing and eliminating de facto discrimination against children with disabilities.</td>
<td>Discrimination/ Awareness raising and campaigns</td>
<td>Accountability</td>
</tr>
<tr>
<td>Para 10</td>
<td>Girls with disabilities are often even more vulnerable to discrimination due to gender discrimination. In this context, States parties are requested to pay particular attention to girls with disabilities by taking the necessary measures, and when needed extra measures, in order to ensure that they are well protected, have access to all services and are fully included in society.</td>
<td>Girls require special protection from discrimination</td>
<td>Vulnerability (gender)</td>
</tr>
<tr>
<td>Para 11</td>
<td>Paragraph 1 of article 23 should be considered as the leading principle for the implementation of the Convention with respect to children with disabilities: the enjoyment of a full and decent life in conditions that ensure dignity, promote self-reliance and facilitate active participation in the community.</td>
<td>Dignity, self-reliance and participation as guiding principles</td>
<td>Enabling environment</td>
</tr>
<tr>
<td>Para 17</td>
<td>Committee recommends that States parties undertake a comprehensive review of all domestic laws and related regulations in order to ensure that all provisions of the Convention are applicable to all children, including children with disabilities who should be mentioned explicitly, where appropriate.</td>
<td>States should review laws and policy</td>
<td>Accountability (review)</td>
</tr>
<tr>
<td>Para 18</td>
<td>The need for a national plan of action that integrates all the provisions of the Convention is a well-recognized need.</td>
<td>States must devise comprehensive national action plans</td>
<td>Accountability (NAP)</td>
</tr>
<tr>
<td>Para 19</td>
<td>It is necessary for States parties to set up and develop mechanisms for collecting data which are accurate, standardized and allow for disaggregation, and which reflect the actual situation of children with disabilities... One of the main challenges in obtaining accurate statistics is the lack of a widely accepted clear definition for disabilities.</td>
<td>States must collect disaggregated data</td>
<td>Accountability (Disaggregated data)</td>
</tr>
<tr>
<td>Para 20</td>
<td>Although the Convention does not make a specific recommendation regarding the most appropriate percentage of the State budget that should be dedicated to services and programmes for children, it does insist that children should be a priority.</td>
<td>States must allocate adequate resources to children as a priority</td>
<td>Rights fulfilment (resources)</td>
</tr>
<tr>
<td>Para 22</td>
<td>States parties should recognize the importance of international cooperation and technical assistance.</td>
<td>International cooperation &amp; technical assistance</td>
<td>Accountability</td>
</tr>
<tr>
<td>Para 24</td>
<td>Both the Convention and the Standard Rules on the Equalization of Opportunities for Persons with Disabilities recognize the importance of the establishment of an appropriate monitoring system.</td>
<td>Appropriate monitoring system</td>
<td>Accountability</td>
</tr>
<tr>
<td>Para 25</td>
<td>States parties are therefore encouraged to support and cooperate with NGOs enabling them to participate in the provision of services for children with disabilities and to ensure that they operate in full compliance with the provisions and principles of the Convention.</td>
<td>States should support and cooperate with NGOs</td>
<td>Empower (civil society)</td>
</tr>
<tr>
<td>Para 26</td>
<td>States parties are encouraged to disseminate knowledge by, inter alia, conducting systematic awareness-raising campaigns, producing appropriate material, such as a child friendly version of the Convention in print and Braille, and using the mass media to foster positive</td>
<td>Awareness raising, change attitudes</td>
<td>Accountability</td>
</tr>
<tr>
<td>Para no</td>
<td>General Comment No 9</td>
<td>Code</td>
<td>Theme</td>
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<tr>
<td>para 29</td>
<td>Article 3 should be the basis on which programmes and policies are set and it should be duly taken into account in every service provided for children with disabilities and any other action affecting them.</td>
<td>Consider best interests in policies/services</td>
<td>Best interests</td>
</tr>
<tr>
<td>para 30</td>
<td>Should have the safety, protection and care of children as their primary consideration, and this consideration should outweigh any other and under all circumstances, for example, when allocating budgets</td>
<td>Safety, protection and care of children</td>
<td>Rights fulfilment</td>
</tr>
<tr>
<td>para 31</td>
<td>States parties are urged to undertake all the necessary measures required to put an end to these practices, including raising public awareness, setting up appropriate legislation and enforcing laws that ensure appropriate punishment to all those who directly or indirectly violate the right to life, survival and development of children with disabilities.</td>
<td>States must end harmful practices through awareness raising and law, also ensuring punishment for violations</td>
<td>Enabling environment</td>
</tr>
<tr>
<td>para 32</td>
<td>Children should be represented in various bodies such as parliament, committees and other forums where they may voice views and participate in the making of decisions that affect them as children in general and as children with disabilities specifically.</td>
<td>Children should be represented</td>
<td>Participation</td>
</tr>
<tr>
<td>para 37</td>
<td>Access to information and means of communication, including information and communication technologies and systems, enables children with disabilities to live independently and participate fully in all aspects of life.</td>
<td>Right to access appropriate info as empowerment</td>
<td>Empowerment</td>
</tr>
<tr>
<td>para 38</td>
<td>States parties are required to protect all children, including children with disabilities from harmful information, especially pornographic material and material that promotes xenophobia or any other form of discrimination and could potentially reinforce prejudices.</td>
<td>Protection from harmful information</td>
<td>Enabling environment (protect)</td>
</tr>
<tr>
<td>para 39</td>
<td>All States parties are urged to set out appropriate policies and procedures to make public transportation safe, easily accessible to children with disabilities, and free of charge, whenever possible, taking into account the financial resources of the parents or others caring for the child.</td>
<td>Right of access to public transport</td>
<td>Enabling environment</td>
</tr>
<tr>
<td>para 40</td>
<td>Children with disabilities are best cared for and nurtured within their own family environment provided that the family is adequately provided for in all aspects.</td>
<td>Best cared for in the family and</td>
<td>Family unity</td>
</tr>
<tr>
<td>para 41</td>
<td>Children with disabilities are more vulnerable to all forms of abuse be it mental, physical or sexual in all settings, including the family, schools, private and public institutions, inter alia alternative care, work environment and community at large.</td>
<td>Children with disabilities are vulnerable to abuse</td>
<td>Vulnerability</td>
</tr>
<tr>
<td>para 47</td>
<td>The Committee therefore urges States parties to use the placement in institution only as a measure of last resort, when it is absolutely necessary and in the best interests of the child.</td>
<td>Institutions as last resort</td>
<td>Family unity</td>
</tr>
<tr>
<td>para 48</td>
<td>The Committee recommends that States parties continue and strengthen their efforts to take into consideration the views of children with disabilities and facilitate their participation in all matters affecting them within the evaluation, separation and placement process in out-of-home care, and during the transition process.</td>
<td>Strengthen efforts to facilitate and consider views</td>
<td>Participation</td>
</tr>
<tr>
<td>para 52</td>
<td>States parties must ensure that health professionals working with children with disabilities are trained to the highest possible standard and practice based on a child-centred approach.</td>
<td>Training healthcare workers on child centred approach</td>
<td>Empowerment</td>
</tr>
<tr>
<td>para 53</td>
<td>It also recommends that States parties provide adequate post-natal health-care services and develop campaigns to inform parents and others caring for the child about basic child healthcare and nutrition.</td>
<td>Provision of adequate services</td>
<td>Empowerment</td>
</tr>
<tr>
<td>para 54</td>
<td>Lifestyle issues, such as alcohol and drug abuse during pregnancy, are also preventable causes of disabilities and in some countries foetal alcohol syndrome presents a major cause for concern. Public education, identification and support for pregnant mothers who may be abusing such substances are just some of the measures that may be taken to prevent such causes of disability among children.</td>
<td>Supporting pregnant mothers</td>
<td>Empowerment (mothers)</td>
</tr>
<tr>
<td>para 60</td>
<td>The Committee urges States parties to prohibit by law the forced sterilisation of children on grounds of disability.</td>
<td>Sterilisation should be prohibited by law</td>
<td>Rights fulfilment (law)</td>
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<tr>
<td>Para no</td>
<td>General Comment No 9</td>
<td>Code</td>
<td>Theme</td>
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<tr>
<td>para 66</td>
<td>Inclusive education should be the goal of educating children with disabilities.</td>
<td>Inclusive education</td>
<td>Enabling environment</td>
</tr>
<tr>
<td>para 71</td>
<td>Children with disabilities should be provided with equal opportunities to participate in various cultural and arts activities as well as sports</td>
<td>Equal access to activities</td>
<td>Non-discrimination</td>
</tr>
<tr>
<td>para 76</td>
<td>Children with disabilities, specifically physical disabilities, often end up on the streets for a variety of reasons, including economic and social factors</td>
<td>vulnerable to homelessness</td>
<td>Vulnerability</td>
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<tr>
<td>Para no</td>
<td>General Comment No 10</td>
<td>Code</td>
<td>Theme</td>
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<tr>
<td>para 4</td>
<td>To encourage States parties to develop and implement a comprehensive juvenile justice policy to prevent and address juvenile delinquency based on and in compliance with CRC, and to seek in this regard advice and support from the Interagency Panel on Juvenile Justice, with representatives of the Office of the United Nations High Commissioner for Human Rights (OHCHR), the United Nations Children's Fund (UNICEF), the United Nations Office on Drugs and Crime (UNODC) and non-governmental organizations (NGOs), established by ECOSOC resolution 1997/32; States should seek advice and support from UN agencies and NGOs Rights fulfilment (cooperation)</td>
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<td>para 6</td>
<td>Particular attention must be paid to de facto discrimination and disparities, which may be the result of a lack of a consistent policy and involve vulnerable groups of children, such as street children, children belonging to racial, ethnic, religious or linguistic minorities, indigenous children, girl children, children with disabilities and children who are repeatedly in conflict with the law De facto discrimination should be particularly addressed Discrimination</td>
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<tr>
<td>para 7</td>
<td>It is necessary that measures are taken to prevent such discrimination, inter alia, as by providing former child offenders with appropriate support and assistance in their efforts to reintegrate in society, and to conduct public campaigns emphasizing their right to assume a constructive role in society (art. 40 (1)). Discrimination should be prevented Discrimination</td>
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<tr>
<td>para 10</td>
<td>In all decisions taken within the context of the administration of juvenile justice, the best interests of the child should be a primary consideration. Best interests must guide decisions on children Best interests</td>
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<tr>
<td>para 11</td>
<td>This inherent right of every child should guide and inspire States parties in the development of effective national policies and programmes for the prevention of juvenile delinquency. Right to life must guide policy Right to life</td>
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<tr>
<td>para 15</td>
<td>This principle reflects the fundamental human right enshrined in article 1 of UDHR, which stipulates that all human beings are born free and equal in dignity and rights. Dignity is a fundamental principle Dignity</td>
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<td>para 18</td>
<td>The Committee fully supports the Riyadh Guidelines and agrees that emphasis should be placed on prevention policies that facilitate the successful socialization and integration of all children, in particular through the family, the community, peer groups, schools, vocational training and the world of work, as well as through voluntary organizations. State led prevention &amp; support Empowerment</td>
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<tr>
<td>para 19</td>
<td>The measures of assistance should not only focus on the prevention of negative situations, but also and even more on the promotion of the social potential of parents. Promotion of social potential of parents</td>
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<tr>
<td>para 20</td>
<td>States parties should fully promote and support the involvement of children, in accordance with article 12 of CRC, and of parents, community leaders and other key actors (e.g. representatives of NGOs, probation services and social workers), in the development and implementation of prevention programmes. Involving children and duty bearers in prevention</td>
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<tr>
<td>para 29</td>
<td>Reintegration requires that no action may be taken that can hamper the child's full participation in his/her community, such as stigmatization, social isolation, or negative publicity of the child. Reintegration</td>
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<tr>
<td>para 31</td>
<td>Article 40 (3) of CRC requires States parties to seek to promote, inter alia, the establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law, but does not mention a specific minimum age in this regard. Law to set procedural safeguards Enabling environment (law)</td>
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<tr>
<td>para 32</td>
<td>It can be concluded that a minimum age of criminal responsibility below the age of 12 years is considered by the Committee not to be internationally acceptable. Law to set procedural safeguards Enabling environment (law)</td>
<td></td>
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<tr>
<td>para 43</td>
<td>Article 12 (2) of CRC requires that a child be provided with the opportunity to be heard in any judicial or administrative proceedings affecting the child, either directly or through a representative or an appropriate body in a manner consistent with the procedural rules of Right to be heard in proceedings Participation</td>
<td></td>
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</table>
Para 45 But to treat the child as a passive object does not recognize his/her rights nor does it contribute to an effective response to his/her behaviour. 

Active engagement of children Participation

Para 47 Every child alleged as or accused of having infringed the penal law has the right to be informed promptly and directly of the charges brought against him/her.

Right to information Empower (information)

Para 48 It is the responsibility of the authorities (e.g. police, prosecutor, judge) to make sure that the child understands each charge brought against him/her.

Ensure child understands Empower (information)

Para 49 The child being questioned must have access to a legal or other appropriate representative, and must be able to request the presence of his/her parent(s) during questioning.

Procedural support for child Rights fulfilment (law)

Para 58 The Committee recommends that States parties ensure that children with speech impairment or other disabilities are provided with adequate and effective assistance by well-trained professionals

Assistance to child with disabilities Enabling environment

Para 61 No information shall be published that may lead to the identification of a child offender because of its effect of stigmatization, and possible impact on his/her ability to have access to education, work, housing or to be safe.

Protection from stigma Enabling environment (privacy)

Para 63 The Committee recommends that States parties ensure that children with speech impairment or other disabilities are provided with adequate and effective assistance by well-trained professionals

Assistance to child with disabilities Enabling environment

Para 64 The Committee recommends that States parties ensure that children with speech impairment or other disabilities are provided with adequate and effective assistance by well-trained professionals

Assistance to child with disabilities Enabling environment

Para 65 States parties should benefit from this experience, and develop and implement these alternatives by adjusting them to their own culture and tradition.

Regard to national culture/tradition Rights fulfilment (culture)

Para 66 The Committee recommends that States parties ensure that children with speech impairment or other disabilities are provided with adequate and effective assistance by well-trained professionals

Assistance to child with disabilities Enabling environment

Para 67 States parties should establish separate facilities for children deprived of their liberty, which include distinct, child-centred staff, personnel, policies and practices.

Child centred approach Enabling environment (child friendly)

Para 68 Every child deprived of liberty has the right to maintain contact with his/her family through correspondence and visits.

Right to maintain family contact Family unity

Para 69 It is clear from many States parties’ reports that non-governmental organizations can and do play an important role not only in the prevention of juvenile delinquency as such, but also in the administration of juvenile justice

Benefit and potential of civil society Rights fulfilment (civil society)

Para 70 To create a positive environment for a better understanding of the root causes of juvenile delinquency and a rights-based approach to this social problem, the States parties should conduct, promote and/or support educational and other campaigns to raise awareness.

Campaigns to raise awareness Empowerment (campaigns)

Para 71 It is essential for the quality of the administration of juvenile justice that all the professionals involved, inter alia, in law enforcement and the judiciary receive appropriate training on the content and meaning of the provisions of CRC in general, particularly those directly relevant to their daily practice.

Appropriate training on CRC Empowerment (duty bearer)

Para 72 The Committee urges the States parties to systematically collect disaggregated data

Disaggregated data Accountability (data)

Para 73 The Committee recommends that States parties conduct regular evaluations of their practice of juvenile justice, in particular of the effectiveness of the measures taken, including those concerning discrimination, reintegration and recidivism, preferably carried out by independent academic institutions.

Evaluations of effectiveness Accountability (evaluation)
<table>
<thead>
<tr>
<th>Para no</th>
<th>General Comment No 11</th>
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<tbody>
<tr>
<td>Para 5</td>
<td>Indigenous children face significant challenges in exercising their rights and has issued specific recommendations to this effect in its concluding observations.</td>
<td>Indigenous children face challenges</td>
<td>Vulnerability</td>
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<td>Para 14</td>
<td>Particular emphasis is placed on the interrelationship between relevant provisions,</td>
<td>Interrelated provisions</td>
<td>Interrelated</td>
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<td>Para 16</td>
<td>close linkage between article 32 of the Convention on the Rights of the Child and article 27 of the International Covenant on Civil and Political Rights.</td>
<td>Link between CRC &amp; ICCPR</td>
<td>Interrelated</td>
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<td>Para 17</td>
<td>The Committee concurs with the Human Rights Committee that positive measures of protection are required, not only against the acts of the State party itself, whether through its legislative, judicial or administrative authorities, but also against the acts of other persons within the State party.</td>
<td>Protection from state acts and third parties</td>
<td>Discrimination (positive)</td>
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<tr>
<td>Para 20</td>
<td>The Committee considers that special measures through legislation and policies for the protection of indigenous children should be undertaken in consultation with the communities concerned and with the participation of children in the consultation process, as provided for by article 12 of the Convention</td>
<td>Special measures should include consultation</td>
<td>Participation (communities)</td>
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<tr>
<td>Para 22</td>
<td>The Committee underlines that cultural practices provided by article 30 of the Convention must be exercised in accordance with other provisions of the Convention and under no circumstances may be justified if deemed prejudicial to the child's dignity, health and development</td>
<td>Limits to culture</td>
<td>Rights holder (culture)</td>
</tr>
<tr>
<td>Para 23</td>
<td>In order to effectively protect children from discrimination, it is a State party obligation to ensure that the principle of non-discrimination is reflected in all domestic legislation and can be directly applied and appropriately monitored and enforced through judicial and administrative bodies. Effective remedies should be timely and accessible.</td>
<td>Effective implementation of non-discrimination with remedies</td>
<td>Accountability (law, remedies)</td>
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<td>Para 24</td>
<td>For example, the Committee highlights, in particular, the need for data collection to be disaggregated to enable discrimination or potential discrimination to be identified.</td>
<td>Using data to identify discrimination</td>
<td>Accountability (data)</td>
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<td>Para 25</td>
<td>Indigenous children are among those children who require positive measures in order to eliminate conditions that cause discrimination and to ensure their enjoyment of the rights of the Convention on equal level with other children.</td>
<td>State must ensure positive measures to avoid discrimination of indigenous children.</td>
<td>Non-discrimination (positive)</td>
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<td>Para 26</td>
<td>disaggregated data collection and the development of indicators for the purposes of identifying existing and potential areas of discrimination of indigenous children.</td>
<td>Data collection and indicators</td>
<td>Accountability (data)</td>
</tr>
<tr>
<td>Para 27</td>
<td>States parties should ensure that public information and educational measures are taken to address the discrimination of indigenous children.</td>
<td>Awareness raising, education and information</td>
<td>Enabling environment</td>
</tr>
<tr>
<td>Para 30</td>
<td>In the case of children, the best interests of the child cannot be neglected or violated in preference for the best interests of the group.</td>
<td>Groups' interests must not usurp individuals’</td>
<td>Best interests</td>
</tr>
<tr>
<td>Para 31</td>
<td>As regards legislation, policies and programmes that affect indigenous children in general, the indigenous community should be consulted and given an opportunity to participate in the process on how the best interests of indigenous children in general can be decided in a culturally sensitive way.</td>
<td>Consultation to ensure sensitivity</td>
<td>Participation</td>
</tr>
<tr>
<td>Para 32</td>
<td>The Committee considers there may be a distinction between the best interests of the individual child, and the best interests of children as a group.</td>
<td>Best interests of individual vs group</td>
<td>Best interests</td>
</tr>
<tr>
<td>Para 33</td>
<td>In order to effectively guarantee the rights of indigenous children such measures would include training and awareness-raising among relevant professional categories of the importance of considering collective cultural rights in conjunction with the determination of the best interests of the child.</td>
<td>Training/ awareness raising on considering cultural rights in best interests</td>
<td>Enabling environment</td>
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<tr>
<td>Para 34</td>
<td>States should assist parents and others responsible for the indigenous child to implement this right by providing culturally appropriate material assistance and support programmes, particularly with regard to nutrition, clothing and housing.</td>
<td>Culturally appropriate support</td>
<td>Rights fulfilment (support)</td>
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<tr>
<td>Para 35</td>
<td>States parties should closely consider the cultural significance of traditional land and the quality of the natural environment while ensuring the children’s right to life, survival and development to the maximum extent possible.</td>
<td>Respect for indigenous cultures</td>
<td>Right to life</td>
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<td>Para 38</td>
<td>the State party should provide an environment that encourages the free opinion of the child.</td>
<td>Right to be heard</td>
<td>Participation</td>
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<td>Para 39</td>
<td>The State party should ensure that this right is applied in particular in the school environment, alternative care settings and in the community in general.</td>
<td>School, care &amp; community environment</td>
<td>Rights fulfilment</td>
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<td>Para 40</td>
<td>The Committee underlines the importance that the media have particular regard for the linguistic needs of indigenous children, in accordance with articles 17 (d) and 30 of the Convention. The Committee encourages States parties to support indigenous children to have access to media in their own languages. The Committee underlines the right of indigenous children to access information, including in their own languages, in order for them to effectively exercise their right to be heard.</td>
<td>Media and state responsibilities to provide for linguistic needs</td>
<td>Enabling environment</td>
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<tr>
<td>Para 46</td>
<td>States parties should ensure effective measures are implemented to safeguard the integrity of indigenous families and communities by assisting them in their child-rearing responsibilities in accordance with articles 3, 5, 18, 25 and 27 (3) of the Convention.</td>
<td>Support for family unit</td>
<td>Enabling environment</td>
</tr>
<tr>
<td>Para 47</td>
<td>States parties should, in cooperation with indigenous families and communities, collect data on the family situation of indigenous children, including children in foster care and adoption processes.</td>
<td>Collecting data to guide policy</td>
<td>Accountability (data)</td>
</tr>
<tr>
<td>Para 48</td>
<td>States should always ensure that the principle of the best interests of the child is the paramount consideration in any alternative care placement of indigenous children and in accordance with article 20 (3) of the Convention pay due regard to the desirability of continuity in the child’s upbringing and to the child’s ethnic, religious, cultural and linguistic background.</td>
<td>Consider best interests including background in alternative care</td>
<td>Best interests</td>
</tr>
<tr>
<td>Para 51</td>
<td>Special consideration should be given to ensure that health-care services are culturally sensitive and that information about these is available in indigenous languages.</td>
<td>Culturally sensitive, accessible services</td>
<td>Enabling environment</td>
</tr>
<tr>
<td>Para 55</td>
<td>States parties should design and implement a policy for preventive measures and ensure that additional financial and human resources are allocated to mental health care for indigenous children in a culturally appropriate manner, following consultation with the affected community. In order to analyse and combat the root causes, the State party should establish and maintain a dialogue with the indigenous community.</td>
<td>Resourced prevention with consultation</td>
<td>Enabling environment</td>
</tr>
<tr>
<td>Para 58</td>
<td>States parties should ensure that the curricula, educational materials and history textbooks provide a fair, accurate and informative portrayal of the societies and cultures of indigenous peoples.</td>
<td>Respect for other groups in school materials</td>
<td>Enabling environment (school)</td>
</tr>
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<td>Para 60</td>
<td>States parties should allocate targeted financial, material and human resources in order to implement policies and programmes which specifically seek to improve the access to education for indigenous children.</td>
<td>Adequately resourced measures to improve access</td>
<td>Rights fulfilment (resources)</td>
</tr>
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<td>Para 61</td>
<td>States parties should ensure that school facilities are easily accessible where indigenous children live.</td>
<td>Accessible schools</td>
<td>Rights fulfilment (access)</td>
</tr>
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<td>Para 71</td>
<td>The prevention of exploitative child labour among indigenous children (as in the case of all other children) requires a rights-based approach to child labour and is closely linked to the promotion of education.</td>
<td>Prevention through rights based approach</td>
<td>Enabling environment (prevention)</td>
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<td>Para 79</td>
<td>Article 42 sets out that States parties are further required to ensure that children and adults are provided information on the principles and provisions of the Convention.</td>
<td>Dissemination of CRC</td>
<td>Accountability (dissemination)</td>
</tr>
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<td>Para 80</td>
<td>Adequate resources should be allocated and special measures adopted in a range of areas in order to effectively ensure that indigenous children enjoy their rights on an equal level with non-indigenous children.</td>
<td>Equal enjoyment of rights</td>
<td>Non-discrimination</td>
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<tr>
<td>para 2</td>
<td>The right of all children to be heard and taken seriously constitutes one of the fundamental values of the Convention... this article establishes not only a right in itself, but should also be considered in the interpretation and implementation of all other rights.</td>
<td>fundamental nature of right to be heard</td>
<td>Participation</td>
</tr>
<tr>
<td>para 3</td>
<td>This term has evolved and is now widely used to describe ongoing processes, which include information-sharing and dialogue between children and adults based on mutual respect, and in which children can learn how their views and those of adults are taken into account and shape the outcome of such processes.</td>
<td>Information sharing</td>
<td>Empowerment</td>
</tr>
<tr>
<td>para 11</td>
<td>States parties should encourage the child to form a free view and should provide an environment that enables the child to exercise her or his right to be heard.</td>
<td>state to craft enabling &amp; encouraging environment</td>
<td>Enabling environment</td>
</tr>
<tr>
<td>para 13</td>
<td>The concept of participation emphasizes that including children should not only be a momentary act, but the starting point for an intense exchange between children and adults on the development of policies, programmes and measures in all relevant contexts of children's lives.</td>
<td>consistent exchange between adults and children</td>
<td>Empowerment</td>
</tr>
<tr>
<td>para 16</td>
<td>Expressing views is a choice for the child, not an obligation. States parties have to ensure that the child receives all necessary information and advice to make a decision in favour of her or his best interests.</td>
<td>Right of information</td>
<td>Empowerment</td>
</tr>
<tr>
<td>para 20</td>
<td>States parties should presume that a child has the capacity to form her or his own views and recognize that she or he has the right to express them; it is not up to the child to first prove her or his capacity.</td>
<td>presumption of capacity</td>
<td>Rights holders</td>
</tr>
<tr>
<td>para 21</td>
<td>Article 12 imposes no age limit on the right of the child to express her or his views, and discourages States parties from introducing age limits either in law or in practice which would restrict the child's right to be heard in all matters affecting her or him.</td>
<td>Accessible participation</td>
<td>Non-discrimination</td>
</tr>
<tr>
<td>para 21</td>
<td>Consequently, full implementation of article 12 requires recognition of, and respect for, non-verbal forms of communication including play, body language, facial expressions, and drawing and painting, through which very young children demonstrate understanding, choices and preferences.</td>
<td>Respect for differences in communication</td>
<td>Enabling environment</td>
</tr>
<tr>
<td>para 21</td>
<td>Efforts must also be made to recognize the right to expression of views for minority, indigenous and migrant children and other children who do not speak the majority language.</td>
<td>Inclusion</td>
<td>Non-discrimination</td>
</tr>
<tr>
<td>para 23</td>
<td>States parties must ensure conditions for expressing views that account for the child's individual and social situation and an environment in which the child feels respected and secure when freely expressing her or his opinions.</td>
<td>ensure conditions conducive to right</td>
<td>Enabling environment</td>
</tr>
<tr>
<td>para 25</td>
<td>The realization of the right of the child to express her or his views requires that the child be informed about the matters, options and possible decisions to be taken and their consequences by those who are responsible for hearing the child, and by the child's parents or guardian.</td>
<td>provide adequate information</td>
<td>Empower</td>
</tr>
<tr>
<td>para 28</td>
<td>Article 12 stipulates that simply listening to the child is insufficient; the views of the child have to be seriously considered when the child is capable of forming her or his own views.</td>
<td>Real rights</td>
<td>Rights holder</td>
</tr>
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<td>para 34</td>
<td>Proceedings must be both accessible and child-appropriate.</td>
<td>Child centred proceedings</td>
<td>Enabling environment</td>
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<td>para 41</td>
<td>Preparation: The child must, furthermore, receive information about the option of either communicating directly or through a representative.</td>
<td>Empowerment (information)</td>
<td></td>
</tr>
<tr>
<td>para 42</td>
<td>The hearing: The context in which a child exercises her or his right to be heard has to be enabling and encouraging, so that the child can be sure that the adult who is responsible for the hearing is willing to listen and seriously consider what the child has decided to communicate.</td>
<td>Responsibility to create enabling and encouraging environment</td>
<td>Enabling environment</td>
</tr>
<tr>
<td>para 44</td>
<td>If the child is capable of forming her or his own views in a reasonable and independent manner, the decision maker must consider the views of the child as a significant factor in the settlement of the issue.</td>
<td>Views are significant</td>
<td>Rights holder</td>
</tr>
<tr>
<td>para 45</td>
<td>The decision maker has to inform the child of the outcome of the process and explain how her or his views were considered.</td>
<td>Inform on outcome</td>
<td>Accountability</td>
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<tr>
<td>para 46</td>
<td>Legislation is needed to provide children with complaint procedures and remedies when their right to be heard and for their views to be given due</td>
<td>Complaints and remedies in law</td>
<td>Accountability</td>
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<tr>
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<tr>
<td>para 47</td>
<td>the child must have access to appeals and complaints procedures which provide remedies for rights violations.</td>
<td>Right to remedy</td>
<td>Accountability</td>
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<tr>
<td>para 48</td>
<td>review or amend their legislation in order to introduce mechanisms providing children with access to appropriate information, adequate support, if necessary, feedback on the weight given to their views, and procedures for complaints, remedies or redress.</td>
<td>Enshrining feedback, information and support into law</td>
<td>Enabling environment (law)</td>
</tr>
<tr>
<td>para 49</td>
<td>Obligations: review &amp; withdraw restrictive declarations, establish independent human rights institutions, provide training on article 12, ensure appropriate conditions for supporting and encouraging children, combat negative attitudes</td>
<td>Review and support</td>
<td>Enabling environment</td>
</tr>
<tr>
<td>para 53</td>
<td>Whenever a decision is made to remove a child from her or his family because the child is a victim of abuse or neglect within his or her home, the view of the child must be taken into account in order to determine the best interests of the child.</td>
<td>Child’s views must be considered in determining best interests where considering removal from family</td>
<td>Best interests</td>
</tr>
<tr>
<td>para 60</td>
<td>In order to effectively participate in the proceedings, every child must be informed promptly and directly about the charges against her or him in a language she or he understands, and also about the juvenile justice process and possible measures taken by the court. The proceedings should be conducted in an atmosphere enabling the child to participate and to express her/himself freely.</td>
<td>Information &amp; supportive environment</td>
<td>Enabling environment</td>
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<td>para 66</td>
<td>The [administrative] proceedings have to be child-friendly and accessible.</td>
<td>Child-friendly &amp; accessible proceedings</td>
<td>Enabling environment</td>
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<tr>
<td>para 68</td>
<td>Article 12, as a general principle, is linked to the other general principles of the Convention, such as article 2 (the right to non-discrimination), article 6 (the right to life, survival and development) and, in particular, is interdependent with article 3 (primary consideration of the best interests of the child).</td>
<td>Interdependence of general principles</td>
<td>Interdependence</td>
</tr>
<tr>
<td>para 74</td>
<td>There is no tension between articles 3 and 12, only a complementary role of the two general principles: one establishes the objective of achieving the best interests of the child and the other provides the methodology for reaching the goal of hearing either the child or the children.</td>
<td>Article 3 &amp; 12 are interdependent and complementary</td>
<td>Interdependence</td>
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<td>para 76</td>
<td>States parties shall take adequate measures to raise awareness and educate the society about the negative impact of such attitudes and practices and to encourage attitudinal changes in order to achieve full implementation of the rights of every child under the Convention.</td>
<td>Awareness/ education to change cultural attitudes</td>
<td>Enabling environment</td>
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<tr>
<td>para 77</td>
<td>The Committee urges States parties to pay special attention to the right of the girl child to be heard, to receive support, if needed, to voice her view and her view be given due weight, as gender stereotypes and patriarchal values undermine and place severe limitations on girls in the enjoyment of the right set forth in article 12</td>
<td>Girls as a vulnerable grouping requiring special support</td>
<td>Gender perspective</td>
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<tr>
<td>para 81</td>
<td>the obligation it imposes on States parties is to refrain from interference in the expression of those views, or in access to information, while protecting the right of access to means of communication and public dialogue.</td>
<td>Refrain from interference</td>
<td>Enabling environment</td>
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<tr>
<td>para 82</td>
<td>Fulfilment of the child’s right to information, consistent with article 17 is, to a large degree, a prerequisite for the effective realization of the right to express views.</td>
<td>right to information</td>
<td>Enabling environment</td>
</tr>
<tr>
<td>para 83</td>
<td>The Committee also reminds States parties that the media are an important means both of promoting awareness of the right of children to express their views, and of providing opportunities for the public expression of such views.</td>
<td>Role of the media as duty bearer</td>
<td>Duty bearer (media)</td>
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<tr>
<td>para 90</td>
<td>A family where children can freely express views and be taken seriously from the earliest ages provides an important model, and is a preparation for the child to exercise the right to be heard in the wider society.</td>
<td>Role of the family</td>
<td>Duty bearer (family)</td>
</tr>
<tr>
<td>para 91</td>
<td>The Convention recognizes the rights and responsibilities of parents, or other legal guardians, to provide appropriate direction and guidance to their children (see para. 84 above), but underlines that this is to enable the child to exercise his or her rights and requires that direction and guidance are undertaken in a manner consistent with the evolving capacities of the child.</td>
<td>Role of family</td>
<td>Duty bearer (family)</td>
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<tr>
<td>para 92</td>
<td>States parties should encourage, through legislation and policy, parents, guardians and childminders to listen to children and give due weight to their views in matters that concern them.</td>
<td>State support</td>
<td>Empowerment</td>
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<tr>
<td>para 93</td>
<td>recommends that States parties promote parent education programmes, which build on existing positive behaviours and attitudes and disseminate information on the rights of children and parents enshrined in the Convention.</td>
<td>States should promote parental education</td>
<td>Empowerment</td>
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<tr>
<td>para 100</td>
<td>They should be provided with information about proposed treatments and their effects and outcomes, including in formats appropriate and accessible to children with disabilities.</td>
<td>Right to accessible information</td>
<td>Empowerment</td>
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<tr>
<td>para 103</td>
<td>The Committee notes with concern continuing authoritarianism, discrimination, disrespect and violence which characterize the reality of many schools and classrooms.</td>
<td>Shaping school environment</td>
<td>Enabling environment (school)</td>
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<tr>
<td>para 105</td>
<td>Children’s participation is indispensable for the creation of a social climate in the classroom, which stimulates cooperation and mutual support needed for child-centred interactive learning.</td>
<td>Rights enshrined in law</td>
<td>Enabling environment (child)</td>
</tr>
<tr>
<td>para 105</td>
<td>Steady participation of children in decision-making processes should be achieved through, inter alia, class councils, student councils and student representation on school boards and committees, where they can freely express their views on the development and implementation of school policies and codes of behaviour.</td>
<td>Rights enshrined in law</td>
<td>Enabling environment (school)</td>
</tr>
<tr>
<td>para 105</td>
<td>The Committee welcomes the introduction of child-friendly school programmes in many countries, which seek to provide interactive, caring, protective and participatory environments that prepare children and adolescents for active roles in society and responsible citizenship within their communities.</td>
<td>Shaping school environments to prepare children for active citizenship</td>
<td>Enabling environment (school)</td>
</tr>
<tr>
<td>para 105</td>
<td>Much of the violence perpetrated against children goes unchallenged both because certain forms of abusive behaviour are understood by children as accepted practices, and due to the lack of child-friendly reporting mechanisms.</td>
<td>Child friendly reporting</td>
<td>Accountability (reporting)</td>
</tr>
<tr>
<td>para 105</td>
<td>The Committee emphasizes that these children have to be provided with all relevant information, in their own language, on their entitlements, the services available, including means of communication, and the immigration and asylum process, in order to make their voice heard and to be given due weight in the proceedings.</td>
<td>Right of information</td>
<td>Empowerment (information)</td>
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<td>para 105</td>
<td>Their views should be elicited in the assessment, design, implementation, monitoring and evaluation of programmes.</td>
<td>Views in programming</td>
<td>Participation</td>
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<tr>
<td>para 105</td>
<td>Children should be supported and encouraged to form their own child-led organizations and initiatives, which will create space for meaningful participation and representation.</td>
<td>Support for participation</td>
<td>Enabling environment</td>
</tr>
<tr>
<td>para 105</td>
<td>The Committee urges States parties to avoid tokenistic approaches, which limit children’s expression of views, or which allow children to be heard, but fail to give their views due weight.</td>
<td>Real rights</td>
<td>Empowerment</td>
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<td>para 105</td>
<td>If participation is to be effective and meaningful, it needs to be understood as a process, not as an individual one-off event</td>
<td>Effective, consistent participation</td>
<td>Enabling environment</td>
</tr>
<tr>
<td>para 105</td>
<td>Processes must be: transparent and informative, voluntary, respectful, relevant, child-friendly, inclusive, supported by training, safe and sensitive to risk, accountable</td>
<td>Child centred processes</td>
<td>Enabling environment</td>
</tr>
<tr>
<td>Para no</td>
<td>General Comment No 13: Freedom from violence</td>
<td>Code</td>
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<tr>
<td>para 3</td>
<td>A child rights-based approach to child caregiving and protection requires a paradigm shift towards respecting and promoting the human dignity and the physical and psychological integrity of children as rights-bearing individuals rather than perceiving them primarily as &quot;victims&quot;;</td>
<td>Child rights as a transformation</td>
<td>Rights holders</td>
</tr>
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<td></td>
<td>The concept of dignity requires that every child is recognized, respected and protected as a rights holder and as a unique and valuable human being with an individual personality, distinct needs, interests and privacy;</td>
<td>Recognition for child</td>
<td>Dignity</td>
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<td></td>
<td>Primary prevention, through public health, education, social services and other approaches, of all forms of violence is of paramount importance;</td>
<td>Prevention</td>
<td>Enabling environment</td>
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<td></td>
<td>The Committee recognizes the primary position of families, including extended families, in child caregiving and protection and in the prevention of violence. Nevertheless, the Committee also recognizes that the majority of violence takes place in the context of families and that intervention and support are therefore required when children become the victims of hardship and distress imposed on, or generated in, families;</td>
<td>Support and conflict within family</td>
<td>Duty bearers (family)</td>
</tr>
<tr>
<td>para 7</td>
<td>Cooperation is needed in particular with the Special Representative of the Secretary-General on Violence against Children, who has the mandate to promote the implementation of the recommendations of the United Nations study on violence against children in close collaboration with Member States and a wide range of partners, including United Nations agencies and organizations, civil society organizations and children.</td>
<td>Cooperation with international and national bodies</td>
<td>Rights fulfilment (cooperation)</td>
</tr>
<tr>
<td>para 14</td>
<td>A respectful, supportive child-rearing environment free from violence supports the realization of children's individual personalities and fosters the development of social, responsible and actively contributing citizens in the local community and larger society.</td>
<td>Role of family environment</td>
<td>Duty bearer (family)</td>
</tr>
<tr>
<td>para 18</td>
<td>States parties need to establish national standards for child well-being, health and development as securing these conditions is the ultimate goal of child caregiving and protection.</td>
<td>Standardisation and definitions</td>
<td>Enabling environment</td>
</tr>
<tr>
<td>Para 30</td>
<td>Mass media, especially tabloids and the yellow press, tend to highlight shocking occurrences and as a result create a biased and stereotyped image of children, in particular of disadvantaged children or adolescents, who are often portrayed as violent or delinquent just because they may behave or dress in a different way.</td>
<td>Media may create biased portrayals</td>
<td>Duty bearer (media)</td>
</tr>
<tr>
<td>Para 35</td>
<td>The Committee considers that, while respecting the evolving capacities and progressive autonomy of the child, all human beings below the age of 18 years are nonetheless “in the care of” someone, or should be.</td>
<td>Balance between autonomy and protection</td>
<td>Family unity</td>
</tr>
<tr>
<td>Para 41</td>
<td>States parties that have not yet done so must: Ratify the two Optional Protocols to the Convention, and other international and regional human rights instruments that provide protection for children, including the Convention on the Rights of Persons with Disabilities and its Optional Protocol and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;</td>
<td>Obligation to ratify</td>
<td>Indivisible</td>
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<td></td>
<td>Strengthen cooperation with treaty bodies and other human rights mechanisms;</td>
<td>Cooperation</td>
<td>Accountability</td>
</tr>
<tr>
<td>para 43</td>
<td>Identification and prevention of factors and circumstances which hinder vulnerable groups' access to services and full enjoyment of their rights (including indigenous and minority children and children with disabilities, among others);</td>
<td>Prevention &amp; identification of vulnerable groups' access</td>
<td>Accountability</td>
</tr>
<tr>
<td>para 44</td>
<td>Educational measures should address attitudes, traditions, customs and behavioural practices which condone and promote violence against children:</td>
<td>Education and awareness raising</td>
<td>Enabling environment</td>
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<tr>
<td></td>
<td>For professionals and institutions (government and civil society): Providing initial and in-service general and role-specific training (including inter-sectoral where necessary) on a child rights approach to article 19 and its application in practice,</td>
<td>Training/ supporting duty bearers</td>
<td>Empowerment (duty bearers)</td>
</tr>
<tr>
<td>para 46</td>
<td>States have the obligation to adopt all measures necessary to ensure that adults responsible for the care, guidance and upbringing of family support</td>
<td>Empower (family)</td>
<td></td>
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<tr>
<td>para 47</td>
<td>For all stakeholders: Challenging attitudes which perpetuate the tolerance and condoning of violence in all its forms, including gender, race, colour, religion, ethnic or social origin, disability and other power imbalances;</td>
<td>changing attitudes and disseminating information on the CRC</td>
<td>Enabling environment</td>
</tr>
<tr>
<td>Para 47</td>
<td>Supporting children to protect themselves and their peers through awareness of their rights and development of social skills as well as age-appropriate empowerment strategies;</td>
<td>Empowering children to protect themselves</td>
<td>Empowerment</td>
</tr>
<tr>
<td>Para 48</td>
<td>Particular vigilance is needed when it comes to marginalized groups of children who are rendered particularly vulnerable due to their alternative methods of communicating, their immobility and/or the perceived view that they are incompetent, such as children with disabilities;</td>
<td>Marginalised groups need special attention</td>
<td>Vulnerability</td>
</tr>
<tr>
<td>Para 60</td>
<td>States parties must address discrimination against vulnerable or marginalized groups of children, such as outlined in paragraph 72 (g) of the present general comment, and make proactive efforts to ensure that such children are assured their right to protection on an equal basis with all other children</td>
<td>address discrimination against vulnerable/ marginalised and ensure equal protection</td>
<td>Discrimination</td>
</tr>
<tr>
<td>Para 61</td>
<td>[Best interests] cannot be used to justify practices, including corporal punishment and other forms of cruel or degrading punishment, which conflict with the child’s human dignity and right to physical integrity.</td>
<td>BI cannot conflict with dignity</td>
<td>Best interests</td>
</tr>
<tr>
<td>Para 62</td>
<td>The Committee expects States to interpret “development” in its broadest sense as a holistic concept, embracing the child’s physical, mental, spiritual, moral, psychological and social development.</td>
<td>Development as a broad concept</td>
<td>Right to development</td>
</tr>
<tr>
<td>Para 63</td>
<td>The Committee is of the opinion that child participation promotes protection and child protection is key to participation.</td>
<td>Children protection and promotion</td>
<td>Participation</td>
</tr>
<tr>
<td>Para 66</td>
<td>Implementation of article 19 requires recognition of, and support for, the primary importance of parents, extended families, legal guardians and community members in the caregiving and protection of children and the prevention of violence.</td>
<td>Primary role of family &amp; community</td>
<td>Duty bearer (family)</td>
</tr>
<tr>
<td>Para 68</td>
<td>The Committee is proposing a “coordinating framework on violence against children” for all child rights-based measures to protect children from violence in all its forms and to support a protective environment.</td>
<td>Child rights based framework &amp; environment</td>
<td>Enabling environment</td>
</tr>
<tr>
<td>Para 72</td>
<td>States parties should ensure that policies and measures take into account the different risks facing girls and boys in respect of various forms of violence in various settings. States should address all forms of gender discrimination as part of a comprehensive violence-prevention strategy.</td>
<td>Children as gendered beings</td>
<td>Gender perspective</td>
</tr>
<tr>
<td>Families (including extended families and other forms of family-type care arrangements) have the greatest potential to protect children and to prevent violence. Families can also support and empower children to protect themselves. The need to strengthen family life, support families and work with families with challenges must therefore be a priority child protection activity at every stage of intervention, particularly prevention (through establishing good child caregiving) and in early intervention.</td>
<td>Role of families as primarily support but also potential for abuse</td>
<td>Duty bearer</td>
<td></td>
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<tr>
<td>Proactive, tailored measures need to be taken to reduce the risk factors to which individual children or groups of children may be exposed in general or in particular contexts.</td>
<td>Reduction of risk factors and vulnerability</td>
<td>Enabling environment</td>
<td></td>
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<tr>
<td>Groups of children which are likely to be exposed to violence include, but are not limited to, children...</td>
<td>Groups vulnerable to violence</td>
<td>Vulnerability</td>
<td></td>
</tr>
<tr>
<td>The Committee has consistently expressed its support for systems of accountability, including in particular through data collection and analysis, indicator construction, monitoring and evaluation as well as support for independent human rights institutions. The Committee recommends that States parties publish an annual report on progress made with regard to the prohibition, prevention and elimination of violence, submit it to parliament for consideration and discussion, and invite all relevant stakeholders to respond to the information...</td>
<td>Accountability through standards, indicators, monitoring, evaluation and annual reports</td>
<td>Accountability</td>
<td></td>
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<tr>
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<tr>
<td>para 73</td>
<td>In the light of States parties’ obligations under articles 4 and 19, inter alia, the Committee considers that resource constraints cannot provide a justification for a State party's failure to take any, or enough, of the measures that are required for child protection. States parties are therefore urged to adopt comprehensive, strategic and time-bound coordinating frameworks for child caregiving and protection.</td>
<td>Resource allocation</td>
<td>Rights fulfilment (resources)</td>
</tr>
<tr>
<td>para 75</td>
<td>In addition to development assistance, cooperation is also needed to address child protection issues which cut across national borders, such as: cross-border movement of children</td>
<td>International cooperation</td>
<td>Rights fulfilment (cooperation)</td>
</tr>
</tbody>
</table>
It recalls that there is no hierarchy of rights in the Convention; all the rights provided for therein are in the “child’s best interests” and no right could be compromised by a negative interpretation of the child’s best interests.

The full application of the concept of the child’s best interests requires the development of a rights-based approach, engaging all actors, to secure the holistic physical, psychological, moral and spiritual integrity of the child and promote his or her human dignity.

Each State party must respect and implement the right of the child to have his or her best interests assessed and taken as a primary consideration, and is under the obligation to take all necessary, deliberate and concrete measures for the full implementation of this right.

States have the obligation to assess and take as a primary consideration the best interests of children as a group or in general in all actions concerning them.

The adoption of any law or regulation as well as collective agreements – such as bilateral or multilateral trade or peace treaties which affect children – should be governed by the best interests of the child.

The concept of the child’s best interests is flexible and adaptable. It should be adjusted and defined on an individual basis, according to the specific situation of the child or children concerned, taking into consideration their personal context, situation and needs. For individual decisions, the child’s best interests must be assessed and determined in light of the specific circumstances of the particular child. For collective decisions – such as by the legislator –, the best interests of children in general must be assessed and determined in light of the circumstances of the particular group and/or children in general. In both cases, assessment and determination should be carried out with full respect for the rights contained in the Convention and its Optional Protocols.

With regard to implementation measures, ensuring that the best interests of the child are a primary consideration in legislation and policy development and delivery at all levels of Government demands a continuous process of child rights impact assessment (CRIA) to predict the impact of any proposed law, policy or budgetary allocation on children and the enjoyment of their rights, and child rights impact evaluation to evaluate the actual impact of implementation measures. States have the obligation to create an enabling environment that respects human dignity and ensures the holistic development of every child. In the assessment and determination of the child’s best interests, the State must ensure full respect for his or her inherent right to life, survival and development.

As the child matures, his or her views shall have increasing weight in the assessment of his or her best interests.

Assessing the child’s best interests is a unique activity that should be undertaken in each individual case, in the light of the specific circumstances of each child or group of children or children in general.

Determining what is in the best interests of the child should start with an assessment of the specific circumstances that make the child unique. child's best interests assessed and taken as a primary consideration, and is under the obligation to take all necessary, deliberate and concrete measures for the full implementation of this right.

Although preservation of religious and cultural values and traditions as part of the identity of the child must be taken into consideration, practices that are inconsistent or incompatible with the rights established in the Convention are not in the child’s best interests.

Given the gravity of the impact on the child of separation from his or her parents, such separation should only occur as a last resort measure, as when the child is in danger of experiencing imminent harm or when otherwise necessary; separation should not take place if less intrusive measures are feasible.
<table>
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<th>General Comment No 46: Best Interests</th>
<th>Code</th>
<th>Theme</th>
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<tr>
<td>para 65</td>
<td>When separation becomes necessary, the decision-makers shall ensure that the child maintains the linkages and relations with his or her parents and family (siblings, relatives and persons with whom the child has had strong personal relationships) unless this is contrary to the child’s best interests.</td>
<td>maintain links to broader family</td>
<td>Family unity</td>
</tr>
<tr>
<td>para 76</td>
<td>The best interests of a child in a specific situation of vulnerability will not be the same as those of all the children in the same vulnerable situation.</td>
<td>Specific vulnerabilities of individuals</td>
<td>Vulnerability</td>
</tr>
<tr>
<td>para 78</td>
<td>States parties have the obligation to ensure that all adolescents, both in and out of school, have access to adequate information that is essential for their health and development in order to make appropriate health behaviour choices.</td>
<td>access adequate information to make healthy choices</td>
<td>Empowerment</td>
</tr>
<tr>
<td>Para 79</td>
<td>It is in the best interests of the child to have access to quality education, including early childhood education, non-formal or informal education and related activities, free of charge.</td>
<td>Right to education</td>
<td>Empowerment</td>
</tr>
<tr>
<td>Para 81</td>
<td>The elements will have to be weighted against each other in order to find the solution that is in the best interests of the child or children.</td>
<td>Child centred</td>
<td>Rights holder</td>
</tr>
<tr>
<td>Para 83</td>
<td>There might be situations where &quot;protection&quot; factors affecting a child (e.g. which may imply limitation or restriction of rights) need to be assessed in relation to measures of &quot;empowerment&quot; (which implies full exercise of rights without restriction).</td>
<td>Conflict between protection and empowerment</td>
<td>Rights holder</td>
</tr>
<tr>
<td>para 84</td>
<td>In the best-interests assessment, one has to consider that the capacities of the child will evolve.</td>
<td>evolving capacities of child</td>
<td>evolving capacities</td>
</tr>
<tr>
<td>para 89</td>
<td>A vital element of the process is communicating with children to facilitate meaningful child participation and identify their best interests.</td>
<td>Importance of communication</td>
<td>Empower</td>
</tr>
<tr>
<td>para 97</td>
<td>In order to demonstrate that the right of the child to have his or her best interests assessed and taken as a primary consideration has been respected, any decision concerning the child or children must be motivated, justified and explained.</td>
<td>Transparency</td>
<td>Accountability</td>
</tr>
<tr>
<td>para 98</td>
<td>States should establish mechanisms within their legal systems to appeal or revise decisions concerning children when a decision seems not to be in accordance with the appropriate procedure of assessing and determining the child's or children's best interests.</td>
<td>accessible mechanisms of review or appeal</td>
<td>Accountability (review)</td>
</tr>
<tr>
<td>para 99</td>
<td>The child-rights impact assessment (CRIA) can predict the impact of any proposed policy, legislation, regulation, budget or other administrative decision which affect children and the enjoyment of their rights and should complement ongoing monitoring and evaluation of the impact of measures on children’s rights.</td>
<td>child impact assessments</td>
<td>Accountability (CRIA)</td>
</tr>
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<td>Para no</td>
<td>General Comment No 15: The Right to Health</td>
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<tr>
<td>Para 2</td>
<td>A holistic approach to health places the realization of children's right to health within the broader framework of international human rights obligations.</td>
<td>Rights within framework</td>
<td>Interdependent</td>
</tr>
<tr>
<td>Para 3</td>
<td>The Committee addresses this general comment to a range of stakeholders working in the fields of children's rights and public health, including policymakers, programme implementers and activists, as well as parents and children themselves... Implementation of article 24 must take into account all human rights principles, especially the guiding principles of the Convention, and must be shaped by evidence-based public health standards and best practices.</td>
<td>Multiple duty bearers</td>
<td>Duty bearers</td>
</tr>
<tr>
<td>Para 4</td>
<td>The Committee recommends</td>
<td>Indivisibility of rights</td>
<td>Indivisible</td>
</tr>
<tr>
<td>Para 5</td>
<td>States should seek to ensure an enabling environment to encourage appropriate health-seeking behaviour by parents and children.</td>
<td>Multiple duty bearers should be engaged by state</td>
<td>Duty bearers</td>
</tr>
<tr>
<td>Para 6</td>
<td>A wide range of different duty bearers need to be involved if children's right to health is to be fully realized and the central role played by parents and other caregivers needs to be better recognized.</td>
<td>Interdependence and equal importance</td>
<td>Interdependence</td>
</tr>
<tr>
<td>Para 7</td>
<td>The Convention recognizes the interdependence and equal importance of all rights (civil, political, economic, social and cultural) that enable all children to develop their mental and physical abilities, personalities and talents to the fullest extent possible.</td>
<td>Equal</td>
<td></td>
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<tr>
<td>Para 8</td>
<td>In order to fully realize the right to health for all children, States parties have an obligation to ensure that children's health is not undermined as a result of discrimination, which is a significant factor contributing to vulnerability.</td>
<td>States must address discrimination, which contributes to vulnerability</td>
<td>Discrimination (positive)</td>
</tr>
<tr>
<td>Para 9</td>
<td>Attention should be given to the differing needs of girls and boys, and the impact of gender-related social norms and values on the health and development of boys and girls.</td>
<td>Gender based discrimination should be given consideration</td>
<td>Gender perspective</td>
</tr>
<tr>
<td>Para 10</td>
<td>States should identify factors at national and subnational levels that create vulnerabilities for children or that disadvantage certain groups of children.</td>
<td>States should identify factors that lead to vulnerability</td>
<td>Vulnerability</td>
</tr>
<tr>
<td>Para 11</td>
<td>Individual children's best interests should be based on their physical, emotional, social and educational needs, age, sex, relationship with parents and caregivers, and their family and social background, and after having heard their views according to article 12 of the Convention.</td>
<td>Individual circumstances of child</td>
<td>Rights holder</td>
</tr>
<tr>
<td>Para 12</td>
<td>States should develop procedures and criteria to provide guidance to health workers for assessing the best interests of the child in the area of health, in addition to other formal, binding processes that are in place for determining the child's best interests.</td>
<td>States should guide health workers in assessment of best interests</td>
<td>Empowerment</td>
</tr>
<tr>
<td>Para 13</td>
<td>Special attention must be given to certain categories of children, including children and adolescents with psychosocial disabilities.</td>
<td>Certain categories require special attention</td>
<td>Discrimination (positive)</td>
</tr>
<tr>
<td>Para 14</td>
<td>The health and health-related behaviours of parents and other significant adults have a major impact on children's health.</td>
<td>Role of family</td>
<td>Duty bearers (family)</td>
</tr>
<tr>
<td>Para 15</td>
<td>States are encouraged to conduct regular participatory consultations, which are adapted to the age and maturity of the child, and research with children, and to do this separately with their parents, in order to learn about their health challenges, developmental needs and expectations as a contribution to the design of effective interventions and health programmes.</td>
<td>Children and parents should be separately consulted</td>
<td>Participation</td>
</tr>
<tr>
<td>Para 16</td>
<td>Priorities along the life cycle, data and information that are collected and analysed should be disaggregated by age, sex, disability, socioeconomic status and sociocultural aspects and geographic location, in accordance with international standards.</td>
<td>Disaggregated data to devise and implement policies</td>
<td>Accountability (Disaggregated data)</td>
</tr>
<tr>
<td>Para 17</td>
<td>At the primary level, these services must be available in sufficient quantity and quality, functional, within the physical and financial reach of all sections of the child population, and acceptable to all.</td>
<td>Accessible services</td>
<td>Enabling environment</td>
</tr>
<tr>
<td>Para 18</td>
<td>States should seek to ensure an enabling environment to encourage appropriate health-seeking behaviour by parents and children.</td>
<td>Environment encourages health seeking behaviour</td>
<td>Enabling environment</td>
</tr>
<tr>
<td>Para 19</td>
<td>The Committee recommends that this be combined with nutrition and health education, including setting up school gardens and training teachers to improve children's nutrition and healthy eating habits.</td>
<td>Schools should provide meals and nutrition education</td>
<td>Enabling environment (School)</td>
</tr>
<tr>
<td>Para 20</td>
<td>States should take measures to address the dangers and risks that local environmental pollution poses to children's health in all sectors.</td>
<td>State shaping environment</td>
<td>Enabling environment</td>
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<tr>
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<tr>
<td>Para 58</td>
<td>The obligations under this provision include providing health-related information and support in the use of this information.</td>
<td>Right to information</td>
<td>Empowerment</td>
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<tr>
<td>Para 59</td>
<td>Children require information and education on all aspects of health to enable them to make informed choices in relation to their lifestyle and access to health services.</td>
<td>Information and education on health issues</td>
<td>Empowerment</td>
</tr>
<tr>
<td>Para 62</td>
<td>Prevention and health promotion should address the main health challenges facing children within the community and the country as a whole.</td>
<td>Preventive and promotive</td>
<td>Enabling environment</td>
</tr>
<tr>
<td>Para 64</td>
<td>Recognizing violence as a significant cause of mortality and morbidity in children, particularly adolescents, the Committee emphasizes the need to create an environment that protects children from violence and encourages their participation in attitudinal and behavioural changes at home, in schools and in public spaces; to support parents and caregivers in healthy child-rearing; and to challenge attitudes which perpetuate the tolerance and condoning of violence in all forms, including by regulating the depiction of violence by mass media.</td>
<td>State should create an environment that protects children, supports parents and challenges attitudes</td>
<td>Enabling environment</td>
</tr>
<tr>
<td>Para 65</td>
<td>States should protect children from solvents, alcohol, tobacco and illicit substances, increase the collection of relevant evidence and take appropriate measures to reduce the use of such substances among children</td>
<td>Protection incl through regulation</td>
<td>Enabling environment</td>
</tr>
<tr>
<td>Para 67</td>
<td>States should adopt evidence-based interventions to support good parenting, including parenting skills education, support groups and family counselling, in particular for families experiencing children's health and other social challenges.</td>
<td>Importance of parents &amp; state support</td>
<td>Enabling environment</td>
</tr>
<tr>
<td>Para 75</td>
<td>The State is responsible for realizing children's right to health regardless of whether or not it delegates the provision of services to non-State actors. In addition to the State, a wide range of non-State actors who provide information and services related to children's health and its underlying determinants have specific responsibilities and impact in this regard.</td>
<td>Responsibilities of multiple duty bearers</td>
<td>Duty bearers</td>
</tr>
<tr>
<td>Para 76</td>
<td>States' obligations include a duty to promote awareness of non-State actors' responsibilities and to ensure that all non-State actors recognize, respect and fulfill their responsibilities to the child, applying due diligence procedures where necessary.</td>
<td>Ensure non-state actors' awareness and compliance with child rights</td>
<td>Enabling environment</td>
</tr>
<tr>
<td>Para 77</td>
<td>The Committee calls on all non-State actors engaged in health promotion and services, especially the private sector, including the pharmaceutical and health-technology industry as well as the mass media and health service providers, to act in compliance with the provisions of the Convention and to ensure compliance by any partners who deliver services on their behalf.</td>
<td>Multiple duty bearers should comply</td>
<td>Duty bearers</td>
</tr>
<tr>
<td>Para 78</td>
<td>Taking the child's evolving capacity into account, parents and caregivers should nurture, protect and support children to grow and develop in a healthy manner.</td>
<td>Role of parents/ family</td>
<td>Duty bearers</td>
</tr>
<tr>
<td>Para 80</td>
<td>All business enterprises have an obligation of due diligence with respect to human rights, which include all rights enshrined under the Convention.</td>
<td>Business must respect human rights</td>
<td>Duty bearers (Business)</td>
</tr>
<tr>
<td>Para 84</td>
<td>Article 17 of the Convention delineates the responsibilities of mass media organizations. In the context of health</td>
<td>Media responsibilities</td>
<td>Duty bearers (Media)</td>
</tr>
<tr>
<td>Para 86</td>
<td>States parties to the Convention have obligations not only to implement children's right to health within their own jurisdiction, but also to contribute to global implementation through international cooperation.</td>
<td>International cooperation</td>
<td>Rights fulfilment (international)</td>
</tr>
<tr>
<td>Para 87</td>
<td>The Convention should guide all international activities and programmes of donor and recipient States related directly or indirectly to children's health</td>
<td>International obligations</td>
<td>Rights fulfilment (international)</td>
</tr>
<tr>
<td>Para 88</td>
<td>States have individual and joint responsibility, including through United Nations mechanisms, to cooperate in providing disaster relief and humanitarian assistance in times of emergency.</td>
<td>Humanitarian assistance</td>
<td>Rights fulfilment (international)</td>
</tr>
<tr>
<td>Para 89</td>
<td>The Committee reminds States to meet the United Nations target of allocating 0.7 per cent of gross national income to international development assistance targets</td>
<td></td>
<td>Rights fulfilment (international)</td>
</tr>
<tr>
<td>Para no</td>
<td>General Comment No 15: The Right to Health</td>
<td>Code</td>
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<tr>
<td>Para 90</td>
<td>Accountability is at the core of the enjoyment of children's right to health.</td>
<td>Accountability for health</td>
<td>Accountability</td>
</tr>
<tr>
<td>Para 91</td>
<td>States should provide an environment that facilitates the discharge of all duty bearers' obligations and responsibilities with respect to children's right to health and a regulatory framework</td>
<td>States should ensure enabling environment including regulatory framework and build capacities</td>
<td>Enabling environment</td>
</tr>
<tr>
<td>Para 92</td>
<td>With the active engagement of the Government, parliament, communities, civil society and children, national accountability mechanisms must be effective and transparent and aim to hold all actors responsible for their actions.</td>
<td>Quality of accountability mechanisms</td>
<td>Accountability</td>
</tr>
<tr>
<td>Para 93</td>
<td>The Committee encourages States to adopt and implement a comprehensive strategy to educate children, their caregivers, policymakers, politicians and professionals working with children about children's right to health, and the contributions they can make to its realization.</td>
<td>States should adopt a comprehensive education strategy</td>
<td>Accountability (strategy)</td>
</tr>
<tr>
<td>Para 95</td>
<td>Legislation should fulfill a number of additional functions in the realization of children's right to health by defining the scope of the right and recognizing children as right-holders;</td>
<td>Role of law</td>
<td>Enabling environment (law)</td>
</tr>
<tr>
<td>Para 96</td>
<td>States are encouraged to ratify and implement international and regional human rights instruments relevant to children's health and to report on all aspects of children's health accordingly.</td>
<td>States should ratify other rights instruments</td>
<td>Indivisibility</td>
</tr>
<tr>
<td>Para 98</td>
<td>Particular attention must be given to identifying and prioritizing marginalized and disadvantaged groups of children, as well as children who are at risk of any form of violence and discrimination.</td>
<td>Marginalised and disadvantaged groups</td>
<td>Discrimination (positive)</td>
</tr>
<tr>
<td>Para 101</td>
<td>States should engage all sectors of society, including children, in implementation of children's right to health.</td>
<td>State support</td>
<td>Enabling environment</td>
</tr>
<tr>
<td>Para 102</td>
<td>In children's health-related issues, parliaments have the responsibility to legislate, ensuring transparency and inclusiveness, and encourage continued public debate and a culture of accountability. They should create a public platform for reporting and debating performance and promoting public participation in independent review mechanisms.</td>
<td>Parliaments should fulfill obligations</td>
<td>Accountability</td>
</tr>
<tr>
<td>Para 109</td>
<td>At the heart of the development, implementation and monitoring of policies, programmes and services that aim to realize children's right to health is the availability of relevant and reliable data.</td>
<td>Gather disaggregated data</td>
<td>Accountability (data)</td>
</tr>
<tr>
<td>Para 111</td>
<td>Based on the outcome of the analysis, a strategy should be developed involving all stakeholders, both State and non-State actors and children.</td>
<td>Situation analyses</td>
<td>Accountability</td>
</tr>
<tr>
<td>Para 117</td>
<td>A well-structured and appropriately disaggregated set of indicators should be established for monitoring and evaluation to meet the requirements under the performance criteria above.</td>
<td>Disaggregated indicators should be used to improve services</td>
<td>Accountability</td>
</tr>
<tr>
<td>Para 118</td>
<td>National accountability mechanisms should monitor, review and act on their findings.</td>
<td>Monitoring, review</td>
<td>Accountability</td>
</tr>
<tr>
<td>Para 119</td>
<td>The Committee strongly encourages States to put in place functional and accessible complaints mechanisms for children that are community-based and render it possible for children to seek and obtain reparations when their right to health is violated or at risk.</td>
<td>Complaints mechanisms</td>
<td>Accountability</td>
</tr>
<tr>
<td>Para 120</td>
<td>States should ensure and facilitate access to courts for individual children and their caregivers and take steps to remove any barriers to access remedies for violations of children's right to health.</td>
<td>Access to court and remedies</td>
<td>Accountability</td>
</tr>
<tr>
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</tr>
<tr>
<td>para 2</td>
<td>States have obligations regarding the impact of business activities and operations on children's rights</td>
<td>States have obligations in relation to business impacts</td>
<td>Duty bearer</td>
</tr>
<tr>
<td>para 4</td>
<td>It is necessary for States to have adequate legal and institutional frameworks to respect, protect and fulfil children's rights, and to provide remedies in case of violations in the context of business activities and operations</td>
<td>legal and institutional framework</td>
<td>enabling environment</td>
</tr>
<tr>
<td>(a)</td>
<td>Childhood is a unique period of physical, mental, emotional and spiritual development and violations of children's rights, such as exposure to violence, child labour or unsafe products or environmental hazards may have lifelong, irreversible and even transgenerational consequences;</td>
<td>Childhood as a unique period of development</td>
<td>Vulnerability</td>
</tr>
<tr>
<td>Para 7</td>
<td>The Committee recognizes the relevance of the United Nations ‘Protect, Respect and Remedy’ Framework and the Guiding Principles on Business and Human Rights ...</td>
<td>challenges in obtaining remedies</td>
<td>Accountability</td>
</tr>
<tr>
<td>Para 8</td>
<td>It is generally challenging for children to obtain remedy – whether in the courts or through other mechanisms –</td>
<td>Other international documents should be given consideration</td>
<td>Interlink</td>
</tr>
<tr>
<td>Para 9</td>
<td>States should encourage such voluntary actions and initiatives as a means to create a business culture which respects and supports children's rights.</td>
<td>Encourage voluntary action</td>
<td>Enabling environment</td>
</tr>
<tr>
<td>Para 12</td>
<td>Children’s rights are universal, indivisible, interdependent and interrelated.</td>
<td>Rights are universal, indivisible, interdependent and interrelated</td>
<td>universal, indivisibility, interdependent interrelated</td>
</tr>
<tr>
<td>Para 13</td>
<td>States must ensure that all legislation, policies and programmes that deal with business issues are not intentionally or unintentionally discriminatory towards children in their content or implementation;</td>
<td>Protection from discrimination</td>
<td>non-discrimination</td>
</tr>
<tr>
<td>Para 14</td>
<td>States are required to prevent discrimination in the private sphere in general and provide remedy if it occurs.</td>
<td>Prevention</td>
<td>Enabling environment</td>
</tr>
<tr>
<td>Para 15</td>
<td>States are obliged to integrate and apply this principle in all legislative, administrative and judicial proceedings concerning business activities and operations that directly or indirectly impact on children.</td>
<td>Integration of best interests</td>
<td>best interests</td>
</tr>
<tr>
<td>Para 19</td>
<td>Measures 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 and the environmental impact of business.</td>
<td>Effective regulation, monitoring</td>
<td>enabling environment</td>
</tr>
<tr>
<td>Para 24</td>
<td>The Convention provides for a set of rights for children that impose a particular level of obligations on the State in view of the special status of children; there is a particular gravity to violations of children’s rights because they often have severe and long-lasting impact on child development</td>
<td>Particular vulnerability of children</td>
<td>Rights holders</td>
</tr>
<tr>
<td>Para 30</td>
<td>The Committee recommends that there should be a permanent monitoring mechanism or process aimed at ensuring that all non-State service providers have in place and apply policies, programmes and procedures which are in compliance with the Convention</td>
<td>Monitoring</td>
<td>Accountability</td>
</tr>
<tr>
<td>Para no</td>
<td>General Comment No 16</td>
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<tr>
<td>Para 37</td>
<td>States must regulate working conditions and ensure safeguards to protect children from economic exploitation and work that is hazardous or interferes with their education or harms their health or physical, mental, spiritual, moral or social development.</td>
<td>Regulation as protection</td>
<td>Enabling Environment</td>
</tr>
<tr>
<td>Para 41</td>
<td>States have obligations to engage in international cooperation for the realization of children's rights beyond their territorial boundaries.</td>
<td>International cooperation</td>
<td>Rights fulfilment (international)</td>
</tr>
<tr>
<td>Para 42</td>
<td>Host States have the primary responsibility to respect, protect and fulfil children’s rights in their jurisdiction.</td>
<td>ensure corporations are regulated</td>
<td>Duty bearer</td>
</tr>
<tr>
<td>Para 44</td>
<td>States should enable access to effective judicial and non-judicial mechanisms to provide remedy for children and their families whose rights have been violated by business enterprises extraterritorially when there is a reasonable link between the State and the conduct concerned.</td>
<td>Right to remedy regardless of jurisdiction</td>
<td>Accountability (remedy)</td>
</tr>
<tr>
<td>Para 47</td>
<td>States also retain their obligations in the field of development cooperation and should ensure that cooperation policies and programmes are designed and implemented in compliance with the Convention and the Optional Protocols thereto.</td>
<td>Avoid harm in international sphere</td>
<td>Rights fulfilment (international)</td>
</tr>
<tr>
<td>Para 48</td>
<td>A State engaged with international development, finance and trade organizations must take all reasonable actions and measures to ensure that such organizations act in accordance with the Convention and the Optional Protocols thereto in their decision-making and operations, as well as when entering into agreements or establishing guidelines relevant to the business sector.</td>
<td>ensure international development, finance and trade organisations comply with child rights</td>
<td>Rights fulfilment (international)</td>
</tr>
<tr>
<td>Para 53</td>
<td>Legislation and regulation are essential instruments for ensuring that the activities and operations of business enterprises do not adversely impact on or violate the rights of the child.</td>
<td>State must shape clear regulatory framework</td>
<td>Enabling environment</td>
</tr>
<tr>
<td>Para 54</td>
<td>In conformity with article 18, paragraph 3, of the Convention, States should create employment conditions within business enterprises which assist working parents.</td>
<td>State support for parents</td>
<td>Enabling environment</td>
</tr>
<tr>
<td>Para 55</td>
<td>States should develop and implement effective laws and regulations to obtain and manage revenue flows from all sources, ensuring transparency, accountability and equity.</td>
<td>Regulation as protection</td>
<td>Enabling environment</td>
</tr>
<tr>
<td>Para 57</td>
<td>States are also required to implement and enforce internationally agreed standards concerning children's rights, health and business, including the World Health Organization Framework Convention on Tobacco Control, and the International Code of Marketing of Breast-milk Substitutes and relevant subsequent World Health Assembly resolutions</td>
<td>States must implement and enforce international standards</td>
<td>Rights fulfilment (international)</td>
</tr>
<tr>
<td>Para 59</td>
<td>States should ensure that marketing and advertising do not have adverse impacts on children's rights by adopting appropriate regulation and encouraging business enterprises to adhere to codes of conduct and use clear and accurate product labelling and information that allow parents and children to make informed consumer decisions.</td>
<td>Regulating the media</td>
<td>Enabling environment</td>
</tr>
<tr>
<td>Para 61</td>
<td>(a) Strengthening regulatory agencies; (b) Disseminating laws and regulations regarding children's rights and business to stakeholders, including children and business enterprises; (c) Training judges and other administrative officials (d) Providing effective remedy through judicial or non-judicial mechanisms and effective access to justice.</td>
<td>Regulation, dissemination and training</td>
<td>Enabling environment</td>
</tr>
<tr>
<td>Para 62</td>
<td>States should require businesses to undertake child-rights due diligence</td>
<td>child rights due diligence</td>
<td>Accountability</td>
</tr>
<tr>
<td>Para 64</td>
<td>States should lead by example, requiring all State-owned enterprises to undertake child-rights due diligence and to publicly communicate their reports on their impact on children's rights, including regular reporting.</td>
<td>due diligence and publicise reports</td>
<td>Accountability</td>
</tr>
<tr>
<td>Para 65</td>
<td>As part of child-rights due diligence, large business enterprises should be encouraged and, where appropriate, required to make public their efforts to address child-rights impacts.</td>
<td>publicise child rights impact</td>
<td>Accountability</td>
</tr>
<tr>
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<tr>
<td>Para 66</td>
<td>Children often find it difficult to access the justice system to seek effective remedies for abuse or violations of their rights when business enterprises are involved.</td>
<td>Powerlessness of children</td>
<td>Vulnerability</td>
</tr>
<tr>
<td>para 68</td>
<td>States should focus their attention on removing social, economic and juridical barriers so that children can in practice have access to effective judicial mechanisms without discrimination</td>
<td>Special assistance to children in accessing justice</td>
<td>Accountability (remedies)</td>
</tr>
<tr>
<td>Para 71</td>
<td>Non-judicial mechanisms, such as mediation, conciliation and arbitration, can be useful alternatives for resolving disputes concerning children and enterprises.</td>
<td>Alternatives to judicial remedies</td>
<td>Accountability (remedies)</td>
</tr>
<tr>
<td>Para 72</td>
<td>States should make every effort to facilitate access to international and regional human rights mechanisms, facilitate access redress</td>
<td>Accountability (remedies)</td>
<td></td>
</tr>
<tr>
<td>Para 73</td>
<td>States should encourage a business culture that understands and fully respects children’s rights.</td>
<td>Guide businesses in respecting child rights</td>
<td>Enabling environment</td>
</tr>
<tr>
<td>Para 76</td>
<td>States have an obligation to monitor violations of the Convention and the Optional Protocols thereto committed or contributed to by business enterprises, including in their global operations.</td>
<td>Monitoring of violations</td>
<td>Accountability</td>
</tr>
<tr>
<td>Para 77</td>
<td>States should also ensure that they monitor progress in implementation of the Convention in the activities and operations of business.</td>
<td>Monitor businesses</td>
<td>Accountability</td>
</tr>
<tr>
<td>Para 82</td>
<td>The Committee recommends that States adopt and implement a comprehensive strategy to inform and educate all children, parents and caregivers that business has a responsibility to respect children’s rights wherever they operate, awareness raising</td>
<td>Enabling environment</td>
<td></td>
</tr>
<tr>
<td>Para 84</td>
<td>Civil society has a critical role in the independent promotion and protection of children's rights in the context of business operations.</td>
<td>Role of civil society</td>
<td>Duty bearer (Civil society)</td>
</tr>
<tr>
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<tr>
<td>para 3</td>
<td>The Committee is particularly concerned about the difficulties faced by particular categories of children in relation to enjoyment and conditions of equality of the rights defined in article 31, especially girls, poor children, children with disabilities, indigenous children, children belonging to minorities, among others.</td>
<td>Vulnerable categories face particular difficulties</td>
<td>Vulnerability</td>
</tr>
<tr>
<td>Para 8</td>
<td>Environments in which play and recreational opportunities are available to all children provide the conditions for creativity;</td>
<td>Enabling environments create the right conditions</td>
<td>Enabling environment</td>
</tr>
<tr>
<td>Para 10</td>
<td>Children’s development can be supported by loving and caring adults as they relate to children through play.</td>
<td>Role of adults</td>
<td>Enabling environment</td>
</tr>
<tr>
<td>Para 11</td>
<td>Involvement in a community’s cultural life is an important element of children’s sense of belonging.</td>
<td>Role in community’s culture</td>
<td>Rights holder</td>
</tr>
<tr>
<td>Para 12</td>
<td>Rest and leisure are as important to children’s development as the basics of nutrition, housing, health care and education.</td>
<td>Interplay of rights</td>
<td>Interdependence</td>
</tr>
<tr>
<td>Para 13</td>
<td>Caregivers may contribute to the creation of environments in which play takes place, but play itself is non-compulsory, driven by intrinsic motivation and undertaken for its own sake, rather than as a means to an end.</td>
<td>Adults should create supportive environments</td>
<td>Enabling environment (caregivers)</td>
</tr>
<tr>
<td>Para 14</td>
<td>States parties must therefore ensure the necessary and appropriate preconditions for participation to facilitate and promote opportunities for the realization of the rights under article 31</td>
<td>States must ensure the necessary preconditions</td>
<td>Enabling environment</td>
</tr>
<tr>
<td>Para 15</td>
<td>Particular attention should be given to addressing the rights of certain groups of children</td>
<td>Vulnerable groups should be given particular attention</td>
<td>Vulnerability</td>
</tr>
<tr>
<td>Para 16</td>
<td>The Committee emphasizes that the realization of the rights under article 31 is, by definition, in the child’s best interests.</td>
<td>Interdependence of rights</td>
<td>Best interests</td>
</tr>
<tr>
<td>Para 17</td>
<td>The Committee underlines the importance of providing opportunities for children to contribute to the development of legislation, policies, strategies and design of services to ensure the implementation of the rights under article 31</td>
<td>Children should be provided opportunities to contribute</td>
<td>Participation</td>
</tr>
<tr>
<td>Para 18</td>
<td>Children have the right to express themselves in whatever way they choose, subject only to restrictions as defined by law and when necessary to ensure respect for the rights and reputations of others, and for the protection of national security, public order and public health or morals.</td>
<td>Freedom of expression</td>
<td>Rights holder</td>
</tr>
<tr>
<td>Para 19</td>
<td>Children are entitled to information and materials which are of social and cultural benefit and which derive from a diversity of community, national and international sources.</td>
<td>Right to info</td>
<td>Rights holder</td>
</tr>
<tr>
<td>Para 20</td>
<td>Efforts must be made to ensure that refugee and asylum-seeking children have equal opportunities with children from the host country to enjoy the rights provided for in article 31</td>
<td>Accessible and inclusive environments</td>
<td>Non-discrimination</td>
</tr>
<tr>
<td>Para 21</td>
<td>Accessible and inclusive environments and facilities must be made available to children with disabilities to enable them to enjoy their rights under article 31</td>
<td>Accessible and inclusive environments</td>
<td>Non-discrimination</td>
</tr>
<tr>
<td>Para 22</td>
<td>Children from ethnic, religious or linguistic minorities should be encouraged to enjoy and participate in their own cultures.</td>
<td>Minority rights</td>
<td>Participation</td>
</tr>
<tr>
<td>Para 23</td>
<td>Children need access to inclusive spaces that are free from inappropriate hazards and close to their own homes, as well as with measures to promote safe, independent mobility as their capacities evolve.</td>
<td>Access to safe spaces</td>
<td>Enabling environments</td>
</tr>
<tr>
<td>Para 24</td>
<td>Children are at particular risk both because their natural curiosity and exploratory play increases the likelihood of exposure and because the impact of an explosion is greater on a child</td>
<td>Unsafe, hazardous environment</td>
<td>Vulnerability</td>
</tr>
<tr>
<td>Para 25</td>
<td>The increasing erosion of many spaces traditionally available to children creates a need for greater Government intervention to protect the rights under article 31</td>
<td>Public environment</td>
<td>Enabling environment</td>
</tr>
<tr>
<td>Para 26</td>
<td>Resistance to children’s use of public spaces</td>
<td>Children’s access to built environment</td>
<td>Enabling environment</td>
</tr>
<tr>
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<tr>
<td>Para 38</td>
<td>States are encouraged to promote dialogue between older and younger generations to encourage greater recognition of children as rights holders, and of the importance of networks of diverse community spaces in local areas or municipalities which can accommodate the play and recreational needs of all children.</td>
<td>Promote recognition as rights holders</td>
<td>Enabling environment</td>
</tr>
<tr>
<td>Para 39</td>
<td>The best interests of the child and listening to children’s experiences and concerns should be mediating principles for determining the level of risk to which children can be exposed.</td>
<td>Balance between protection and participation</td>
<td>Best interests</td>
</tr>
<tr>
<td>Para 42</td>
<td>Children are entitled to time that is not determined or controlled by adults, as well as time in which they are free of any demands – basically to do ‘nothing, if they so desire.</td>
<td>Freedom to play</td>
<td>Rights holders</td>
</tr>
<tr>
<td>Para 45</td>
<td>These platforms offer huge benefits – educationally, socially and culturally – and States are encouraged to take all necessary measures to ensure equality of opportunity for all children to experience those benefits.</td>
<td>Encourage access to internet</td>
<td>Enabling environment</td>
</tr>
<tr>
<td>Para 48</td>
<td>Given these widespread and pervasive barriers impeding girls’ realization of their rights under article 31, the Committee urges States parties to take action to challenge gender stereotypes which serve to compound and reinforce patterns of discrimination and inequality of opportunity.</td>
<td>States should challenge gender stereotypes</td>
<td>Gender perspective</td>
</tr>
<tr>
<td>Para 50</td>
<td>Pro-active measures are needed to remove barriers and promote accessibility to and availability of inclusive opportunities for children with disabilities to participate in all these activities.</td>
<td>Equal access for children with disabilities</td>
<td>Discrimination (positive)</td>
</tr>
<tr>
<td>Para 51</td>
<td>Committee stresses the need for States to work towards the de-institutionalization of children; but until that goal is reached, States should adopt measures to ensure that all such institutions guarantee both spaces and opportunities for children to associate with their peers in the community, to play and to participate in games, physical exercise, cultural and artistic life.</td>
<td>Children in institutions should be provided with time and access to self directed play</td>
<td>Enabling environment</td>
</tr>
<tr>
<td>Para 52</td>
<td>States have an obligation to recognize, protect and respect the right of minority groups to take part in the cultural and recreational life of the society in which they live, as well as to conserve, promote and develop their own culture.</td>
<td>Removing barriers to minorities' access to play</td>
<td>Enabling environment</td>
</tr>
<tr>
<td>Para 56</td>
<td>Support for caregivers, Such support could be in the form of practical guidance, for example, on how to listen to children while they are playing; create environments that facilitate children’s play; allow children to play freely and play with children.</td>
<td>State support for caregivers</td>
<td>Enabling environment</td>
</tr>
<tr>
<td>Para 57</td>
<td>Awareness raising: States should invest in measures to challenge widespread cultural attitudes which attach low value to the rights provided for in article 31.</td>
<td>Awareness raising incl through harnessing media</td>
<td>Enabling environment</td>
</tr>
<tr>
<td>Para 57</td>
<td>Non-discrimination: Legislation is required to guarantee access for every child, without discrimination on any ground, to all recreational, cultural and artistic environments, including public and private spaces, natural spaces, parks, playgrounds, sporting venues, museums, cinemas, libraries, theatres, as well as to cultural activities, services and events;</td>
<td>Access to spaces</td>
<td>Non-discrimination</td>
</tr>
<tr>
<td></td>
<td><strong>Regulation of non-State actors:</strong> Legislation, regulations and guidelines should be introduced, together with the necessary budgetary allocation and effective mechanisms for monitoring and enforcement, to ensure that all members of civil society, including the corporate sector, comply with the provisions of article 31, including, inter alia:</td>
<td>Regulation as protection</td>
<td>Enabling environment (law)</td>
</tr>
<tr>
<td></td>
<td><strong>Protection of children from harm:</strong> Child protection policies, procedures, professional ethics, codes and standards for all professionals working with children in the field of play, recreation, sports, culture and the arts must be introduced and enforced.</td>
<td>protected from potential harm</td>
<td>Enabling environment</td>
</tr>
<tr>
<td></td>
<td>Measures should be introduced to promote online access and accessibility, as well as safety for children. These should include action to empower and inform children to enable them to act safely online, to become confident and responsible citizens of digital environments and to report abuse or inappropriate activity when it is encountered.</td>
<td>Empowering to reduce harmful affects of online world</td>
<td>Empower</td>
</tr>
<tr>
<td></td>
<td>Review policies concerning the commercialization of toys and games to children, including through children's television programmes</td>
<td>Review policies for toys and games</td>
<td>Enabling environment</td>
</tr>
<tr>
<td>Para no</td>
<td>General Comment No 17: Right to Play</td>
<td>Code</td>
<td>Theme</td>
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<td>and directly related advertisements, with particular regard to those promoting violence, girls or boys in a sexual way and reinforcing gender and disability stereotypes;</td>
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<td>Limit exposure to advertising during peak viewing hours for children;</td>
<td>Limit advertising</td>
<td>Enabling environment</td>
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<td></td>
<td>Complaint mechanisms: Independent, effective, safe and accessible mechanisms must be in place for children to make complaints and seek redress</td>
<td>complaint mechanisms</td>
<td>Accountability (complaints)</td>
</tr>
<tr>
<td>Para 58</td>
<td>The Committee strongly encourages States to consider introducing legislation to ensure the rights under article 31 for every child, together with a timetable for implementation.</td>
<td>Legislation and planning</td>
<td>Enabling environment</td>
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<td></td>
<td>States need to collect population-based data, disaggregated by age, sex, ethnicity and disability, to gain an understanding of the extent and nature of children’s engagement in play, recreation and cultural and artistic life.</td>
<td>Disaggregated data</td>
<td>Accountability (data)</td>
</tr>
<tr>
<td></td>
<td>Budgets should be reviewed to ensure that the allocation for children</td>
<td>Budget review</td>
<td>Accountability</td>
</tr>
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<td></td>
<td>Investment in universal design is necessary with regard to play, recreational, cultural, arts and sports facilities, buildings, equipment and services, consistent with the obligations to promote inclusion and protect children with disabilities from discrimination</td>
<td>Designing environments</td>
<td>Enabling environments</td>
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<td></td>
<td>Local municipalities should assess provision of play and recreation facilities to guarantee equality of access by all groups of children, including through child-impact assessments.</td>
<td>Equality of access</td>
<td>Non-discrimination</td>
</tr>
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<td>Availability of inclusive parks, community centres, sports and playgrounds that are safe and accessible to all children;</td>
<td>Availability of spaces</td>
<td>Enabling environments</td>
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<td></td>
<td>Creation of a safe living environment for free play, including design of zones in which players, pedestrians and bikers have priority;</td>
<td>Creating a safe environment</td>
<td>Enabling environments</td>
</tr>
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<td></td>
<td>Public safety measures to protect areas for play and recreation from individuals or groups who threaten children’s safety;</td>
<td>Protecting areas</td>
<td>Enabling environments</td>
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<td></td>
<td>Dedicated and affordable cultural activities for children of all ages and from all communities, including theatre, dance, music, art exhibitions, libraries and cinema. Such provision should comprise opportunities for children to produce and create their own cultural forms as well as exposure to activities produced by adults for children;</td>
<td>Provision of cultural activities</td>
<td>Enabling environments</td>
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<td></td>
<td>Review of all cultural policies, programmes and institutions to ensure their accessibility and relevance for all children and to ensure that they take into account the needs and aspirations of children and support their emerging cultural practices;</td>
<td>Review of policies</td>
<td>Accountability</td>
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<td></td>
<td>Schools: Educational environments should play a major role in fulfilling the obligations under article 31.</td>
<td>Role of schools</td>
<td>Duty bearers (schools)</td>
</tr>
<tr>
<td>Para no</td>
<td>General Comment No 18: Gender</td>
<td>Code</td>
<td>Theme</td>
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<td>Para 12</td>
<td>The obligation to protect requires States parties to establish legal structures to ensure that harmful practices are promptly, impartially and independently investigated, that there is effective law enforcement and that effective remedies are provided to those who have been harmed by such practices.</td>
<td>Role of law</td>
<td>Enabling environments</td>
</tr>
<tr>
<td>Para 30</td>
<td>States parties to CEDAW are obliged to plan and adopt appropriate legislation, policies and measures and ensure that their implementation responds effectively to specific obstacles, barriers and resistance to the elimination of discrimination that give rise to harmful practices and violence against women (arts. 2 and 3).</td>
<td>Eliminate discrimination through laws, policies, measures</td>
<td>Enabling environments</td>
</tr>
<tr>
<td>Para 32</td>
<td>The effective prevention and elimination of harmful practices require the establishment of a well-defined, rights-based and locally-relevant holistic strategy which includes supportive legal and policy measures, including social measures that are combined with a commensurate political commitment and accountability at all levels.</td>
<td>Prevention of harmful practices requires rights based strategy</td>
<td>Enabling environments</td>
</tr>
<tr>
<td>Para 34</td>
<td>Implementation of any holistic strategy necessarily requires the provision of adequate organizational, human, technical and financial resources that are supplemented with appropriate measures and tools, such as regulations, policies, plans and budgets.</td>
<td>Strategies must be adequately resourced and monitored</td>
<td>Accountability</td>
</tr>
<tr>
<td>Para 36</td>
<td>The regular and comprehensive collection, analysis, dissemination and use of quantitative and qualitative data on harmful practices is crucial to ensure effective policies, the development of appropriate strategies and the formulation of actions as well as for evaluating impact and monitoring progress achieved towards the elimination of harmful practices.</td>
<td>Data to evaluate and plan policies and monitoring</td>
<td>Accountability</td>
</tr>
<tr>
<td>Para 38</td>
<td>Prioritize the regular collection, analysis, dissemination and use of quantitative and qualitative data on harmful practices disaggregated on the basis of sex, age, geographical location, socio-economic status, education levels and other key factors, and ensure that these activities are adequately resourced.</td>
<td>Disaggregated data</td>
<td>Accountability</td>
</tr>
<tr>
<td>Para 39</td>
<td>Collect data through the use of national demographic and indicator surveys and censuses which may be supplemented by data from nationally representative household surveys.</td>
<td>Data collection</td>
<td>Accountability</td>
</tr>
<tr>
<td>Para 40</td>
<td>Each State party is under the obligation to send a clear message of condemnation of harmful practices, provide legal protection for victims, enable State and non-State actors to protect women and children at risk, provide appropriate responses and care and ensure the availability of redress and an end to impunity.</td>
<td>Condemn practices, provide protection, protect at risk, provide responses and ensure redress</td>
<td>Accountability</td>
</tr>
<tr>
<td>Para 41</td>
<td>Legislation must therefore be supplemented with a comprehensive set of measures to facilitate its implementation, enforcement, follow-up, monitoring and evaluation of the results achieved.</td>
<td>Limits of legislation</td>
<td>Enabling environment</td>
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<td>Para 51</td>
<td>Women and children affected by harmful practices should have access to legal remedies, victim support and rehabilitation services as well as social and economic opportunities.</td>
<td>Compensation</td>
<td>Accountability</td>
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<td>Para 55</td>
<td>Both Committees have underlined that prevention can be best achieved through a human rights-based approach to changing social and cultural norms, empowering women and girls, building the capacity of all relevant professionals who are in regular contact with victims, potential victims and perpetrators of harmful practices at all levels, and raising awareness of the causes and consequences of harmful practices, including through dialogue with relevant stakeholders.</td>
<td>Prevention through changing norms, empowerment, capacity building and raising awareness</td>
<td>Empowerment</td>
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<td>Para 60</td>
<td>States parties have an obligation to challenge and change patriarchal ideologies and structures that constrain women and girls from fully exercising their human rights and freedoms education is an important tool for empowering women and girls to claim their rights.</td>
<td>States must challenge and change harmful ideologies and structures</td>
<td>Empowerment</td>
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<td>Para 65</td>
<td>Another means of encouraging the empowerment of women and girls is by building their social assets. This can be facilitated through the creation of safe spaces where girls and women can connect with peers, mentors, teachers and community leaders and express themselves, speak out, articulate their aspirations and concerns and participate in decisions affecting their lives.</td>
<td>State should facilitate the forming of groups to empower women</td>
<td>Empowerment</td>
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<tr>
<td>Para no</td>
<td>General Comment No 18: Gender</td>
<td>Code</td>
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<td>Para 69</td>
<td>A comprehensive, holistic and effective approach to capacity-building should aim to engage influential leaders, such as traditional and religious leaders, and as many relevant professional groups as possible, including health, education and social workers, asylum and immigration authorities, the police, public prosecutors, judges and politicians at all levels.</td>
<td></td>
<td>Capacity building</td>
</tr>
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<td>Para 73</td>
<td>To challenge socio-cultural norms and attitudes that underlie harmful practices, including male dominated power structures, sex and gender-based discrimination and age hierarchies, both Committees regularly recommend that States parties undertake comprehensive public information and awareness-raising campaigns that are part of long-term strategies to eliminate harmful practices.</td>
<td>States should inform and awareness raise to challenge social norms</td>
<td>Empowerment</td>
</tr>
<tr>
<td>Para 74</td>
<td>The mass media can perform an important function in ensuring new thinking in particular through women’s and children’s access to information and material aimed at the promotion of their social and moral well-being and physical and mental health, in line with obligations under both Conventions that help to protect them from harmful practices.</td>
<td>Role of mass media</td>
<td>Duty bearer (media)</td>
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