

**CONSIDERING THE BEST INTERESTS OF THE CHILD
WHEN MARKETING FOOD TO CHILDREN: AN
ANALYSIS OF THE SOUTH AFRICAN REGULATORY
FRAMEWORK**

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DECLARATION

By submitting this dissertation electronically, I declare that the entirety of the work contained therein is my own, original work, that I am the authorship owner thereof (unless to the extent explicitly otherwise stated) and that I have not previously in its entirety or in part submitted it for obtaining any qualification.

Date: December 2016

SUMMARY

This thesis seeks to establish whether the South African government fulfils its international and constitutional obligations by applying the standard of the best interests of the child when food-marketing practices to children are employed. According to the World Health Organisation, overweight and obesity ranks as the fifth leading risk for death globally. It is therefore of particular concern to note that the WHO reports that in 2013 more than 42 million children under the age of five were overweight or obese. Although the reasons for the tremendous increase in global obesity rates can be complex and a number of factors contribute to the associated rise in non-communicable diseases, research has shown that the heavy marketing of fast food and energy-dense, micronutrient-poor foods and beverages is a probable causal factor in weight gain and obesity. It has been established and accepted that there is a relationship between the marketing of food and children's dietary choices and consumption. Moreover, studies from all over the world show that the foods which are most often marketed to children, are foods which are nutritionally poor and which contain high levels of salt, sugar and fat. Consequently, the WHO and other bodies have called for a restriction to be placed on the marketing of nutritionally poor foods to children. This thesis entails a discussion and an analysis of South Africa's response to this call. It describes and assesses this country's regulatory efforts regarding the marketing of food to children, comparing it to standards set by both international law and methods of regulation in other jurisdictions. The aim of the thesis is to assess the implementation of South Africa's international and constitutional obligations in this respect, focussing in particular on the duty to regard the best interests of children as a matter of paramount importance and primary concern. The concept of the best interests of the child has been firmly entrenched in international law, the South African Constitution and South African legislation and jurisprudence. Since the Committee on the Rights of the Child has confirmed that the best interests of the child is a substantive right of itself, while also being a rule of procedure and a method of interpretation, it is also true that the implementation of this right may have an effect on other fundamental rights and freedoms. The thesis provides some suggestions as to how to achieve a proportional balance between the best interests of the child and the rights of the food and media industries, and of parents in South Africa, whilst bearing in mind that children's interests are more important than anything else.

OPSOMMING

Hierdie tesis stel ten doel om vas te stel of die Suid-Afrikaanse regering sy internasionale en grondwetlike verpligtinge nakom deur die standaard van die beste belang van die kind toe te pas wanneer kosprodukte aan kinders bemark word. Volgens die Wêreldgesondheidsorganisasie (WGO), is oorgewig en vetsug die vyfde grootste risiko faktor vir sterftes. Daarom is dit veral kommerwekkend dat die WGO rapporteer dat meer as 42 miljoen kinders in 2013 oorgewig of vetsugtig was. Alhoewel die redes is vir die geweldige en wêreldwye toename in vetsug syfers kompleks is, en 'n verskeidenheid faktore 'n rol speel in die verwante styging in nie-oordraagbare siektes, het navorsing bewys dat die aggressiewe bemarking van gemorskos en ander kos met baie kalorieë maar weinig mikro-nutriënte, 'n waarskynlike kousale faktor in gewigstoename en vetsug is. Verskeie studies het dit bevestig en dit word aanvaar dat daar 'n verwantskap is tussen die bemarking van kos en die keuses en verbruik van kos deur kinders. Daar is verdermeer bewys dat die kosprodukte wat die meeste aan kinders bemark word, kosse is wat baie min nutriënte maar hoë vlakke van sout, suiker en vet bevat. Die WGO en ander liggame bepleit daarom 'n beperking op die bemarking van hierdie kosse aan kinders. Hierdie tesis bevat 'n bespreking en 'n analise van Suid-Afrika se reaksie tot hierdie pleidooi. Dit bespreek en evalueer die land se metodes van regulering ten opsigte van die bemarking van kos aan kinders, deur die metodes te vergelyk met die standarde wat deur die internasionale reg en ander jurisdiksies se reguleringsmeganismes gestel word. Die doel van die tesis is om die implementering van Suid-Afrika se internasionale en grondwetlike verpligtinge in hierdie opsig, te beoordeel, terwyl daar spesifiek gefokus word op die plig om die beste belang van die kind te beskou as 'n aangeleentheid van deurslaggewende en primêre belang. Die konsep van die beste belang van die kind is verskans in die internasionale reg, die Suid-Afrikaanse Grondwet en Suid-Afrikaanse wetgewing en regsleer. Aangesien die Komitee van die Regte van die Kind bevestig het dat die beste belang van die kind 'n substantiewe reg opsig self is, asook 'n prosedurele reël en 'n metode van interpretasie, is dit ook waar dat die implementering van hierdie reg 'n effek op ander fundamentele regte en vryhede kan hê. Hierdie tesis verskaf 'n aantal voorstelle ten opsigte van 'n proporsionele balans tussen die beste belang van die kind en die regte van die kos en media industrieë, en die van ouers in Suid-Afrika, terwyl dit in ag geneem moet word dat kinders se belange belangriker is as enige iets anders.

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God. Ek verstaan nie U weë en tydsberekening nie. Maar daar is net een ry spore.

LIST OF ABBREVIATIONS

AAAA	American Association of Advertising Agencies
AAF	American Advertising Federation
ACRWC	African Charter to the Rights and Welfare of the Child
AMS	Audiovisual Media Services
ANA	Association of National Advertisers B
ASA Code	South African Advertising Standards Authority
BCAP	Broadcast Committee on Advertising Practice
BCCSA	Broadcasting Complaints Commission of South Africa
CAP	Committee of Advertising Practice
CARU	Children's Advertising Review Unit
CBBB	Council of Better Business Bureaus, Inc.
CCFBAI	Canadian Children's Food and Beverage Advertising Initiative
CSPI	Center for Science in the Public Interest
CRC	Convention on the Rights of the Child
CRIA	Child rights impact assessments
DMA	Direct Marketing Association
EASO	European Association for the Study of Obesity
ECJ	European Court of Justice
ERA	Electronic Retailing Association
ERSP	Electronic Retailing Self-Regulation Program
EU	European Union
FAO	Food and Agriculture Organisation
FCC	Federal Communications Commission
FDA	Food and Drug Administration
FSA	Food Standards Agency
FTC	Federal Trade Commission
IAB	Interactive Advertising Bureau
IASO	International Association for the Study of Obesity
ICC	International Chamber of Commerce
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights

IDF	International Diabetes Federation
IOC	International Olympic Committee
IOTF	International Obesity Task Force
IPA	International Pediatric Association
IUNS	International Union of Nutritional Sciences
FCTC	World Health Organisation Framework Convention on Tobacco Control
FTC	Federal Trade Commission
GATT 1994	General Agreement on Tariffs and Trade 1994
HFSS foods	Food containing high amounts of fat, sugar and salt
JRC	Joint Research Centre
NAD	National Advertising Division
NARB	National Advertising Review Board
NARC	National Advertising Review Council
NGO	Non-governmental Organisation
SANHANES	South African National Health and Nutrition Examination Survey
SCA	Supreme Court of Appeal
SCOPE	Specialist Certification of Obesity Professionals in Education
SSB	Sugar-sweetened beverages
TOP	Olympic Partner programme
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
TWF	Television Without Frontiers
UK	United Kingdom
UN	United Nations
UNESCO	United Nations Educational, Scientific, and Cultural Organization
UNICEF	United Nations Children's Fund
USA	United States of America
WHA	World Health Assembly
WHF	World Heart Federation
WHO	World Health Organisation
WIPO	World Intellectual Property Organisation

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CHAPTER 1: INTRODUCTION AND AIM OF THIS THESIS*

1 Problem identification

Children are human beings. As human beings, they are the bearers of human rights and entitled to the fundamental freedoms enshrined in various instruments of international, regional and domestic human rights law. Moreover, children are a special group of human beings with distinctive characteristics and needs. Since children are people who may not yet have fully developed physically, mentally or socially, they have specific vulnerabilities and incapacities.¹ Children are to be guided and assisted during the period of growth and development of their capacities so that they may mature into contributing adult members of society who will assume their responsibilities within the community.² These facts warrant special measures of protection and the implementation and promotion of children's rights in a unique manner.

The foundation for this unique method of implementation lies in the recognition that children's rights are manifestly important: whenever a child is involved in a matter, the child's rights must be considered. Not only should it be considered but children's best interests must also be regarded as the first and foremost aspect of that matter. This approach has been firmly entrenched in a number of legal instruments, most notably in Article 3 of the CRC. Article 3 provides that "[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."³ The Committee on the Rights of the Child has interpreted

* The idea for this study was born from the views and arguments which I expressed in L Mills "Selling Happiness in a Meal: Serving the Best Interests of the Child at Breakfast, Lunch and Supper" (2012) 20 *Int'l J Child Rts* 624-644. Many of the thoughts which I raised therein, will be repeated in this thesis. I have made every effort to acknowledge the use of those ideas in this study but concede that there may still be some room for error in this respect.

¹ See in this regard the preamble to the Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 ("CRC"), recalling, in particular, the Declaration of the Rights of the Child, which proclaims that "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection". See also the preamble to the African Charter to the Rights and Welfare of the Child (adopted on 1 July 1990, entered into force 29 November 1999) OAU Doc. CAB/LEG/153/Rev.2 (1990) ("ACRWC"), which recognises that "on account of the child's physical and mental immaturity he/she needs special safeguards and care."

² See the preamble to the CRC.

³ At this point it must be noted that the use of the word "interests" as opposed to "rights" in these and other legal instruments will be explained in ch 3 at 2 below.

this provision of the CRC to be a substantive right of itself, while also being a rule of procedure and a method of interpretation.⁴

However, applying this unique approach is easier said than done: any study of the theory of children's rights reveals that this field of law requires an analysis of many intricacies.⁵ First and foremost, children's rights cannot be interpreted or promoted without a consideration of children as individual human beings, as members of a family, and as members of society.⁶ The many legal, philosophical, moral and social issues require an analysis and understanding of how to identify children's rights, how to balance conflicting rights of the child, as well as how to resolve the dispute which arises when the implementation of children's rights impact upon the rights of others.⁷ Moreover, the analysis may not be restricted to a theoretical exercise, since every attempt should be made to "articulate and enumerate the practical implications"⁸ of saying that children have rights and that their best interests are paramount. As explained by Fortin, when existing legal principles can reflect and demonstrate the theoretical ideals, the law gains greater intellectual validity.⁹

In order to provide practical implementation of the theory of children's rights and to truly understand what it means to give paramount consideration to the best interests of the child, the inquiry should also include asking how, if at all, the principle affects an aspect of children's lives which is ostensibly so routine but yet so vital, namely what food they eat every day. In order to increase consumption, food is being marketed today in many different and ubiquitous ways, especially to children. If the international standard of the primacy of children's best interests is to be applied, food and marketing companies also need to consider the effect that their practices have on children. Furthermore, if it can be accepted that the state, as signatory to instruments of international child law, has the obligation to consider, develop, and implement the principle of the best interests of the child, the state has the duty to ensure that

⁴ UNCRC "General Comment No 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art 3, para 1)" UN Doc CRC/C/GC/14 4 ("General Comment No 14 (2013)").

⁵ S Human "The Theory of Children's Rights" in CJ Davel (ed) *Child Law in South Africa* (2009) 243. See also Mills (2012) 624.

⁶ Human "The Theory of Children's Rights" in *Child Law in South Africa* 243; JA Robinson "Reflections on the conflict of interests of children and parents" (2013) 76 *THRHR* 400 406.

⁷ J Fortin *Children's Rights and the Developing Law* (2003) 3.

⁸ SA Wolfson "Children's Rights: The Theoretical Underpinning of the 'Best Interests of the Child'" in M Freeman & P Veerman (eds) *The Ideologies of Children's Rights* (1992) 7.

⁹ Fortin *Children's Rights and the Developing Law* 3. See also Mills (2012) 625.

children's rights are effected in every daily experience of a child's life. As a result, the state not only has the duty to assist parents and other family members of the child in achieving this goal, but it also has the obligation to ensure that members of the broader community, in particular food and marketing businesses, consider the best interests as their point of departure. This may necessitate an intrusion upon private decisions, institutions and enterprises.

However, the question as to the degree of state intervention into private lives has always been a controversial one and is especially evident when asked in the context of personal choices as to food consumption. In addition to the freedom of choice, other rights, including the right to freedom of trade, commercial speech and the intellectual property of stakeholders such as food manufacturers, may be affected by government intervention. It is clear that, in order to address the issue of the regulation of food marketing to children, a number of conflicting rights must be considered and, ultimately, balanced. This balancing exercise provides a number of challenges. In some instances, the solution to these challenges can be found in international standards, guiding principles and best practices employed by other jurisdictions.

Against this background, this thesis entails a discussion and an analysis of South African regulatory efforts regarding the marketing of food to children, comparing it to international standards set by both international law and methods of regulation in other jurisdictions. The aim of the discussion and analysis is to assess the South African response to its international and constitutional obligations in this respect. To this end, it must first be determined what these obligations are and what it means to consider the best interests of the child in complying with such obligations. Ultimately, the thesis aims to provide a sound legal framework and practical guidance as to how meaning and effect may be given to the principle of the best interests of the child when food is being marketed to her.

A key aspect of the assessment entails a discussion of the parameters of the carefully balanced relationship, which must exist between children, their parents, the food industry and the state, in order to respect and promote the rights of all parties concerned. This discussion will consequently consider how the South African government may strike a balance between the best interests of the child, the rights of parents and the rights of the food and marketing industries. When evaluating regulatory efforts in the context of promoting children's rights, it will be argued that, in

an attempt to achieve a balance between the rights of all stakeholders, the best interests of the child must, at all times, be considered to be paramount.

2 Rationale

Obesity, according to the World Health Organisation (“WHO”), is a disease in which excess body fat has accumulated to such an extent that a person’s health may be adversely affected.¹⁰ Carrying extra body weight may cause serious health problems, including cardiovascular disease (mainly heart disease and strokes), type two diabetes, high blood pressure, musculoskeletal disorders like osteoarthritis, and some cancers such as endometrial, breast and colon cancer. In fact, obesity has been identified as a key risk factor for these and other non-communicable diseases.¹¹ Obesity is furthermore linked to health complications such as breathing difficulties, increased risk of fractures, hypertension, early markers of cardiovascular disease, and insulin resistance.¹² Many of these conditions cause premature death and substantial disability.¹³ In fact, overweight and obesity, which show a greater increase in low and middle-income countries, are linked to more deaths in the world than underweight.¹⁴ Moreover, obese people, and children in particular, are also often the subject of ridicule and discrimination, while they may suffer from psychological problems, including eating disorders and body shape dissatisfaction.¹⁵ Apart from the direct

¹⁰ WHO “Obesity and overweight fact sheet N°311” (updated March 2011) *WHO* <<http://www.who.int/mediacentre/factsheets/fs311/en/index.html>> (accessed 26-04-2011).

¹¹ World Health Organization *Obesity: Preventing and Managing the Global Epidemic* (2000) 40. Overweight and obesity is the fifth leading risk for death globally. World Health Organisation “Set of recommendations on the marketing of foods and non-alcoholic beverages to children” (2010) *WHO* 4 <<http://www.who.int/dietphysicalactivity/publications/recsmarketing/en/index.html>> (06-05-2011).

¹² WHO “Obesity and overweight Fact sheet N°311” (updated March 2011) *WHO*.

¹³ WHO “What are the health consequences of being overweight?” (updated March 2013) *WHO* <<http://www.who.int/features/qa/49/en/index.html>> (accessed 05-05-2011); PubMed Health “Obesity” (12-05-2012) *PubMed Health* <<http://www.ncbi.nlm.nih.gov/pubmedhealth/PMH0004552/>> (accessed 05-05-2011).

¹⁴ The WHO reports that “65% of the world’s population live in countries where overweight and obesity kill more people than underweight (this includes all high-income and most middle-income countries). WHO “Obesity and overweight Fact sheet N°311” (updated March 2011) *WHO*. In 2008 an estimated 36 million of the 57 million global deaths were caused by non-communicable diseases, of which 9 million deaths occurred before the age of 60. Nearly 80% of those deaths occurred in developing countries. See also the Resolution adopted by the United Nations General Assembly, 3rd plenary meeting 19 September 2011 Sixty-sixth session Agenda item 117 11-45894 Political Declaration of the High-level Meeting of the General Assembly on the Prevention and Control of Non-communicable Diseases UNGA Res 66/2 (19 Sep 2011) UN Doc A/RES/66/2.

¹⁵ World Health Organization *Preventing and Managing Obesity* 55-58. See also V Iannelli “Health Effects of Childhood Obesity” (updated 30-12-2014) *Very Well* <http://pediatrics.about.com/od/obesity/a/1108_obs_effect.htm> (accessed 05-05-2011).

economic costs of obesity to the formal health sector, there are furthermore indirect and opportunity costs of obesity, including the costs of decreased productivity, increased household expenditure and loss of future income due to premature death.¹⁶

Despite the numerous negative effects caused by obesity, there has been a disturbing increase in global obesity rates, and consequently in the number of deaths associated with non-communicable diseases. The WHO reports that overweight and obesity ranks as the fifth leading risk for death globally, with nearly 36 million of 57 million annual deaths caused by non-communicable diseases.¹⁷ This fact has instigated a number of calls for action by intergovernmental organisations, including the United Nations General Assembly, which adopted a resolution in September 2011 seeking to address the global prevention and control of non-communicable diseases, with a particular focus on developing countries.¹⁸

Arguably, the biggest concern is the fact that the WHO reports that globally in 2013 more than 42 million children under the age of five were overweight or obese.¹⁹ During the period of 1990 to 2013, the number of obese or overweight children in Africa alone increased from four to nine million.²⁰ In South Africa, Armstrong *et al* found that in 2006 2,4 percent of boys between the ages of six and thirteen and 4,8 percent of girls

¹⁶ C Hattingh *The Impact of Obesity on the South African Economy* MBA thesis Stellenbosch University (2009) 46-49.

¹⁷ World Health Organisation "Set of Recommendations on the Marketing of Foods and Non-Alcoholic Beverages to Children" (2010) *WHO*; Resolution adopted by the United Nations General Assembly, 3rd plenary meeting 19 September 2011 Sixty-sixth session Agenda item 117 11-45894 [*without reference to a Main Committee (A/66/L.1)*] (available at <http://www.who.int/nmh/events/un_ncd_summit2011/political_declaration_en.pdf?ua=1> accessed 16-08-2015).

¹⁸ Resolution adopted by the United Nations General Assembly, 3rd plenary meeting 19 September 2011 Sixty-sixth session Agenda item 117 11-45894 [*without reference to a Main Committee (A/66/L.1)*] (available at <http://www.who.int/nmh/events/un_ncd_summit2011/political_declaration_en.pdf?ua=1> accessed 16-08-2015).

¹⁹ WHO Commission on Ending Childhood Obesity "Facts and figures on childhood obesity" (29-10-2014) *WHO* <<http://www.who.int/end-childhood-obesity/facts/en/>> (accessed 29-11-2014). The most commonly used indicator of overweight and obesity is the Body Mass Index (BMI), a measure of body weight (expressed in kilograms) divided by height (expressed in metres squared): $BMI = \frac{kg}{m^2}$. The normal range of BMI for most adult populations lies between 18 and 25, whereas a person with a BMI of greater than 25 is considered to be overweight. The WHO has defined being obese as having a BMI of equal to or more than 30 and morbid obesity to be assumed from a BMI of 40 or beyond. World Health Organization *Preventing and Managing Obesity* 8-9. See also World Health Organization *Preventing and Managing Obesity* 11-13; A Garde *EU Law and Obesity Prevention* (2010) 2 as well as the Centers for Disease Control and Prevention's explanation of how BMI is used to establish whether a child is overweight or obese: Centers for Disease Control and Prevention "About Child and Teen BMI" (updated 15-05-2015) *Centers for Disease Control and Prevention* <http://www.cdc.gov/healthyweight/assessing/bmi/childrens_bmi/about_childrens_bmi.html> (accessed 26-04-2011).

²⁰ WHO Commission on Ending Childhood Obesity "Facts and figures on childhood obesity" (29-10-2014) *WHO*.

of this age were obese.²¹ The statistics are even more alarming for adolescents in South Africa. According to the South African National Health and Nutrition Examination Survey (“SANHANES”) published in 2012, the prevalence of overweight and obesity has doubled in adolescent boys over a six-year period. The survey found that 23 percent of girls and 10 percent of boys, aged ten to fourteen, are overweight or obese, while 27 percent of girls and 9 percent of boys aged fifteen to seventeen are overweight or obese.²² It has furthermore been found that children between the ages of five and seven, adolescent girls aged fifteen to nineteen, pregnant and menopausal women, and men in their early thirties are most prone to weight gain.²³ In a developing country such as South Africa, children are, due to (amongst other factors) a lack of financial resources, particularly vulnerable to inadequate pre-natal, infant and young child nutrition. In addition, children are at the same time also exposed to high-fat, high-sugar, high-salt, energy-dense, and micronutrient-poor foods, which tend to be lower in cost. These foods are moreover the foods that are usually most heavily marketed to children.²⁴ The most important long-term consequence of childhood obesity is the fact that obese children become obese adults.²⁵ Overweight and obesity in adolescence are associated with continuing morbidity and mortality.²⁶

The prevention of overweight and obesity, and the associated non-communicable diseases, however, should be relatively simple. A balance between the intake of foods and its accompanying calories, and the consumption thereof by getting enough exercise, will, in normal circumstances, lead to a healthy weight. As a result, the daily consumption of high calorific foods will not necessarily cause obesity, provided that

²¹ MEG Armstrong, MI Lambert, KA Sharwood & EV Lambert "Obesity and overweight in South African primary school children - the Health of the Nation Study" (2006) 11 *JEMDSA* 52. 10,9% of boys and 17,5% of girls were found to be overweight. See also SB Cassim "Food and beverage marketing to children in South Africa: mapping the terrain" (2010) 23 *SAJCN* 1 who cites Mukkudem-Petersen and Petersen in their finding that the prevalence of overweight children in South Africa stood at 12% in the same year.

²² O Shisana, D Labadarios, T Rehle, L Simbayi, K Zuma, A Dhansay, P Reddy, W Parker, E Hoosain, P Naidoo, C Hongoro, Z Mchiza, NP Steyn, N Dwane, M Makoae, T Maluleke, S Ramlagan, N Zungu, MG Evans, L Jacobs, M Faber & SANHANES-1 Team *The South African National Health and Nutrition Examination Survey (SANHANES-1)* (2013) 136, 140 and 204-205. The survey also reported at 135 that 56% of adult black females are overweight or obese; and at 144 that South Africa and Swaziland had the highest mean BMI (26.2 compared to 26.7 kg/m²) and overweight (22.6% compared to 28.6%) and obesity (25.8% compared to 24.3%) prevalence for both sexes combined.

²³ World Health Organization *Preventing and Managing Obesity* 139-140.

²⁴ See ch 2, section 2.2 of this thesis.

²⁵ World Health Organization *Preventing and Managing Obesity* 58.

²⁶ 58.

calorie expenditure compensates for intake.²⁷ However, the expenditure required in order to balance the consumption of some of the processed foods, which are available today, is of such an onerous level that the average person is not able to use all of the calories consumed. Furthermore, a number of studies have shown that weight gain and obesity is far more complex than what these simplistic statements above suggest.²⁸ In addition to genetic factors, a number of societal and environmental factors play a role in expanding waistlines.²⁹ In these contexts, weight control may not purely be subscribed to personal choice and responsibility. Instead, this becomes a matter of responsibility which must be shared between individuals and their children, striving to adopt healthy lifestyles, as well as society and policy-makers, creating environments that make it easier to make the healthier choice.³⁰ It is moreover important to acknowledge that although there is a belief that the law is able to change individual behaviour through regulatory intervention, changing behavioural perceptions will not always occur by means of legal reform.³¹ Policy makers should approach this topic with a holistic and realistic understanding of the complexities of this pandemic while appreciating the limits of intervention.³² Ultimately a healthy lifestyle should be “the easier, default option rather than agonizingly difficult.”³³ When it is furthermore borne in mind that more than 25 percent of adult participants in the SANHANES study disagreed with the statement that dietary habits influence body

²⁷ SS Martin "From Poverty to Obesity: Exploration of the Food Choice Constraint Model and the Impact of an Energy-Dense Food Tax" (2005) 49 *American Economist* 79 and the research studies cited there.

²⁸ A Alemanno & A Garde (eds) *Regulating Lifestyle Risks: The EU, Alcohol, Tobacco and Unhealthy Diets* (2015) 3 refer to studies researching the impact which factors such as culture, social and commercial pressures, genetic and epigenetic influences and environmental factors have on weight gain and obesity. The findings have been published in, *inter alia*, D Kahneman *Thinking, Fast and Slow* (2011); D Ariely *Predictably Irrational: The Hidden Forces that Shape Our Decisions* (2008); R Thaler & C Sunstein *Nudge: Improving Decisions About Health, Wealth and Happiness* (2008); C Sunstein "The Storrs Lectures: Behavioral Economics and Paternalism" (2013) 122 *Yale LJ* 1826; Government Office for Science *Foresight: Tackling Obesities: Future Choices 2* ed (2007); KD Brownell, R Kersh, DS Ludwig, RC Post, RM Puhl, MB Schwartz & WC Willett "Personal Responsibility and Obesity: A Constructive Approach to a Controversial Issue" (2010) 29 *Health Affairs* 378; D King Chief Scientific Adviser to the UK Government and Head of the Government Office for Science Foreword in Government Office for Science *Tackling Obesities*.

²⁹ Alemanno & Garde (eds) *Regulating Lifestyle Risks* 3 and their sources cited above in n 28.

³⁰ 4.

³¹ 2.

³² 2.

³³ B Thomas & L Gostin "Tackling the Global NCD Crisis: Innovations in Law & Governance" (2013) 16 *J Law Med Ethics* 25, as cited by Alemanno & Garde (eds) *Regulating Lifestyle Risks* 4.

weight,³⁴ it is clear that there is still much room for improving knowledge and education regarding dietary intake.

Due to the complex nature of the reasons for weight gain, it is often argued that food-marketing practices should not bear the brunt of reactive governmental intervention in an effort to reduce obesity rates.³⁵ Nevertheless, the aggressive and direct marketing of energy-dense, micronutrient-poor foods is definitely not assisting in the aim of slimming down the global population, and children in particular. Even though there may be some disagreement as to the extent of the influence which marketing has on children's diet and health, a Joint World Health Organization/Food and Agriculture Organization of the United Nations Expert Consultation concluded in 2002 that the heavy marketing of fast food and energy-dense, micronutrient-poor foods and beverages is a "probable" causal factor in weight gain and obesity.³⁶ Studies such as the Hastings Review,³⁷ the Institute of Medicine of the National Academies Report,³⁸ and the WHO Forum and Technical Meeting Report of 2006³⁹ have all found that there is a relationship between the marketing of food and children's dietary choices and consumption.

Consequently, in an attempt to improve the health of the population on a global, regional and local level, the World Health Assembly ("WHA") adopted the WHO Global Strategy on Diet, Physical Activity and Health in 2004. The WHO also developed the 2008 – 2013 Action Plan containing a global strategy for the prevention and control of non-communicable diseases.⁴⁰ During the consultation processes, it was concluded that the marketing of food to children is an international issue and that there is a need

³⁴ Shisana *et al* *The South African National Health and Nutrition Examination Survey (SANHANES-1)* 180.

³⁵ Alemanno & Garde (eds) *Regulating Lifestyle Risks 2*.

³⁶ C Hawkes *Marketing Food to Children: The Global Regulatory Environment* (2004) 1. See also World Health Organisation "Set of Recommendations on the Marketing of Foods and Non-Alcoholic Beverages to Children" (2010) *WHO 7* and the sources listed therein.

³⁷ G Hastings, M Stead, L McDermott, A Forsyth, AM MacKintosh, M Rayner, C Godfrey, M Caraher & K Angus "Review of research on the effects of food promotion to children" (2003) *UK Government Archive*

<http://tna.europarchive.org/20110116113217/http://www.food.gov.uk/multimedia/pdfs/foodpromotiontochildren1.pdf> (accessed 26-04-2011).

³⁸ JM McGinnis, J Appleton Gootman & VI Kraak (eds) *Food Marketing to Children and Youth: Threat or Opportunity?* (2006).

³⁹ World Health Organization "Marketing of food and non-alcoholic beverages to children, Report of a WHO Forum and Technical Meeting Oslo, Norway, 2-5 May 2006" (2006) *WHO* <<http://www.who.int/dietphysicalactivity/publications/Oslo%20meeting%20layout%2027%20NOVEMBER.pdf>> (accessed 26-04-2011).

⁴⁰ WHO "Obesity and overweight Fact sheet N°311" (updated March 2011) *WHO*.

to ensure that the private sector markets its products responsibly.⁴¹ As a result, in 2010 the WHO published a set of recommendations in an effort to guide Member States in designing new policies or to strengthen their existing policies on food marketing communications to children.⁴² The set of recommendations, *inter alia*, suggest that Member States must establish, as part of their policy framework, specific monitoring and enforcement mechanisms which include definitions of sanctions and a complaints reporting system.⁴³ One of the key recommendations is that governments are to be the key stakeholders in developing policies, but that all relevant stakeholders from industry and other platforms should also be responsible for the implementation, monitoring and evaluation of policies.

When referring to the practice of marketing⁴⁴ food to children, six techniques that are used extensively by companies to promote their food products must be singled out. These are television advertising, product placement, in-school marketing, sponsorship, sales promotions and online promotions by means of so-called “new media” platforms. Of these methods, television advertising probably stands out as the most popular and visible, and also the most regulated means of promoting food. The regulation of the other less traditional forms of marketing can be described as “patchy,” not only in South Africa but globally. In many countries regulations used for television advertising are also used to regulate other forms of marketing, often with various levels of success.⁴⁵

South Africa’s current approach to regulation in this respect is not unique: the country is one of many countries in which both statutory regulations as well as self-regulatory mechanisms in the form of codes of conduct of the relevant industry stakeholders co-exist. This co-existence of regulatory methods, which in many cases

⁴¹ World Health Organisation “Set of Recommendations on the Marketing of Foods and Non-Alcoholic Beverages to Children” (2010) WHO 6.

⁴² World Health Organisation *Set of recommendations on the marketing of foods and non-alcoholic beverages to children*; The World Health Organisation “Set of Recommendations on the Marketing of Foods and Non-alcoholic Beverages to Children” (2010) WHO.

⁴³ Some more background information, as well as the text of the recommendations are available at <http://whqlibdoc.who.int/publications/2010/9789241500210_eng.pdf> (accessed 28-04-2011).

⁴⁴ Marketing is defined as “the action, business, or process of promoting and selling a product, etc, including market research, advertising, and distribution.” Oxford English Dictionary “*marketing, n.*” It is commonly understood to refer to the practices used to encourage the consumption of a product. Hawkes *Marketing Food to Children* 1.

⁴⁵ In South Africa, the Advertising Standards Authority’s (ASA) Code of Conduct is mainly relied upon for such purposes, available at <http://www.asasa.org.za/Default.aspx?mnu_id=11> (accessed 02-02-2011). Of particular importance is Appendix M to the Code, being the Food and Beverage Code as well as the Sponsorship Code, <http://www.asasa.org.za/Default.aspx?mnu_id=87> (accessed 02-02-2011). These mechanisms will be described and analysed in chapters 7 and 8 of this thesis.

may rely more heavily on the food industry regulating its own processes, have both been praised and criticised. However, since marketing practices have an impact on children's dietary choices and consequently upon children's health, the methods of regulation, which will best serve the purpose of promoting the best interests of the child, must be identified.

The crucial point of departure for this thesis is that the South African government has committed itself to promoting the best interests of children in all matters concerning them. This commitment is evident from the fact that South Africa has ratified the CRC, stipulating that the best interests of the child shall be a primary consideration in all actions concerning children.⁴⁶ South Africa has further underlined its commitment to this principle by ratifying the ACRWC, which provides further protection in that Article 4 requires that "[i]n all actions concerning the child undertaken by any person or authority, the best interests of the child shall be the primary consideration."⁴⁷ The Constitution of the Republic of South Africa, 1996 ("Constitution") stipulates that a child's best interests are of paramount importance in every matter concerning the child,⁴⁸ while the Children's Act 38 of 2005 ("Children's Act") contains 57 references to the best interests of the child. Section 9 of the Children's Act also confirms that the child's best interests are of paramount importance and section 7 lists a number of factors to be taken into consideration "[w]henever a provision of this act requires the best interests of the child standard to be applied".

Through its ratification of the CRC, the South African government must also enforce Article 18 of the CRC, which recognizes that parents, or in some instances, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will, however, remain their basic concern. For the purposes of this research, it is important to note that the CRC stipulates that State Parties must assist parents and guardians in the performance of their child-rearing responsibilities and must ensure the development of child care institutions, facilities and services.⁴⁹ The ACRWC takes a further step by specifically prescribing that State Parties to this charter shall, in accordance with their means and national conditions, provide all appropriate measures to assist parents and other persons responsible for

⁴⁶ Art 3(1) of the CRC.

⁴⁷ Art 4 of the ACRWC.

⁴⁸ S 28(2) of the Constitution.

⁴⁹ Art 18(2).

the child, and in case of need, provide material assistance and support programmes particularly with regard to nutrition, health, education, clothing and housing.⁵⁰

However, as is the case with all constitutional rights, other competing constitutional rights may lawfully limit children's rights in South Africa and it must be emphasised that the best interests of the child will not apply absolutely in every case. The Constitutional Court has in fact remarked that the interpretation which must be given to section 28(2) of the Constitution is that "the child's interests are 'more important than anything else', but not that everything else is unimportant".⁵¹ In each instance a balancing exercise must be conducted and it must be determined whether or not the "limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors".⁵² In determining whether a limitation is reasonable and justifiable within the meaning of section 36 of the Constitution, the effect and extent of the limitation of the right must be weighed against the purpose and the importance of the limitation, bearing in mind the availability of less restrictive means to achieve such a purpose.⁵³

In respect of regulating certain marketing practices for the purpose of promoting children's rights, the right to freedom of commercial speech, the right to intellectual property and parental responsibilities and rights may all be affected. One of the particular questions which this research seeks to address, is in which instances the competing right of the best interests of the child may impose restrictions upon these freedoms and rights of the food and media industries, and of parents in South Africa.

3 Research questions

The main research question that this thesis seeks to answer is how, if at all, do the government, marketing companies and the food industry in South Africa apply the principle of the best interests of the child when food is being marketed. In order to answer this question, it must first be established what it means to apply the best

⁵⁰ Art 20 of the ACRWC.

⁵¹ *Centre for Child Law v Minister of Justice and Constitutional Development* 2009 6 SA 632 (CC).

⁵² S 36 of the Constitution.

⁵³ See, for example, *S v Makwanyane* 1995 3 SA 391 (CC) para [104]; *S v Manamela (Director-General of Justice Intervening)* 2000 3 SA 1 (CC) [32] - [33]; *Dawood v Minister of Home Affairs, Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs* 2000 3 SA 936 (CC); *Islamic Unity Convention v Independent Broadcasting Authority* 2002 4 SA 294 (CC); *Sonderup v Tondelli* 2001 1 SA 1171 (CC); *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division* 2004 1 SA 406 (CC).

interests of the child when regulating marketing of food to children. It must then be asked whether it is necessary to amend South African regulatory policies in this regard in order to meet its international and constitutional imperatives. If it must indeed be amended in order to promote the best interests of the child, the question as to how this can be done without unjustifiably infringing upon other fundamental rights, must be answered.

4 Value and underlying assumptions

The Committee on the Rights of the Child has continuously emphasised that Article 3 of the CRC should not only be reflected in national legislation but also be integrated into all aspects of policy and decision-making.⁵⁴ In its General Comment no 5 of 2003 the Committee stressed that Article 3(1) requires active measures through Government, Parliament and the Judiciary:

“Every legislative, administrative and judicial body or institution is required to apply the best interests principle by systematically considering how children’s rights and interests are or will be affected by their decisions and actions — by, for example, a proposed or existing law or policy or administrative action or court decision, including those which are not directly concerned with children, but indirectly affect children.”⁵⁵

In essence, the scope of child law rests on three pillars: it must first be established what the status, capacities, and rights of children as individual human beings are; secondly the nature of the relationships between children and their parents, guardians and care-givers must be established; and thirdly the role of the state in protecting children from harm, supporting families and discharging its own parental responsibilities must be defined.⁵⁶ It is submitted that the state, acting as *parens patriae*,⁵⁷ must protect and promote the best interests of its children since it is in the public, as well as the government’s interest to ensure that the current generation matures into responsible, functioning adults.⁵⁸ As a result, the state must, *inter alia*,

⁵⁴ “CRC on best interest of the child” <http://www.kinderrechte.gv.at/home/upload/crc_on_best_interest_of_the_child.pdf> (accessed 14-07-2009).

⁵⁵ “Committee on the Rights of the Child, Thirty-fourth session (19 September – 3 October 2003) General comment No 5 (2003) (General measures of implementation of the Convention on the Rights of the Child) <[http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/3bba808e47bf25a8c1256db400308b9e/\\$FILE/G0345514.doc](http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/3bba808e47bf25a8c1256db400308b9e/$FILE/G0345514.doc)> 4 (accessed 01-06-2010).

⁵⁶ L Schäfer *Child Law in South Africa: Domestic and International Perspectives* (2011) 6.

⁵⁷ In its role as “parent of his or her country” the state needs to provide protection to those who cannot do so for themselves. D Archard *Children, Family and the State* (2003) 120.

⁵⁸ 117.

ensure that children are protected from harm and are provided with socio-economic essentials such as nutritious food, clean water, clothing and shelter and education. The state, when performing its duties as *parens patriae*, may only interfere “in the last instance”, that is when there has been a failure on the side of a parent.⁵⁹ It may do so since a parent cannot or will not make the appropriate choices on behalf of a child and the child herself is also unable to do so.⁶⁰

It is therefore clear that the South African government needs to ensure that food marketing and the associated regulatory policies also consider and apply the best interests of the child. The underlying assumption of this thesis is that this is not the case in South Africa, and even if mention is made of the best interests of the child in some instances, there is insufficient knowledge and understanding of what it truly means to implement it. The value of this research is that it will seek to provide practical and feasible recommendations as to how the state, the food industry, media organisations and even parents should implement the right of the best interests of the child, something which apparently has received very little attention thus far. Since it has been said that “[t]wo of the most important components in building a democracy are participation of young people in society and a free media”,⁶¹ it is vital that a relatively young constitutional democracy such as South Africa adheres to its international and constitutional obligations in this respect.

5 Methodology

This is an exploratory analytic literature study. By using the framework of the best interests of the child, specific emphasis will be placed on the child’s rights to enjoy the highest attainable standard of health, to participate in the media but to also be protected from harmful material provided by the mass media. For the purposes of this research, the regulation of the six most popular methods of food marketing, namely television advertising, in-school marketing, sponsorship, product placement, sales promotions, and online and so-called “new media” marketing, will be studied. When critically reviewing South African legislation, regulations and media monitoring bodies’

⁵⁹ 120.

⁶⁰ 121.

⁶¹ Searle as quoted by M Jempson “The Oslo Challenge and beyond: A view from the inside” (2009) *Save the Child Resource Centre* <<http://www.mediawise.org.uk/files/uploaded/The%20Oslo%20Challenge%20and%20beyond.pdf>> (accessed 10-05-2010).

codes of conduct, such texts will be compared to standards set by both international law and foreign jurisdictions. The thesis will refer to best practices and regulatory efforts from a number of jurisdictions and not focus on any countries in particular. However, in respect of the question as to how to strike a proportional balance between fundamental rights, the jurisdictions of the United States of America (“USA”), Canada and the European Union (“EU”) provide a useful comparative perspective since the tests used by the courts in these jurisdictions are comparable to the proportionality test found in the South African Constitution.

6 Sequence of chapters

Chapter 2 will provide a brief explanation of six marketing techniques, which are typically used to promote foods and beverages to children, while also explaining what impact these practices have on children. Thereafter chapter 3 will discuss the historical context and development of the theory of children’s rights, including the concept of the best interests of the child. It will not only provide some practical content to the phrase which has been criticised for being vague and indeterminate but will also describe the rights of children which are affected by the marketing of food to children. Chapter 4 will provide a juxtaposition by explaining which competing rights of stakeholders in the marketing industry are applicable and which rights may be restricted by the regulation of marketing practices. The next chapter will describe the international framework, which should be used to regulate the marketing of food to children, and will include an exposition of instruments of consumer protection, marketing codes and the promotion of global health. Chapter 6 will entail a discussion of the systems of regulation currently in force in a number of jurisdictions by explaining their efforts pertaining to each of the six categories of marketing practices. Chapter 7 will consider how the marketing of food to children is presently being regulated in South Africa, as well as describe some of the draft regulations that have been published by the South African Department of Health. The next chapter will analyse these current as well as proposed measures in order to assess whether South Africa is complying with its international and constitutional obligations. The final chapter will draw from the best practices employed by other jurisdictions in order to make recommendations as to how to address the matter of food marketing to children. It will also provide a final assessment as to how

the best interests of the child should be regarded as a primary consideration in this matter that affect all children.

CHAPTER 2: TECHNIQUES USED TO MARKET FOOD TO CHILDREN

1 Introduction

Although chapter 1 has provided some background to the current challenges of obesity and the probable causing factors, the range and scope of marketing practices employed by food manufacturers will be explained in greater detail in this chapter. It is important to first understand what types of mechanisms are being used to market food to children globally and why it is necessary to regulate these practices. This chapter will also present the results from a number of studies as to the types of foods, which are typically being marketed to children, and the amounts that are spent in doing so. More importantly, the chapter will discuss the effect marketing practices have on children's dietary decisions. This information will provide the context to the discussion in chapter 3 of what it means to implement the best interests of the children and which of their rights may be affected by the different marketing messages children receive. Chapter 2 will also provide a basis for understanding why other rights may be affected by the regulation of the marketing communications. In describing the practices most often used to convince children to eat and drink particular foods and beverages, it will become clear why rights such as commercial speech and intellectual property, as well as parental responsibilities and rights, which will be discussed in chapter 4, may be affected by the regulation of the relevant marketing practices.

2 Marketing food to children

2.1 Marketing techniques

The marketing of products is logically an essential part of the growth and sustainability of any business and recognised as a protected form of commercial speech.⁶² The International Chamber of Commerce ("ICC") describes marketing as "communications produced directly by or on behalf of marketers intended primarily to promote products or to influence consumer behaviour".⁶³ Put differently, the term "marketing" refers to measures that are employed in order to increase the consumption of products.⁶⁴

⁶² As to the development of the recognition of this form of speech, see ch 4.

⁶³ International Chamber of Commerce "ICC Consolidated Code of Advertising and Marketing Communications Practice" (08-2011) *Code Centre 4* <http://www.codescentre.com/media/2083/660%20consolidated%20icc%20code_2011_final%20with%20covers.pdf> (accessed 10-02-2015).

⁶⁴ Hawkes *Marketing Food to Children* 1. Coca-Cola Company agrees by stating that "[w]e define marketing as anything we do to create consumer demand for our brands." *Coca-Cola Annual Report of*

Marketing is therefore said to promote both the rights of businesses and consumers since it creates competition and employment while it enhances consumers' choices of goods and services.⁶⁵ In the context of marketing to children, especially on television, it furthermore often sustains and finances children's programming content.⁶⁶

Some of the most common and visible types of marketing techniques are those of advertising, promotions and sponsorships. Nonetheless, it must be borne in mind that marketing is a much broader process, which also includes market research, distribution, pricing, packaging, product development, and public relations.⁶⁷ For the purpose of this research, however, the six techniques, which are most often used to promote food to children, will receive particular attention. Many techniques are used in conjunction with each other and from the descriptions below it will become clear that it is sometimes not possible to draw a definite distinction between the different methods of marketing.

2 1 1 Television advertising

Television marketing has always been the most popular marketing technique used to target children. Classified alongside print media, movie-theatre, billboards and radio broadcasts, the marketing communications shown on television have been described as one of the "traditional" forms of advertising.⁶⁸ In terms of expenditure, food manufacturers usually spend approximately half of their marketing budgets on television commercials. One study in the USA, for example, reported that in 2006, the 44 companies that participated in the research, spent \$745 million on marketing their food products to children on television advertisements.⁶⁹ The reason for this spending

1995 as quoted by C Hawkes "Self-regulation of food advertising: what it can, could and cannot do to discourage unhealthy eating habits among children" (2005) 30 *Nutrition Bulletin* 374 374.

⁶⁵ The Responsible Advertising and Children Programme "Advertising and Children" (19-02-2009) *Responsible Advertising and Children* <<https://web.archive.org/web/20160306205329/http://responsibleadvertising.org/advertisingandchildren.asp>> (accessed 10-02-2015).

⁶⁶ The Responsible Advertising and Children Programme "Advertising and Children" (19-02-2009) *Responsible Advertising and Children*.

⁶⁷ Hawkes *Marketing Food to Children* 3. The four traditional components of marketing have been described as the four "Ps", consisting of Product (features, quality, quantity, and packaging); Place (location, outlets, and distribution points used to reach target markets); Price (strategy, determinants, and levels); and Promotion (advertising, consumer promotion trade promotions and public relations), see Institute of Medicine of the National Academies *Food Marketing to Children and Youth: Threat or Opportunity?* (2006) 135.

⁶⁸ Hawkes *Marketing Food to Children* 3.

⁶⁹ NA Wilks (ed) *Marketing Food to Children and Adolescents - A Review of Industry Expenditures, Activities, and Self-Regulation* (2009) 25. This report, edited by Wilks, was the result of a study

trend seems evident: children are exposed to television from a very young age and this type of marketing can ensure the establishment of brand loyalty in virtually every home.⁷⁰

Advertising to children on USA television appeared as early as the 1950s when all three networks operative at that stage, scheduled programmes which were specifically dedicated to child audiences to be shown on Saturday mornings. Already at this point in time, programmes such as *The Mickey Mouse Club* were often interrupted by persuasive messages with memorable jingles from, *inter alia*, breakfast cereal manufacturers. The very excited and enthusiastic hosts of these programmes regularly promoted sweets and cookies.⁷¹ The association between freedom, fun, and food was introduced and would become firmly established during the decades to follow.⁷²

Today there are numerous channels exclusively dedicated to children's programming, broadcasting 24 hours a day and seven days a week. This is also the situation in South Africa, where a number of international channels air their content through local broadcasters. In similar fashion, marketing companies have extended their periods of commercial activity and expanded their variety of methods to attract children to their products.

One such method employed specifically by food marketers is the use of cross-promotions and third-party licenced characters.⁷³ Media companies often enter into numerous cross-promotional contracts with food companies, agreeing to allow the food manufacturers to use the characters from their child-orientated movie or television programme to market their food products. The very popular characters from Disney or Nickelodeon, for example, have advertised fruit juices, biscuits, yoghurt, chocolates, cookies, chips, carbonated drinks, breakfast cereals, frozen desserts and

conducted by the Federal Trade Commission ("FTC") at the request of the US Congress. A follow-up report, published in 2012, reported that the expenditure for television marketing dropped during 2009 to \$632 million. The reason for the reduction is said to be the increase of money spent on "new" media, such as online advertising. Federal Trade Commission *A Review of Food Marketing to Children and Adolescents: Follow-Up Report* (2012) 12.

⁷⁰ Institute of Medicine of the National Academies *Food Marketing to Children and Youth* 176-177 reporting that infants as young as a couple of months' watch television regularly and that already in the 1950s 87% of American households had a television. The report furthermore lists statistics on how much time American children spent in front of the TV.

⁷¹ Institute of Medicine of the National Academies *Food Marketing to Children and Youth* 180.

⁷² S De Iulio "The construction of fun in food advertisements targeting children" (2010) 11 *Young Consumers* 96-107 provides a historical and comparative analysis of the use of the "fun" theme in food advertisements.

⁷³ Wilks (ed) *Marketing Food to Children and Adolescents* 40.

basically all other confectionery and snack items.⁷⁴ Moreover, these characters have not only appeared on the packaging and labels of such products but have also been used as toys included as a “free” promotional item in food containers, very often also as part of a large collectible series of toys.⁷⁵ The fact that these toys form part of a bigger set of collectibles increases its value and encourages the consumption of more of the particular food or beverages items. This method has been particularly successful in countries where historically there has been a scarcity of manufactured toys.⁷⁶ Messages included on the packaging also encourage consumers to watch particular movies or TV programmes or direct them to a website where children can discover more games or activities featuring the characters.⁷⁷ Another method of promotion is the offering of discounts on the purchase price of movie tickets or DVDs upon purchasing particular food products.⁷⁸

A study conducted in the USA in 2008 found that movie, cartoon or animated and costumed characters were used in 74 percent of food advertisements featured on Saturday morning television.⁷⁹ In some instances, new characters are created specifically for a particular brand, as can be illustrated by Tony the Tiger promoting Kellogg’s Sugar Frosted Flakes. Another example is that of Ronald McDonald used as the mascot for McDonald’s, or that of the Nesquick Bunny promoting sugary flavoured milk to children.⁸⁰ In other cases, well-known third party characters such as *Winnie the Pooh*, *Spiderman*, *Barbie* and *The Simpsons* are used to appeal to children to consume certain beverages.⁸¹ In 2007, the popular characters from the film, *Shrek the Third*, promoted a large variety of food products in terms of licencing agreements with, *inter alia*, McDonald’s, M&Ms and Kellogg’s.⁸²

⁷⁴ 40-43.

⁷⁵ See 30 explaining how the costs of these items are entirely covered by the incremental revenue generated by the promotions. The customer may therefore not explicitly be charged for the toys but are still paying for the costs thereof by paying for the foodstuffs.

⁷⁶ G Cairns, K Angus & G Hastings *The extent, nature and effects of food promotion to children: a review of the evidence to December 2008* (2009) 20.

⁷⁷ Wilks (ed) *Marketing Food to Children and Adolescents* 43 – 44. Further promotion will then take place on these platforms, as will be discussed below.

⁷⁸ 43 – 44.

⁷⁹ Cairns *et al* *The extent, nature and effects of food promotion to children* 16 citing the study by A Batada, MD Seitz, MG Wootan & M Story “Nine out of 10 food advertisements shown during Saturday morning children’s television programming are for foods high in fat, sodium, or added sugars, or low in nutrients” (2008) 108 *J Am Diet Assoc* 673-678.

⁸⁰ Institute of Medicine of the National Academies *Food Marketing to Children and Youth* 171.

⁸¹ 173.

⁸² The products included Kellogg’s Marshmallow Froot Loops cereal, Keebler EL Fudge Double Stuffed cookies, “ogre-sized” Peanut Butter M&M’s, Cheetos, and Kellogg’s Frosted S’Mores Pop Tarts. At McDonald’s children were treated to promotional glasses that enticed children to “ogre-fied” foods as

These types of characters often seem to personify the light-hearted, fun and humorous tones of advertisements which are found far more often in commercials promoting food to children than in advertisements for any other products, or in commercials aimed at adults. Several studies conducted worldwide found that humour and fun is used in approximately 90 percent of children's food adverts.⁸³ Other themes which are most commonly used in television food commercials aimed at children are that of fantasy or adventure, novelty, taste (with an emphasis on sweetness), the physical appearance or texture of the food, nutritional or health properties (whether they are misleading or not), and price.⁸⁴ Television commercials also often use familiar songs and catchy music or jingles to enhance the perceived brand quality of a product or to enhance the memory of a particular product.⁸⁵

2 1 2 *Product placement*

Another method which is used during television programming is that of "embedded TV marketing" or product placement where television or film characters consume certain beverages within the programme or movie itself. It has also been described as the use of any message, logo, or object that appears in a visual or graphic representation, including music videos and other forms of entertainment, in exchange for payment.⁸⁶ Food products or product branding are therefore integrated into the storyline of the programme or the movie. Thus, for example, the tomato sauce of Heinz was clearly used in the *Scooby Doo* movie, whilst in *Spy Kids 2* one of the characters opened a lunch box in which a Big Mac burger, french fries and a carbonated soft drink with the golden arches of McDonald's were prominently featured.⁸⁷ The latest *Transformers*

the "ogre-tastic" Minty Mudd Bath Triple Thick Shake. S Linn & CL Novosat "Calories for Sale: Food Marketing to Children in the Twenty-First Century" (2008) 615 *Ann Am Acad Pol Soc Sci* 133137.

⁸³ Cairns *et al* *The extent, nature and effects of food promotion to children* 16-17. See also E Boyland *Television Food Advertising to Children: Nature, Extent and Potential Consequences* Doctoral thesis University of Liverpool (2011) 57 - 58 where she cites numerous studies which reported the same findings.

⁸⁴ Cairns *et al* *The extent, nature and effects of food promotion to children* 16.

⁸⁵ Institute of Medicine of the National Academies *Food Marketing to Children and Youth* 169.

⁸⁶ Hawkes *Marketing Food to Children* 44. Art 1(1)(m) of the European Audiovisual Media Services Directive defines it as "the inclusion of or reference to a product, a service or the trademark thereof so that it is featured within a programme, in return for payment or for similar consideration". Garde highlights the two defining features of product placement, namely that the product, service or trade mark must feature within a programme, and the reference must be in return for payment or for similar consideration. A Garde "Towards the liberalisation of product placement on UK television?" (2011) 16 *Communications law* 92.

⁸⁷ Institute of Medicine of the National Academies *Food Marketing to Children and Youth* 193.

film has once again followed in the shoes of its predecessors by winning the “Brandchannel Award for Achievement in Product Placement in a Single Film”.⁸⁸ In 2011 *Transformers: Dark of the Moon* won the dubious award for being the movie containing the most products since it contained 71 brands. *Transformers: Age of Extinction* won the award in 2015, boasting 55 brands, including Coca-Cola, Budweiser, Red Bull and Yili Milk.⁸⁹ In South Africa, this movie carried a 13V age restriction for its cinema release and a 10–12PG advisory label for its release on home entertainment media.⁹⁰ If it is accepted that these age restrictions are being adhered to in South Africa, it means that many an adolescent has been subconsciously exposed to a vast array of products and brands in one movie, without probably even realising that these products are being marketed. The effect of product placement is discussed in part 2 3 of this chapter.

Another very popular example of product placement can be found in the *American Idol* TV series, which is hugely popular amongst adolescents, younger children, and adults alike. In the thirteen years during which the judges of the talent show pronounced their view on the level of talent presented to them, they often have been pictured with a large red plastic cup in front of them displaying the Coca-Cola logo.⁹¹

2 1 3 Schools and places where children gather

A rather controversial method of marketing is that of in-school marketing. In 1999, the European Commission explained the convenience that school settings provide to marketers as follows:

“Schools are seen by some as the ideal place for spreading advertising messages targeted at children, since that is where they are gathered together and the place itself tends to guarantee the interest and quality of the messages that circulate there.”⁹²

⁸⁸ A Sauer "Announcing the 2015 Brandcameo Product Placement Awards" (20-02-2015) *Brandchannel* <<http://www.brandchannel.com/home/post/2015/02/20/150220-2015-Brandcameo-Product-Placement-Awards.aspx>> (accessed 26-05-2015).

⁸⁹ Sauer "Announcing the 2015 Brandcameo Product Placement Awards" (20-02-2015) *Brandchannel*.

⁹⁰ Film and Publication Board of South Africa "Search for Classification" (2015) *Film and Publication Board Query* <<http://fpbquery.fpb.org.za/erms/fpbquerytitle.aspx?filmtitle=transformers&Submit1=Go>> (accessed 26-03-2015).

⁹¹ Institute of Medicine of the National Academies *Food Marketing to Children and Youth* 192. A Garofalo "'American Idol' Season 14: Coca-Cola drops out ahead of 2015 premiere; show's future looks bleak" (2015) *IB Times* <<http://www.ibtimes.com/american-idol-season-14-coca-cola-drops-out-ahead-2015-premiere-shows-future-looks-1760307>> (accessed 11-02-2015) reports that this relationship between the beverage company and the producers of the talent-show has now come to an end.

⁹² Marketing in schools. Report on a study conducted for the European Commission. European Union "Commercial Communications: The Journal of Advertising and Marketing Policy and Practice in the

Food marketing companies are definitely also making use of the opportunity of a captive audience which the school setting provides. It is reported that in 2012 in the USA 70 percent of elementary and middle school students and 90 percent of high school students attended schools with in-school food marketing, most of which was for unhealthy food.⁹³ Some techniques may be described as indirect opportunities such as sponsorship of school stationery or supplies, whereas more direct approaches of signage and the sale of products in school tuck-shops or vending machines provide ample prospects of increasing brand loyalty.⁹⁴ In South Africa huge billboards on school sport fields or scoreboards displaying the brand names of carbonated soft drinks or restaurant chains is a regular sight. Company logos and brand names often appear on sport or concert programmes. Other smaller signs may also be displayed at play parks or party venues specifically designed for children's parties.

Schools are increasingly facing budgetary restraints: as a result, principals or governing bodies are often left with little or no other option than to accept generous offers of sponsorship from big co-operations. In many instances, the sale of pre-prepared and branded meals in school cafeterias provide a unique opportunity to resolve both issues of budgetary and staffing challenges which a school may encounter. These offers become even more attractive if the co-operation offers to also provide educational material about nutrition, fitness, wellness or other aspects of development, despite the fact that all of the material is branded with the food company's logo.⁹⁵

Other seemingly philanthropic marketing methods which are being used, include that of providing children with discount coupons when reaching a certain target of a number of books read.⁹⁶ A rather ironic and contradictory example of this is the

European Community" (1999) *European Union* 19:24-28 <http://europa.eu.int/comm/internal_market/comcom/newsletter/edition19/text_en.pdf> (accessed 26-09-2003) as cited in Hawkes *Marketing Food to Children* 32.

⁹³ Food Marketing Workgroup "Food Marketing to Children in School: Reading, Writing, and a Candy Ad?" (2014) *Foodmarketing* <http://www.foodmarketing.org/wp-content/uploads/2014/05/school_marketing_factsheet14.pdf> (accessed 14-02-2015); Eat Smart Move More "Unhealthy Food Marketing in schools: Reading, writing, and a candy ad?" (17-03-2014) *Eat Smart Move More* <<http://eatsmartmovemore.org/event/unhealthy-food-marketing-in-schools-reading-writing-and-a-candy-ad/>> (accessed 28-03-2015) .

⁹⁴ Hawkes *Marketing Food to Children* 32.

⁹⁵ Wilks (ed) *Marketing Food to Children and Adolescents* 58 – 60.

⁹⁶ Food Marketing Workgroup "Food Marketing to Children in School: Reading, Writing, and a Candy Ad?" (2014) *Foodmarketing*.

Cadbury marketing campaign which was launched in 2003 in the United Kingdom (“UK”). In terms of this scheme, children were encouraged to eat large amounts of chocolate in order to receive sports equipment for their schools. It was estimated that, in order for a school to receive a single set of posts and a net for volleyball, tokens from 5 440 chocolate bars would have been required. The UK Food Commission pointed out that this would require children to spend more than £2 000 on chocolate and to wolf their way through 1,25 million calories.⁹⁷

2 1 4 Sponsorship

In addition to sponsorship schemes in schools, the provision of funding or other resources for an event or activity may provide several commercial benefits for both the sponsor and the receiver of the sponsorship. The ICC defines “sponsorship” as “[a]ny communication by which a sponsor, for the mutual benefit of sponsor and sponsored party, contractually provides financing or other support in order to establish a positive association between the sponsor’s image, brands, products, or services and a sponsored event, activity, organisation or individual.”⁹⁸ This type of marketing technique is often cheaper than broadcast advertising, it may overcome a number of restrictions of conventional advertising, and if the event is broadcasted worldwide, the sponsorship will have global reach.⁹⁹ As a result, the corporate sponsorship of sporting, music and entertainment events have proven to be very popular with food and beverage manufacturers. In a study conducted by the Federal Trade Commission (“FTC”) in the USA in 2006, nearly all of the 44 food and beverage companies which participated in the study, reported that they used athletic sponsorships of children and young people, totalling \$37,6 million for that year.¹⁰⁰ Major international sporting events have indeed become synonymous with popular food and drink brands, including that of the Baseball and Basketball World Series, the Rugby, Cricket, Football World Cup events, and the Formula One Grand Prix series.

⁹⁷ The Food Commission “Cadbury wants children to eat two million kg of fat - to get fit” (29-04-2003) *The Food Commission* <http://www.foodcomm.org.uk/articles/cadbury_in_schools/> (accessed 20-08-2015).

⁹⁸ International Chamber of Commerce “Consolidated ICC Code of Advertising and Marketing Communication Practice: Sponsorship Code” (15-07-2003) *AFBI* <[http://www.abfi.ie/Sectors/ABFI/ABFI.nsf/vPagesABFI/Responsibilities~sponsorship/\\$File/ICC+International+Code+on+Sponsorship.pdf](http://www.abfi.ie/Sectors/ABFI/ABFI.nsf/vPagesABFI/Responsibilities~sponsorship/$File/ICC+International+Code+on+Sponsorship.pdf)> (accessed 10-02-2015).

⁹⁹ Hawkes Marketing Food to Children 42.

¹⁰⁰ Wilks (ed) *Marketing Food to Children and Adolescents* 33.

Certainly the most fitting example of the sponsorship of a global sporting event is that of the Summer Olympic Games. The Olympic Partner programme (“TOP”) establishes long-term corporate partnerships with certain companies as part of the IOC’s worldwide sponsorship programme.¹⁰¹ Coca-Cola, for example, holds the title as the longest continuous partner of the Olympic Movement, since in 1928 it first delivered 1 000 cases of its product to Amsterdam as a European test marketing exercise.¹⁰² The 2012 Games hosted in London had 11 TOP partners, most notably represented by Coca-Cola, McDonald’s and Cadbury’s: last-mentioned being assigned as the “official treat provider” for the event.¹⁰³ This meant that for the four year term referred to as the “Olympic quadrennium”, these three food and beverage manufacturers had the exclusive rights to be associated with the event. Only sponsors’ brands are allowed to be seen and marketed and any other goods or services for sale in and around Olympic venues must be unbranded.¹⁰⁴

One of McDonald’s marketing strategies, as part of its sponsorship of the 2012 Olympic Games, was the McDonald’s Champions of Play Programme. This programme was promoted as part of the company’s “commitment to children’s well-being” and explained in the following terms:

“Play is essential for kids. It’s a way they discover, grow, and learn ... to make friends, solve problems and make their minds and bodies stronger. Play contributes to children’s healthy development on multiple levels.”

McDonald’s further promoted play activities by distributing the *McDonald’s Little Book of Ways to Play*, inviting children and adults alike to “think of McDonald’s as World

¹⁰¹ The International Olympic Committee (“IOC”) has described its role with sponsoring companies in the following terms:

“Olympic sponsorship is an agreement between an Olympic organisation and a commercial operator whereby the latter is granted the rights to specific Olympic intellectual property and Olympic marketing opportunities in exchange for financial support and goods and services contributions. Olympic sponsorship programmes operate on the principle of product-category exclusivity. Under the direction of the IOC, the Olympic Family works to preserve the value of Olympic properties and to protect the exclusive rights of Olympic sponsors.”

A Garde & N Rigby “Going for gold - Should responsible governments raise the bar on sponsorship of the Olympic Games and other sporting events by food and beverage companies?” (2012) 17 *Communications Law* 42 42.

¹⁰² 43. The authors explain that one of the US rowing team members at the Berlin Olympic Games in 1936, Paul Austin, went on to become the CEO and chairman of Coca Cola.

¹⁰³ 43.

¹⁰⁴ 44.

Play Headquarters".¹⁰⁵ At the same time, Coca-Cola's Olympic campaign included an invitation to the world to "Move to the Beat", an advertisement soundtrack and endorsements by several international performing artists.¹⁰⁶

2 1 5 Sales promotions and branding

Sales promotions are aimed at inducing consumers to buy a product at the point of sale.¹⁰⁷ Sales promotions can therefore refer to a variety of methods employed in retail outlets, including product-specific bins or racks; display units designed specifically to attract children or participants of a certain sport; the use of catchy slogans; a temporary reduction in price; the use of coupons or rebates; free samples; and attractive packaging designed to appeal to the target market.¹⁰⁸ These methods of promotion need to attract new customers, but also keep the existing buyers interested in the product. As a result, the strategy of branding will in some instances also be employed in order to create loyal customers. Branding can be regarded as a method of marketing, since brand equity is established through advertising, packaging and other marketing communications.¹⁰⁹ In fact, branding has been defined as "an advertising method designed to establish recognition and positive associations with a company name or product, with the goal of creating lifelong customers."¹¹⁰ It therefore seems apposite to include branding as part of the discussion of sales promotions.

One of the effective ways in which to attract customers to a brand is the use of celebrity endorsements, both in advertisements and on the packaging of a product. These endorsements are believed to assist with generating brand identity and facilitating a brand-consumer relationship.¹¹¹ In addition to the use of animated or third party characters, the validation which a sport star or another celebrity provides to a

¹⁰⁵ 44 citing Champions of Play "McDonalds is the world's biggest fan of Play" (16-11-2015) *Champions of Play* <<http://www.championsofplay.com>> (accessed 16-11-2015).

¹⁰⁶ Garde & Rigby (2012) *Communications Law* 44.

¹⁰⁷ Hawkes *Marketing Food to Children* 51.

¹⁰⁸ Wilks (ed) *Marketing Food to Children and Adolescents* 52-53.

¹⁰⁹ See the discussion in ch 4 at 3 2.

¹¹⁰ Boyland *Television Food Advertising to Children* 60 citing SM Connor "Food-related advertising on preschool television: Building brand recognition in young viewers" (2006) 118 *Pediatrics* 1478 1478-1485.

¹¹¹ Boyland *Television Food Advertising to Children* 61-62 citing D Lawrence (2003) "The role of characters in kids marketing" (2003) 4 *Young Consumers* 43 43-48. At 62 of her thesis Boyland refers to the famous example of Gary Lineker, endorsing Walkers Crisps during a time in which the brand won an award for being the "consumer's favourite in the food and drink category."

product, may prove incredibly useful in increasing a product's appeal to especially children.¹¹² A recent and rather familiar example of this type of marketing can be found in the endorsement, which the international football legend Lionel Messi, gave to Lay's Potato Chips and Pepsi Cola, especially during the 2014 FIFA World Cup.¹¹³ This sport star frequently appears in the commercials of these products and on the packaging thereof, and Pepsi has declared that this collaboration will continue to "bring [their] fans exciting and engaging content, products and experiences – bringing fans closer to the game they love."¹¹⁴ South African sport stars such as Francois Pienaar and AB de Villiers have both also promoted Lay's Potato Chips,¹¹⁵ Schalk Burger appeared in a number of Steers advertisements, while international celebrities such as Madonna and Beyoncé have endorsed Pepsi and Mr T has put his power behind Snickers Chocolate Bars.¹¹⁶

Another popular method that is being used to tempt consumers into buying more products is that of "end aisle marketing".¹¹⁷ A recent study in the UK showed that an estimated 30 percent of supermarket sales come from aisle-ends.¹¹⁸ It furthermore found that end-of-aisle displays "substantially increased sales volumes in all six beverage categories studied, with increases to alcohol sales of between 23,2 percent and 46,1 percent and on non-alcohol drink sales of between 51,7 percent and 113,8 percent".¹¹⁹ Moreover, another study in July 2014 by the Center for Science in the Public Interest ("CSPI") in the USA found that all 30 of the retail stores across fourteen

¹¹² Wilks (ed) *Marketing Food to Children and Adolescents* 54.

¹¹³ South African Food Review "Lionel Messi leads new Lay's commercial campaign" (02-07-2014) *Foodreview* <<http://www.foodreview.co.za/snacks-and-confectionery/1274-lionel-messi-in-lays-campaign>> (accessed 14-02-2015); M Chapman "Pepsi signs up Messi to ambush Coke's World Cup sponsorship" (17-01-2014) *Campaign Live* <<http://www.marketingmagazine.co.uk/article/1227538/pepsi-signs-messi-ambush-coke-s-world-cup-sponsorship>> (accessed 14-02-2015).

¹¹⁴ Chapman "Pepsi signs up Messi to ambush Coke's World Cup sponsorship" (17-01-2014) *Campaign Live*.

¹¹⁵ T Koenderman "Francois gets layed" *Finweek* (22-02-2007) 106.

¹¹⁶ ToxicFighterSB "Madonna- Like A Prayer (Pepsi Commercial, 1989)" (23-03-2012) *YouTube* <<https://www.youtube.com/watch?v=rM-0rmUgOnY>> (accessed 05-05-2015); Devalish28 "Beyoncé Grown Woman Official 2013 Pepsi Commercial" (04-04-2013) *YouTube* <https://www.youtube.com/watch?v=_Cb07li2iil> (accessed 05-05-2015); M Brink "Steers Schalk Burger Ice-Cream Ad" (20-11-2007) *YouTube* <https://www.youtube.com/watch?v=jMcW_8uqZUM> (accessed 05-05-2015); GCXtremeBoomboxUnit "The Extended Snickers Commercials of Mr T (Full Version)" (10-04-2010) *YouTube* <<https://www.youtube.com/watch?v=Ona7QYULRVE>> (accessed 05-05-2015).

¹¹⁷ L Koekemoer (ed) *Marketing Communications* (2004) 308.

¹¹⁸ R Nakamura, R Pekhey, M Suhrcke, SA Jebb & TM Marteau "Sales impact of displaying alcoholic and non-alcoholic beverages in end-of-aisle locations: An observational study" (2014) 108 *Soc Sci & Med* 68 73.

¹¹⁹ 73.

categories which the CSPI studied, including non-food stores, promoted food products at their check-out points.¹²⁰ Consumers waiting in a line to pay at the cashiers often find themselves in a very peculiar situation and can fall prey to “impulse marketing”.¹²¹ Customers may have already collected the items, which they originally intended purchasing, but have to wait in a queue with seemingly nothing little more to do than to take in their surroundings. In many instances consumers are surrounded by items which were not on their original shopping list but are demonstrating to be rather alluring. As was the case in the retail outlets studied by the CSPI, several supermarkets all over the world stack their shelves with both sweet and savoury snacks. To children who are accompanying their parents on the shopping excursion and who very often have had to remain seated in a shopping trolley, these colourful and fun items featuring their favourite animation characters are especially appealing.

One of the most popular methods of sales promotion is that of providing collectable toys as part of so-called “kiddies meals”. McDonald’s version of this, the “Happy Meal”, has become synonymous with this marketing method and there are copious examples of movie, television and popular culture characters which have accompanied burgers and french fries. The FTC estimates that in 2006 food marketing companies participating in the research spent more than \$360 million to acquire the toys included in children’s meals.¹²² It must also be borne in mind that in many instances a cross-promotional partner, such as a toy manufacturer, will cover the costs of the toy. According to information released by the NPD group (formerly National Purchase Diary), in 2006 quick-service restaurants sold more than 1,2 billion children’s meals with toys to children younger than twelve.¹²³ The FTC reported that in 2006 the 44 companies participating in the study spent \$7 million on cross-promotional licensing fees. In 2009 this figure rose to \$80,6 million.¹²⁴

¹²⁰ P Fielding-Singh, J Almy & MG Wootan *Sugar Overload: Retail Checkout Promotes Obesity* (2014) *Center for Science in the Public Interest (CSPI)* <<http://cspinet.org/sugaroverload.pdf>> (accessed 20-02-2015).

¹²¹ DA Cohen & SH Babey “Candy at the Cash Register — A Risk Factor for Obesity and Chronic Disease” (2012) *New England Journal of Medicine* 1381-1383 .

¹²² Wilks (ed) *Marketing Food to Children and Adolescents* 30. There are some discrepancies as to how much the companies actually spent on these promotions since such toys are classified as “self-liquidating premiums”. The cost of such promotions are entirely covered by the incremental revenue generated by the promotions and are thus not classified as a reportable expense. Wilks (ed) *Marketing Food to Children and Adolescents* 19.

¹²³ Wilks (ed) *Marketing Food to Children and Adolescents* 30.

¹²⁴ Federal Trade Commission *A Review of Food Marketing to Children and Adolescents* 22.

These cross-promotional licensing fees are also part of the expenditure for the attractive packaging used by food manufacturers, which includes the use of animated and other popular characters on the wrapping. Food products aimed at children are usually sold in brightly coloured containers, boxes or packets and graphics which suggests “fun”, energy or being “cool”.¹²⁵ The products are furthermore packaged in specific shapes of containers that appeal to children.¹²⁶ The wrapping frequently incorporates the word “kids” into the displayed wording, explaining to children that these products have been developed especially for them, while also sometimes directing them to company websites where they can have more “fun and adventures”. In addition, some product packaging includes games, jokes or cut-outs or even promotes the product itself as a form of amusement in that it includes a special dispenser for the food or that it can be worn as a type of jewellery.¹²⁷ The packets may also include premiums such as coupons for admission to theme parks or other events, free movies, digital movie or music downloads, ringtones or vouchers for sporting equipment.¹²⁸

2 1 6 “New” media

In 2013 the WHO commissioned a report which provides information on the changes which have occurred in the food and beverage marketing environment, and in particular to children, during the last decade.¹²⁹ This report shows that, although television advertising remains the dominant medium, it is now only one of many different forms of media through which advertisers promote products, build brand awareness and consumer loyalty. The emerging techniques, which are increasingly gaining popularity, are those of placement of online advertising,¹³⁰ viral marketing,¹³¹

¹²⁵ Wilks (ed) *Marketing Food to Children and Adolescents* 52.

¹²⁶ 53.

¹²⁷ 53.

¹²⁸ 53 – 54.

¹²⁹ The report was compiled by C Bollars, E Boyland, J Breda, K Gapanenko, J Halford, K-I Klepp, T Lobstein & G Xuereb and is entitled *Marketing of foods high in fat, salt and sugar to children.* C Bollars E Boyland, J Breda, K Gapanenko, J Halford, K-I Klepp, T Lobstein & G Xuereb *Marketing of foods high in fat, salt and sugar to children: update 2012–2013* (2013).

¹³⁰ 3. On, *inter alia*, search engines, social networking sites, news and entertainment websites and blogs, around or in TV-on-demand, around or in films and media clips viewed online, and around or in online and downloadable games, music and other media.

¹³¹ 3. This method includes word-of-mouth and personal recommendations by consumers, especially on social networking sites and for which payment or reward may be offered.

direct marketing,¹³² and interactive and user-generated marketing.¹³³ Despite the huge amounts of money spent on television marketing, European markets have at the same time shown a dramatic increase in the expenditure of online advertising, reporting an increase from less than €0,5 billion in 2000 to more than €10 billion in 2010.¹³⁴ In 2009, online marketing expenditure in the UK was higher than that of television marketing and it is predicted that this will also be the case in the USA by 2018. The FTC in 2012 reported that in 2009 food companies spent 50 percent more to reach youth using online, mobile and viral marketing compared to what was spent in 2006.¹³⁵ The reported expenditure for new media marketing by the participating companies in 2009 was \$122,5 million of which manufacturers of carbonated beverages spent \$23 million and quick service restaurants accounted for \$19 million.¹³⁶ The amount spent on online marketing in this country in 2015 is estimated to be \$57,5 billion.¹³⁷

It would appear that spending these amounts of money on these methods of advertising is not in vain since some of the websites of food and beverage manufacturers in fact attract large amounts of traffic. In 2011 Coca-Cola's fan page was rated the eleventh most popular in the world, with a total of 32 million fans, while Starbucks had 23 million fans.¹³⁸ There are furthermore a vast number of ways in which advertising occurs online, including within search engines, "pop-up" advertising, advergames,¹³⁹ smart phone apps and social networking sites.¹⁴⁰ Through these means online consumers also have unlimited access to a variety of television commercials from local and international channels.

A number of recent studies have focussed in particular on the Internet when used as a promotional tool to market food to children, with some of this research also paying

¹³² Including promotional e-mails, telephone calls, text messaging and promotional sampling schemes in schools. Bollars *et al Marketing of foods high in fat, salt and sugar to children*.

¹³³ 3. Consumers may be invited to vote for different flavours of a brand which is then produced and marketed, or a competition is launched in terms of which individuals must create their own video commercials and which are then distributed through YouTube for viral distribution.

¹³⁴ S Galbraith-Emami & T Lobstein "The impact of initiatives to limit the advertising of food and beverage products to children: a systematic review" (2013) 14 *Obesity Reviews* 960 973

¹³⁵ Federal Trade Commission *A Review of Food Marketing to Children and Adolescents* 15.

¹³⁶ 16.

¹³⁷ Go-Gulf "Global Online Advertising Spending Statistics" (02-05-2012) *Go-Gulf* <<http://www.go-gulf.com/blog/online-ad-spending/>> (accessed 20-02-2015). These type of statistics are unfortunately not available for the South African market.

¹³⁸ Galbraith-Emami & Lobstein (2013) *Obesity Reviews* 973. In February 2015 the Coca-Cola South Africa Facebook page had nearly 94 million "likes".

¹³⁹ The use of these advertiser-sponsored video or computer games will be discussed below.

¹⁴⁰ Galbraith-Emami & Lobstein (2013) *Obesity Reviews* 973.

attention to the content of these companies' websites.¹⁴¹ One such study was the one conducted by the FTC in 2006: amongst the 44 companies, which participated in the research, more than two thirds reported that they make use of online, youth directed activities. These activities included, *inter alia*:

“dedicating space on a company website to child- or teen-focused content; developing independent websites for particular child- or teen-directed food products or promotional campaigns; purchasing ads on third-party websites to promote a food item or promotion; and using a range of other digital marketing techniques, such as email newsletters, downloadable screensavers and wallpapers, podcasts, and ‘webisodes’, to reach children and adolescents.”¹⁴²

Another study found that of the brands identified for the study, 85 percent had a website with content specifically aimed at children. These websites annually receive approximately 49 million visits by children aged two to 11.¹⁴³ It has furthermore been estimated that about 70 percent of young children in the USA aged between two and five actively use tablets.¹⁴⁴ It is evident that children are frequent users of online media and are, as a result, frequently exposed to the method of marketing which marketers are increasingly using as their first choice. However, as will be shown in chapters 6 and 7, this is also the marketing technique which is largely unregulated.

Another new method of marketing, already mentioned above in part 2 1 5, is that children are often encouraged to send a promotional or unique code, found in or on the packaging of food products, via a messaging service from their mobile phone to a competition line or telephone line. In response, these young consumers receive free ringtones, downloads or entries to competitions.¹⁴⁵

Advergaming appear to be a particularly popular form of marketing to children.¹⁴⁶ These advertiser-sponsored video or computer games, also sometimes referred to as “immersive marketing”, embed brand messages throughout the game with the explicit

¹⁴¹ Cairns *et al* *The extent, nature and effects of food promotion to children* 14.

¹⁴² Wilks (ed) *Marketing Food to Children and Adolescents* 49.

¹⁴³ ES Moore & VJ Rideout "The Online Marketing of Food to Children: Is It Just Fun and Games?" (2007) 26 *JPP&M* 205.

¹⁴⁴ D Nielsen "Consumer Groups Bash YouTube Kids for Being Hyper-Commercialized" (07-04-2015) *Capital Wired* <<http://www.capitalwired.com/consumers-groups-bash-youtube-kids-for-being-hyper-commercialized/28112/>> (accessed 24-04-2015).

¹⁴⁵ See also C Corbett & C Walker "Catchy cartoons, wayward websites and mobile marketing - food marketing to children in a global world" (2009) 21 *Education Review* 84 89-90.

¹⁴⁶ Moore & Rideout (2007) *JPP&M* 202.

purpose of promoting a particular product or brand.¹⁴⁷ In one study it was found that 73 percent of the websites studied, posted at least one game and some offered as many as 67 games.¹⁴⁸ Children are encouraged to play all of the games included in the range and in this way are constantly being exposed to the brand. This type of persistent exposure to a brand logo or animated character shapes a child's brand preferences. In these circumstances and to a younger audience the lines between advertising and entertainment will be blurred and the intention of the marketer less apparent.¹⁴⁹ As a result, advergames is effective since the player of the game is less likely to be sceptical towards a brand. In fact, it has been found that children are more likely to be receptive to a brand message when it is embedded in entertainment.¹⁵⁰ Younger children may, of course, not even realise that these games are intended to promote a product. The interaction between a child and the marketing technique is also different to other forms of marketing: whereas with television or print advertisements a child is a passive receiver of information, in the case of advergames, she becomes an active participant.

Of late the increase in popularity of social networking sites have also provided an excellent source of fostering relationships with customers.¹⁵¹ Brand fan pages created on social networking sites provide a useful platform where customers can interact with a company by liking or commenting on brand posts. It has been found that consumers who become fans of these brand fan pages tend to be loyal and committed customers while they also tend to visit the brand stores more often.¹⁵² Although some social media sites such as Facebook require that members must be older than thirteen,¹⁵³ there is ample evidence that younger children regularly access social media websites: more than 30 percent of children aged eight to twelve in the UK have Facebook profiles¹⁵⁴ and this social media network recently announced that it intends to focus

¹⁴⁷ 202. V Mallinckrodt & D Mizerski "The Effects of Playing an Advergame on Young Children's Perceptions, preferences, and requests" (2007) 36 *Journal of Advertising* 87 88.

¹⁴⁸ Moore & Rideout (2007) *JPP&M* 207-208.

¹⁴⁹ 203.

¹⁵⁰ 208.

¹⁵¹ L de Vries, S Gensler & PSH Leeflang "Popularity of Brand Posts on Brand Fan Pages: An Investigation of the Effects of Social Media Marketing" (2012) 26 *Journal of Interactive Marketing* 83.

¹⁵² 83.

¹⁵³ Facebook "How old do you have to be to sign up for Facebook?" (2016) *Facebook* <<https://www.facebook.com/help/210644045634222>> (accessed 20-02-2015).

¹⁵⁴ Galbraith-Emami & Lobstein (2013) *Obesity Reviews* 973.

on this market by allowing children younger than thirteen to also become official members.¹⁵⁵

Another platform used for promoting products to children was launched in February 2015. YouTube Kids is a new entertainment app which has been accused of infringing children's rights by allowing TV-style adverts to be shown among the educational and entertainment content aimed specifically at children.¹⁵⁶ McDonald's, and toy companies such as Hasbro and Mattel, for example, are featuring their commercials before video posts popular with children between the ages of 11 to 17. It has been reported that a spokesperson of YouTube stated that YouTube Kids was a "natural progression" since the popularity of family entertainment increased by 200 percent in only one year on this online channel.¹⁵⁷

2.2 Types of foods which are marketed

There have been a number of detailed studies in which the types of foods, which are marketed to children, have been analysed. Cairns *et al*, for example, report that during the period 2006 to 2008 they found 84 studies that analysed children's food advertisements.¹⁵⁸ Virtually all of these studies found that five groups of food items, namely sugar-sweetened breakfast cereals, confectionery, savoury snacks, fast food, and (carbonated) soft-drinks dominated television advertising. The authors refer to examples such as a study in Portugal in which of 26 percent of children's adverts were for breads and sugared cereals, 35 percent for sweets (chocolates and cookies) and 12 percent were for soft drinks.¹⁵⁹ In the USA researchers found that sugared cereals were the most advertised product (23 percent), followed by candy (15 percent), cereal with sugar as the main ingredient (10,3 percent), low-sugared cereals (6 percent) and

¹⁵⁵ S Gibbs "Facebook patent reveals plans for children to join the social network" (03-06-2014) *The Guardian* <<http://www.theguardian.com/technology/2014/jun/03/facebook-children-join-social-network>> (accessed 20-02-2015).

¹⁵⁶ Gibbs "Facebook patent reveals plans for children to join the social network" (03-06-2014) *The Guardian*.

¹⁵⁷ Nielsen "Consumer Groups Bash YouTube Kids for Being Hyper-Commercialized" (07-04-2015) *Capital Wired*.

¹⁵⁸ Cairns *et al* *The extent, nature and effects of food promotion to children* 15.

¹⁵⁹ DMP Lemos "Saturday morning children television food advertising ... The nightmare of nutrition educators" (2004) *J Pediatr Gastroenterol Nutr* 39 S471–S472, as cited by Cairns *et al* *The extent, nature and effects of food promotion to children* 15.

soft-drinks (5,6 percent).¹⁶⁰ A study from the Islamic Republic of Iran found that the most frequently advertised food items were salty or fatty snacks (for example cheese puffs or crisps), biscuits or cakes, and soft drinks,¹⁶¹ while in Canada studies of “regular” foods (as opposed to “junk” foods) on sale in a supermarket and repackaged to appeal to children, found that 89 percent (of those with on-pack nutritional data) could be classified as of poor nutritional quality.¹⁶² In addition, many studies found that food makes up a far greater proportion of the commercials aimed at children than when compared with advertising to adults. One study in the UK recorded that 62,5 percent of advertising during children’s programming were devoted to food advertising whereas only 18,4 percent of prime-time television advertising consisted of food commercials.¹⁶³

In this regard, Harris *et al* present a further analysis of the recent research. They also conclude that the most common food items, which are being marketed worldwide, are foods which contain high amounts of sugar, salt and fat.¹⁶⁴ The research which they refer to include a series of studies by Consumers International in 23 countries in Western Europe, central Europe and Asia which all found that calorie-dense but nutritionally poor foods are the most commonly marketed foods to children.¹⁶⁵ It has been estimated that for every US\$1 the WHO spends on promoting healthy nutrition, the food industry spends US\$500 promoting foods with a high fat, sugar or salt content. This estimate is supported by marketing budgets in, for example, the UK: in 2003 Nestlé spent £43 million promoting breakfast cereals and chocolate, Kellogg’s spent £30 million promoting their cereals, while Coca-Cola invested £26 million in their products’ marketing expenditure.¹⁶⁶

¹⁶⁰ K Kotz & M Story “Food advertisements during children’s Saturday morning television programming - are they consistent with dietary recommendations” (1994) *J Am Diet Assoc* 94 1296-1300, as cited by Cairns *et al* *The extent, nature and effects of food promotion to children* 15.

¹⁶¹ A Maryam, MR Mehdi, K Masood, G Mosoome, O Nasrin & M Yadollah “Food advertising on Iranian children’s television: A content analysis and an experimental study with junior high school students” (2005) 44 *Ecology of Food and Nutrition* 123–133, as cited by Cairns *et al* *The extent, nature and effects of food promotion to children* 15.

¹⁶² C Elliott “Marketing fun foods: A profile and analysis of supermarket food messages targeted at children” (2008) 34 *Canadian Public Policy-Analyse De Politiques* 259-273 and C Elliott “Assessing ‘fun foods’: nutritional content and analysis of supermarket foods targeted at children” (2008) 9 *Obesity Reviews* 368-377, as cited by Cairns *et al* *The extent, nature and effects of food promotion to children* 15.

¹⁶³ Cairns *et al* *The extent, nature and effects of food promotion to children* 14.

¹⁶⁴ JL Harris, JL Pomeranz, T Lobstein & KD Brownell “A Crisis in the Marketplace: How Food Marketing Contributes to Childhood Obesity and What Can Be Done” (2009) 30 *Annu Rev Public Health* 211 213.

¹⁶⁵ 213.

¹⁶⁶ Boyland *Television Food Advertising to Children* 45-46.

Another finding from these studies is the fact researchers found that snacking between meals is often being encouraged since the pastime appears in 58 percent of food advertisements and only 11 percent of meal times were being portrayed as taking place at the dinner or kitchen table or in a restaurant. This research once again confirmed that the predominant message in the marketing communications is that of fun, happiness and being “cool”. Commercials and other forms of marketing furthermore make it clear that it is exciting, great and convenient to be eating high-calorie foods almost anywhere and at any time, and that there are no negative consequences in doing so.¹⁶⁷

2.3 Effects of marketing on children

There is ample evidence to support the statement that the effect of marketing food to children is exactly what the industry intends it to be.¹⁶⁸ Food marketing companies seek increased consumption of the products they promote and are generally very successful at it. Simply put: marketing works.¹⁶⁹ In a poll conducted in 2002 in the USA, 83 percent of the children aged twelve to thirteen responded that they regularly ask their parents to buy or let them buy something they had seen advertised. 71 percent of these children repeated the request an average of eight times, and 11 percent repeated the request more than fifty times.¹⁷⁰ Marketers often deny that marketing have a detrimental effect on children and proclaim that their promotions will only affect children’s brand choices.¹⁷¹ It is claimed that the reasons why so much money is spent on food marketing is not to increase the consumption of high-calorie but nutritionally poor products, but rather for enterprises to remain competitive.¹⁷²

¹⁶⁷ Harris *et al* (2009) *Annu Rev Public Health* 213. See furthermore Institute of Medicine of the National Academies *Food Marketing to Children and Youth* 183 which cites studies with similar results, some of which date back to the 1950s and Wilks (ed) *Marketing Food to Children and Adolescents* 19 where the expenditure for different categories of foods marketed to children during the FTC study is listed.

¹⁶⁸ Prof Kelly Brownell, Rudd Center for Food Policy and Obesity, Yale University in World Health Organization “Marketing of food and non-alcoholic beverages to children, Report of a WHO Forum and Technical Meeting Oslo, Norway, 2-5 May 2006” (2006) *WHO* 9.

¹⁶⁹ Preface to Institute of Medicine of the National Academies *Food Marketing to Children and Youth* xiii.

¹⁷⁰ B Jeffery “The Supreme Court of Canada’s Appraisal of the 1980 Ban on Advertising to Children in Quebec: Implications for ‘Misleading’ Advertising Elsewhere” (2006) 39 *Loy LA L Rev* 237 274. In marketing terms this is known as “pester power”.

¹⁷¹ Harris *et al* (2009) *Annu Rev Public Health* 212.

¹⁷² Institute of Medicine of the National Academies *Food Marketing to Children and Youth: Threat or Opportunity?* (2006) 21.

Conversely, a number of studies indicated that children's dietary choices and preferences are directly affected by television marketing. Already in 1978, it was proven that children's choice of foods reflected their experimental television food advert exposure. This study by Goldberg showed that children who had viewed adverts for highly sugared foods were more likely to opt for sugared items (both those advertised and those not appearing in the adverts), whereas children who had viewed public service announcements with a pro-nutrition message selected more fruit and vegetables.¹⁷³ There have since been numerous papers publishing the results from research indicating that there is a direct link between the promotion of food and children's dietary choices. One reviewer of these studies has concluded that food promotion has a "causal and direct effect on children's food preferences, knowledge and behaviour."¹⁷⁴

The seminal Hastings report of 2003, commissioned by the Food Standards Agency in the UK, reviewed 201 papers and found, *inter alia*, that the studies provided strong evidence that food promotion influences children's food purchase-related behaviour. In all except one study, the effect was increasing purchase requests for foods high in fat, sugar or salt. In the remaining study, the effect was that more low fat snack sales were consumed, in line with the promotional stimulus used in the study.¹⁷⁵ The Hastings Report furthermore highlighted the fact that many studies made use of sophisticated methodologies to conclude that the effect of food marketing is not purely due to chance. The effect which marketing has on children's food preferences, purchase behaviour and food consumption is independent of other factors that may influence diet, such as parents' eating habits or attitudes. Hastings and his colleagues finally concluded that these effects occur at a brand and category level.¹⁷⁶ The authors noted, however, that an important factor which need to be considered is that the

¹⁷³ ME Goldberg, GJ Gorn & W Gibson "TV Messages for Snack and Breakfast Foods: Do They Influence Children's Preferences?" (1978) 5 *J Cons Res* 73-81, as cited by Boyland *Television Food Advertising to Children* 65.

¹⁷⁴ S Livingstone "Assessing the research base for the policy debate over the effects of food advertising to children" (2005) 24 *Inte J Adver* 273 283.

¹⁷⁵ Hastings *et al* "Review of Research on the Effects of Food Promotion to Children" (2003) *UK Government Archive* 15. See also the longitudinal study of F Folkvord, DJ Anschutz & M Buijzen "The association between BMI development among young children and (un)healthy food choices in response to food advertisements: a longitudinal study" (2016) 13 *International Journal of Behavioral Nutrition* 16 which concluded that "coping with environmental cues that trigger unhealthy eating behaviour is associated with the body mass index of young children two years later."

¹⁷⁶ Hastings *et al* "Review of Research on the Effects of Food Promotion to Children" (2003) *UK Government Archive* 3, 20 and 182.

majority of the studies which they reviewed, focussed on television advertising and that the cumulative effect of combined methods of marketing is likely to be significantly greater.¹⁷⁷

There have also been studies focussing on the effects of other forms of marketing, apart from television commercials. Auty and Lewis, for example, explored the effects of product placement.¹⁷⁸ They found that product placement of a bottle of Pepsi in a scene from the *Home Alone* movie increased children's preference in favour of Pepsi over Coke. This was the case for both groups of children: the group who said that they had noticed the bottle of Pepsi, as well as the group who did not remember seeing the Pepsi bottle in the film clip, both seemed to prefer Pepsi after seeing the film.¹⁷⁹ This was also the conclusion drawn from studying a group of children who played a Froot Loops advergaming in Australia. The researchers found that children's preference for Froot Loops over the other cereals appeared to increase by age if they were in the treatment group – that is, those who played the advergaming. However, for those who were in the control group, that is, children who did not play the game, the preference for Froot Loops seemed to decrease as their age increased.¹⁸⁰ The proportion of children in the treatment group reporting a preference for Froot Loops cereal over the other food options was from 300 percent (seven year-olds) to 400 percent (eight year-olds) higher than the control-group children of similar ages.¹⁸¹

It must of course be borne in mind that many of the studies which have been reviewed, occurred in laboratory settings and therefore may raise issues of external validity. Nevertheless, in Quebec in Canada, where there is a complete ban on advertising to children under the age of thirteen, research has shown that families here do not buy fast food as often as their counterparts in Ontario where the ban does not exist. There is also evidence to show that French-speaking Canadians make fewer

¹⁷⁷ 20. See further also the results of a meta study performed by G Cairns, K Angus, G Hastings & M Caraher "Systematic reviews of the evidence on the nature, extent and effects of food marketing to children. A retrospective summary" (2013) 62 *Appetite* 209-215 confirming these results.

¹⁷⁸ S Auty & C Lewis "Exploring Children's Choice: The Reminder Effect of Product Placement" (2004) 21 *Psychology & Marketing* 697.

¹⁷⁹ 706-707. Auty also has researched the effects that playing branded video games have on children. In this experiment they found that children who played a game with the Nike logo displayed were more likely to write down Nike in a memory-based test and were also more likely to choose the brand in a stimulus-based test than those who just played the branded game without interacting with the placement. See H Hang & S Auty "Children playing branded video games: The impact of interactivity on product placement effectiveness" (2011) 21 *Journal of Consumer Psychology* 65 70.

¹⁸⁰ Mallinckrodt & Mizerski (2007) *Journal of Advertising* 97.

¹⁸¹ 97.

children's cereal purchases than English-speaking Canadians do. In the provinces and territories of Canada other than the French-speaking Quebec, fast food and children's cereals are the most highly advertised food products on children's television.¹⁸²

Research during the 1990s found that, even if a marketing campaign is not specifically aimed at children, the use of animated characters creates a strong brand appeal to children. This was evident from studying the effect, which the character of Old Joe Camel, used as the marketing mascot for Camel cigarettes during the 1980s and 1990s, had on children. In 1991 *The Journal of the American Medical Association* published a number of results from studies which showed that the marketing campaign had been "far more successful at marketing Camel cigarettes to children than to adults."¹⁸³ One study also found that six year-old children were as familiar with Old Joe Camel as they were with the Mickey Mouse logo for the Disney Channel.¹⁸⁴ Similarly, in an alcohol-brand awareness study, nearly as many nine and ten year-olds who were able to identify the Budweiser frogs, were as familiar with Bugs Bunny.¹⁸⁵

Moreover, it is important to note that the marketing strategy to children has changed over the years. In the 1920s through to the post-war era the approach of convincing mothers that a product was beneficial for their children, was used.¹⁸⁶ This gatekeeper model collapsed during the 1980s and made way for the "kid power" approach in terms of which the message is conveyed to the child that the only one who understands the child, is the corporate sponsor.¹⁸⁷ Mothers who were once depicted as loving and kind, are now portrayed as neglectful, incompetent and embarrassing parents and marketing strategies aim to undermine parental authority.¹⁸⁸ It has furthermore been noted that whereas advertisements used to provide product information to consumers,

¹⁸² Harris *et al* (2009) *Annu Rev Public Health* 214.

¹⁸³ JR DiFranza, JW Richards, PM Paulman, N Wolf-Gillespie, C Fletcher, RD Jaffe & D Murray "RJR Nabisco's Cartoon Camel Promotes Camel Cigarettes to Children" (1991) 266 *JAMA* 3149-3149.

¹⁸⁴ PM Fischer, MP Schwartz, JW Richards, AO Goldstein & TH Rojas "Brand Logo Recognition by Children Aged 3 to 6 Years: Mickey Mouse and Old Joe the Camel" (1991) 266 *JAMA* 3145-3148. See also DiFranza *et al* (1991) *JAMA* 3149-3153; JP Pierce, E Gilpin, DM Burns, E Whalen, B Rosbrook, D Shopland & M Johnson "Does Tobacco Advertising Target Young People to Start Smoking? Evidence from California" (1991) 266 *JAMA* 3154-3158.

¹⁸⁵ B Wilcox, D Kunkel, J Cantor, P Dowrick, S Linn & E Palmer "Report of the APA Task Force on Advertising and Children" (20-02-2004) *American Psychological Association* 200 432 <<https://www.apa.org/pi/families/resources/advertising-children.pdf>> (accessed 05-07-2016).

¹⁸⁶ F Shaheed *Report of the Special Rapporteur in the Field of Cultural Rights: The impact of commercial advertising and marketing practices on the enjoyment of cultural rights* (2014) 8.

¹⁸⁷ Jeffery (2006) *Loy LA L Rev* 273.

¹⁸⁸ 273. Jeffrey explains that sociologist Juliet Schor reached these conclusions after extensive research and interviews with US marketing executives and reported her findings in her book J Schor *Born to Buy, The Commercialized Child and the New Consumer Culture* (2004).

the emphasis is now on creating an emotional appeal.¹⁸⁹ The American Psychological Association has concluded that advertising to children avoids any appeal to the rational.¹⁹⁰ Instead, marketing strategies seek to create a connection between the product or brand and the consumer. In the case of children, the most persuasive technique is that of fun, happiness, adventure and other imagery that has little to do with the product's qualities. There is generally very little product information accompanying a singing and dancing Ronald McDonald or Tony the Tiger.¹⁹¹

3 Conclusion

From the above discussion, it is evident that food manufacturers and marketers use a variety of marketing techniques in order to persuade child consumers to increase their consumption of their respective products. After all, as will be discussed in chapter 4, this manifestation of commercial speech has the purpose of encouraging commercial transactions.¹⁹² The establishment of strong brands and brand loyalty through celebrity endorsements and sponsorship, as well as creating trade marks which convey messages of fun, adventure and popularity, is furthermore vital to the growth of any business. The protection of such valuable intellectual property must therefore also be ensured.¹⁹³ Such marketing and branding campaigns have furthermore proven to have the desired increase in consumption. Unfortunately, the overwhelming majority of food products which are promoted to children are products which should not be consumed in large quantities or on a frequent basis. Although the regular intake of foods saturated in sugar, salt and fat is not the only contributing factor to obesity, a causal connection has been established between regular consumption of such foods and an increase in body weight.¹⁹⁴ If the persistent and effective exposure to the above-mentioned marketing techniques lead to the increased consumption of products which may be harmful to a child's health, it seems logical that these practices must be curbed. If businesses are continuing to make use of techniques in order to increase

¹⁸⁹ Shaheed *Report of the Special Rapporteur in the Field of Cultural Rights* 8.

¹⁹⁰ Wilcox *et al* "Report of the APA Task Force on Advertising and Children" (20-02-2004) *American Psychological Association* 23.

¹⁹¹ Wilcox *et al* "Report of the APA Task Force on Advertising and Children" (20-02-2004) *American Psychological Association* 23 – 24.

¹⁹² See ch 4 at 2 2.

¹⁹³ As will be discussed in ch 4 at 3 2.

¹⁹⁴ See ch 1 and Hastings *et al* "Review of Research on the Effects of Food Promotion to Children" (2003) *UK Government Archive*.

their profits but in the process act contrary to the best interests of children and society as a whole, the rights to commercial speech and intellectual property may have to be restricted. These measures of restriction, however, must be reasonable and justifiable in a constitutional democracy, and proportional in relation to the interests it seeks to protect. Furthermore, governments should always be reminded of the obligations which they have in terms of international law and that they must implement and enforce these duties by setting certain standards that society – including, but not limited to, big business and parents – must uphold. It is submitted that by using the best interests of children as the standard, a government will indeed be promoting the interests of society. In order to understand and substantiate this argument, it must first be established what it means to say that children have interests and rights and which rights may be affected by the marketing techniques discussed above. The following chapter will provide such an explanation by examining and analysing the right contained in Article 3(1) of the CRC.

CHAPTER 3: THE BEST INTERESTS OF THE CHILD

1 Introduction

1.1 Purpose and scope of the chapter

The previous chapter explained some of the practices employed by marketing companies and the ways in which they use various efficient techniques in order to increase food consumption amongst child consumers. It was shown that marketing techniques have the clear aim of encouraging children to eat, in particular, foods which may have an adverse effect on their well-being. It was explained in chapter 1 that the South African government has committed itself to promoting the best interests of the child in all matters that affect children. In doing so, the South African government declared its intention to always consider children's rights as the point of departure whenever a matter relates to children. As a result, South African policy decisions regarding the marketing of food products must also follow this approach and first consider if marketing techniques serve the best interests of children.

This chapter will consequently examine the concept of the best interests as a theoretical and practical foundation for the assessment of food-marketing practices to children.¹⁹⁵ First, it will provide a brief historical background to the concept, explaining how the best interests of the child developed within the theoretical and international framework of children's rights. The chapter will furthermore provide an analysis of the phrase, as well as other terminology used in conjunction with the phrase, and in particular focus on the meaning of this concept within the context of food marketing. During this analysis, the emphasis will be on the content and meaning which the CRC provides to the phrase. The chapter will also consider the various roles, which different actors such as the state, private enterprises and parents have in the promotion and implementation of the best interests of the child, highlighting the co-operation which needs to take place between the different role-players in achieving this goal.

¹⁹⁵ Although the focus of this thesis is to provide an analysis of the South African response to its international obligations, this chapter will first provide a discussion of the phrase from a more general perspective. However, some references to the use of the phrase in the South African context will occasionally be made in ch 3. The interpretation which has been given to the best interests of the child in South Africa in particular will be explained in ch 7.

1 2 General remarks

The concept of the best interests of the child was established in international law in 1959 when the General Assembly of the United Nations adopted the Declaration of the Rights of the Child and agreed that the best interests of the child was to be “the paramount consideration” whenever laws were enacted to provide special protection to children.¹⁹⁶ Used primarily as a principle of compassion and a self-imposed limitation of adult power, the best interests of the child was regarded as a method of protecting the weak and vulnerable child victim who is unable to speak or make decisions for herself.¹⁹⁷ The CRC departed from the traditional welfare approach to children and confirmed that children are entitled to a full range of human rights.¹⁹⁸ The CRC introduced the best interests as a new principle of interpretation in international law, remoulding it from a principle of benevolence to one of empowerment and a method of interpretation which has to be considered in all actions concerning children.¹⁹⁹ Article 3 of the CRC stipulates that the best interests of the child should be a primary consideration in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies. In terms of this rights based approach a child is regarded as an individual bearer of rights: correspondingly her views must be considered, also in instances where her best interests are to be determined.²⁰⁰ This approach was further clarified in the fourteenth General Comment of the Committee on the Rights of the Child, issued in May 2013.²⁰¹ The General Comment provides some much-anticipated direction regarding the best interests of the child as enshrined in Article 3 of the CRC. The Committee explicitly states that the best interests is a threefold concept existing

¹⁹⁶ Principle 2 of the Declaration.

¹⁹⁷ G van Bueren “The United Nations Convention on the Rights of the Child: An Evolutionary Revolution” in CJ Davel (ed) *Introduction to Child Law in South Africa* (2000) 202.

¹⁹⁸ J Zermatten “The Best Interests of the Child Principle: Literal Analysis and Function” (2010) *Int'l J Child Rts* 483 483.

¹⁹⁹ Van Bueren “The United Nations Convention on the Rights of the Child” in *Introduction to Child Law in South Africa* 205. Zermatten (2010) *Int'l J Child Rts* 493; “General Comment No 14” (2013) 4. (Also available at http://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf (accessed 03-10-2013)).

²⁰⁰ MDA Freeman “Introduction” in MDA Freeman (ed) *Law and Childhood Studies* (2012) 5, 8 in particular calls for a recognition of a child as a human *being*, as opposed to viewing a child as a *becoming*.

²⁰¹ “General Comment No 14 (2013) 4.

both as a substantive right; a fundamental, interpretative legal principle; and as a rule of procedure.²⁰²

Apart from the CRC, the principle can also be found in the ACRWC²⁰³ in that Article 4 requires that “[i]n all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration.” The concept is also incorporated in a number of national constitutions²⁰⁴ while numerous other jurisdictions around the world have acknowledged the significance of the best interests of the child by incorporating the principle into their national legislation.²⁰⁵ Chapter 7 of this thesis will explain how the South African Constitution and Children’s Act requires the best interests of the child to be of paramount importance in any matter affecting the child.

2 Historical and theoretical context: The development of children’s rights

2 1 Introduction

The development of the recognition of children’s rights has played an essential role in the philosophy underpinning the concept of the best interests of the child. The best interests of children were not associated with the concept of parental authority, especially not during the rule of Roman and Germanic law.²⁰⁶ In terms of Roman and Germanic law, children did not have their own interests and existed for the benefit and interests of the head of the family. It is submitted that whereas the paternalistic approach to children was based on the absolute control and authority of parents, and in particular that of the father, the recognition of the best interests of the child principle

²⁰² 4. This view departs from the opinion previously forwarded by some academics, most notably, Van Bueren (G van Bueren *The International Law on the Rights of the Child* (1995) 46) and Alston (P Alston “The best interests principle: towards a reconciliation of culture and human rights” (1994) 8 *Int J Law Policy Family* 1), preferring to refer to the best interests as a principle which “does not create rights or duties” (Van Bueren *The International Law on the Rights of the Child* 46).

²⁰³ The ACRWC entered into force in November 1999 and South Africa ratified this convention on 7 January 2000.

²⁰⁴ Including that of Ethiopia, Columbia, Paraguay, and Sri Lanka and South Africa. The UNICEF Innocenti Research Centre “Law Reform and Implementation of the Convention on the Rights of the Child” (12-2007) *UNICEF* <http://www.unicef-irc.org/publications/pdf/law_reform_crc_imp.pdf> (accessed 17-06-2014) 13-16 and 23-25.

²⁰⁵ The Innocenti Research Centre “Law Reform and Implementation of the Convention on the Rights of the Child” (12-2007) *UNICEF* 23-26. These countries include Indonesia, the Philippines, Tunisia, Egypt, Colombia, Romania, Sweden, Italy, Quebec and the UK. Since the publication of this report by the Innocenti Research Centre, South Africa has also joined these jurisdictions by enacting the Children’s Act and in particular ss 6, 7 and 9 thereof.

²⁰⁶ B de Villiers “The rights of children in international law: guidelines for South Africa” (1993) 3 *Stell LR* 289 291.

in modern times is established in the belief that children too are the bearers of fundamental rights.²⁰⁷ The modern concept of paternalism is based on the presumption that parents will act in their children's best interests and for this reason the state shows restraint in interfering in private family life.²⁰⁸ However, since it is a presumption, which is all too often is rebutted, the state has the obligation of implementing the best interests of the child, especially where others fail to do so.

The purpose of the following discussion is twofold. First, it will be explained how the development of the recognition of children's rights has played an essential role in the philosophy underpinning the best interests of the child. Second, it will be explained how the concept of the best interests of the child developed from something which at first could not exist, into something which today is recognised as a substantive right, a procedural guarantee and a universally recognised standard and principle.²⁰⁹

2.2 From property to protection

The absolute power of the *paterfamilias* over his children was derived from the Roman doctrine of *patria potestas*.²¹⁰ This power has been described as a proprietary, imperious and arbitrary power which belonged to the father as *paterfamilias*²¹¹ and included all rights of custody or ownership over the body, name, sale, trade, labour, education, emancipation and religion, as well as the power of corporal punishment, including exposure of new-born babies, chastisement and death.²¹² The *paterfamilias* could exercise his *potestas* over all members of his household such as his children, grandchildren, wives, relatives, servants and their offspring and existed solely for the

²⁰⁷ Schäfer *Child Law in South Africa* 6; E Sutherland "Child Law: Respecting the Rights of Children" in EC Reid & D Visser (eds) *Private Law and Human Rights: Bringing Rights Home in Scotland and South Africa* (2013) 81-82.

²⁰⁸ Sutherland "Child Law: Respecting the Rights of Children" in *Private Law and Human Rights* 82.

²⁰⁹ "General Comment No 14 (2013)" 4.

²¹⁰ The Twelve Tables - TABLE IV Law 1 <http://www.constitution.org/sps/sps01_1.htm> (accessed 01-09-2015). *J.I.IX; Gl. 1.55. THE CIVIL LAW* Including The Twelve Tables, The Institutes of Gaius, The Rules of Ulpian, The Opinions of Paulus, The Enactments of Justinian, and The Constitutions of Leo, Translated by SP Scott Cincinnati The Central Trust Company 1932 <http://www.constitution.org/sps/sps02_j2-01.htm> (accessed on 01/09/2015).

²¹¹ A McGillivray "Children's Rights, Paternal Power and Fiduciary Duty: From Roman law to the Supreme Court of Canada" (2011) 19 *Int'l J Child Rts* 21 25; JF Gardner *Being a Roman Citizen* (1993) 52.

²¹² The Twelve Tables - TABLE IV Law 1 <http://www.constitution.org/sps/sps01_1.htm> (accessed on 01/09/2015). *J.I.IX; Gl. 1.55. THE CIVIL LAW* Including The Twelve Tables, The Institutes of Gaius, The Rules of Ulpian, The Opinions of Paulus, The Enactments of Justinian, and The Constitutions of Leo, Translated by SP Scott Cincinnati The Central Trust Company 1932 <http://www.constitution.org/sps/sps02_j2-01.htm> (accessed 01-09-2015).

benefit of the father.²¹³ The basis for the continuation of the power of the father has been explained to be dependent on the life of or decisions made by the *paterfamilias* and not on the child's need for nurturance or protection.²¹⁴ The father was allowed to manage his household without any interference from the Roman Empire and the state respected his individual freedom, judgement and absolute authority in his own home.²¹⁵ Similarly, in terms of Greek law, the child was considered the property of his father who had the power to decide whether the child would live or die.²¹⁶ This choice was explained as something rational, for Seneca declared:

“we drown even children who at birth are weakly and abnormal. Yet it is not anger but reason that separates the harmful from the sound.”²¹⁷

This *ius vitae necisque* was abolished during the latter years of the Roman Empire and by AD 374 the killing of an infant was considered murder.²¹⁸ By AD 565, the sale of children was prohibited and by the time of Justinian, a father was only allowed reasonable chastisement, although this term was never clearly defined.²¹⁹ A series of

²¹³ *Gl.1.55; Jl.1.9*. See also The Twelve Tables - TABLE IV Law 1 http://www.constitution.org/sps/sps01_1.htm Justinian Institutiones Book I Title IX; Digest Book I Title VI. THE CIVIL LAW Including The Twelve Tables, The Institutes of Gaius, The Rules of Ulpian, The Opinions of Paulus, The Enactments of Justinian, and The Constitutions of Leo, Translated by SP Scott Cincinnati

The Central Trust Company 1932 http://www.constitution.org/sps/sps02_j2-01.htm (accessed 01-09-2015). McGillivray (2011) *Int'l J Child Rts* 25; Gardner *Being a Roman Citizen* 54; JF Gardner *Family and Familia in Roman Law and Life* (1998) 2 and 6; Archard *Children, Family and the State* 87-88. Paul wrote to the Galatians that:

“What I am saying is that as long as an heir is underage, he is no different from a slave, although he owns the whole estate. The heir is subject to guardians and trustees until the time set by his father.” Galatians 4:1-7 New International Version.

²¹⁴ F Schulz *Classical Roman Law* (1951) 150; JM Kruger *Judicial interference with parental authority: a comparative analysis of child protection measures* LLD thesis University of South Africa (2009) 26.

²¹⁵ Schulz *Classical Roman law* 150; Kruger *Judicial interference with parental authority: a comparative analysis of child protection measures* 27.

²¹⁶ DM Richett & JR Hudson “The Socio-Legal History of Child Abuse and Neglect: An Analysis of the Policy of Children's Rights” (1979) 6 *J Soc and Soc Welfare* 849-852. Before the celebratory *Amphidromia* ceremony took place five days after the birth of a child, infanticide was still permissible and not considered an offence.

²¹⁷ Seneca Book I Chapter 15 <http://praxeology.net/seneca2.htm> (accessed 17/11/2015).

²¹⁸ The Twelve Tables - TABLE IV Law 1 http://www.constitution.org/sps/sps01_1.htm Richett & Hudson (1979) *J Soc and Soc Welfare* 852.

²¹⁹ M Kaser *Roman private law* (1965) 60 I 3(a); WW Buckland *A text-book of Roman law from Augustus to Justinian* (1921) 103; R Sohm *The Institutes of Roman Law* (1907) 502-503; Schulz *Roman law* 151; Thomas *Institutes* 27. Richett & Hudson (1979) *J Soc and Soc Welfare* 852. Even though the general power of life and death was abolished, the father still had a duty to kill a seriously deformed child. Kruger *Judicial interference with parental authority: a comparative analysis of child protection measures* 23-24; McGillivray (2011) *Int'l J Child Rts* 25; see also Gardner *Being a Roman Citizen* 54-55.

Novels removed the paternal power of the chastisement of adults and conferred the jurisdiction over brutal crimes to the courts.²²⁰

The doctrine of *patria potestas* was exercised in conjunction with another Roman doctrine, namely that of *parens patriae*: the fiduciary jurisdiction of the state over those who were unable to care for themselves.²²¹ It was originally derived from the Roman emperor's title as *pater patriae*²²² and extended to notions of capacity and guardianship over the mentally-disordered, mentally-disabled and orphaned children.²²³ In terms of this doctrine, the state assumed the responsibility of being a parent in the last instance, that is in instances where there was a failure to perform the required management functions over the incapable persons. This failure could have been due to the fact that there was no other adult willing and able to assume the function of parent or guardian, or due to the fact that those who were initially charged with the functions, were proving themselves incapable of performing the required tasks.²²⁴

Albeit not exactly the same concept, parental authority in Germanic law was exercised in the form of the *munt* of the father, paternal grandfather, the father's brother or any other head of the household over the house and family.²²⁵ It has been explained that the *munt* initially also consisted of paternal power over family members but unlike under the *patria potestas*, children were subordinate to their fathers due to their physical vulnerabilities. In Germanic law legal capacity was dependant on the ability to bear arms and since women and children were unable to do so, they were subjected to the *munt*. The *munt*, however, had to be exercised in the interests of the women and children and gradually became associated with the ideas of obligations and duties of the father towards his family rather than with his powers over them.²²⁶ Despite the fact that the *munt* originally also vested the power of the father to kill or sell his wife and children as well as to have complete power over their persons and property, the extent of his powers dramatically decreased and were basically non-

²²⁰ McGillivray (2011) *Int'l J Child Rts* 25.

²²¹ 26.

²²² Father of the state or country.

²²³ McGillivray (2011) *Int'l J Child Rts* 26.

²²⁴ Archard *Children, Family and the State* 120.

²²⁵ HR Hahlo & E Kahn *The South African Legal System and its Background* (1968) 343–344; Kruger *Judicial interference with parental authority: a comparative analysis of child protection measures* 39-40.

²²⁶ Studiosus "Die aard van die gesagsregte van ouers ten opsigte van hul minderjarige kinders" (1946) *THRHR* 33-34 and 36; JW Wessels *History of Roman Dutch Law* (1908) 417 and 418; Kruger *Judicial interference with parental authority: a comparative analysis of child protection measures* 41-42.

existent by the Middle Ages.²²⁷ After the reception of Roman law in Europe after AD 476 and the fall of the Roman Empire, the main characteristic of the *munt* was the obligations of the father to care for, educate and maintain his children and to appoint guardians in the interests of his children.²²⁸ The mother too was able to exercise some parental control over her children.²²⁹

In Roman-Dutch law,²³⁰ parental authority was also vested in both a mother and father, although the mother's position was always subordinate to that of the father's.²³¹ Both parents were allowed to chastise their children within reasonable limits and children had a corresponding duty to be obedient towards them.²³² The father was under the obligation to assist his children in concluding juristic acts and managing their property but both parents had to consent to the child's marriage. Both parents also had to perform their duties in caring for the child, seeing to the material needs of the child in providing them with food, clothes and accommodation, as well as education and medical care.²³³ The parental authority over children was terminated with the attainment of majority: in the sixteenth century this happened at the age of 25 for men and at 20 for women.²³⁴

In terms of English common law, childhood was characterised as a period of incapacity. Hobbes articulated this notion by explaining that children were classed with the mentally ill:

“Over natural fools, children, or madmen there is no law, no more than over brute beasts; nor are they capable of the title of just or unjust, because they had never power to make any covenant or to understand the consequences thereof”.²³⁵

²²⁷ R Huebner *History of Germanic Private Law* (1918) 666. Kruger *Judicial interference with parental authority: a comparative analysis of child protection measures* 42.

²²⁸ Huebner *History* 657-659. Kruger *Judicial interference with parental authority: a comparative analysis of child protection measures* 42.

²²⁹ Huebner *History* 664-665. Kruger *Judicial interference with parental authority: a comparative analysis of child protection measures* 42 and 46.

²³⁰ Referring in its wider sense to the *ius commune* in Europe which developed from the *Corpus Iuris Civilis* of Justinian. See also Kruger *Judicial interference with parental authority: a comparative analysis of child protection measures* 47.

²³¹ Kruger *Judicial interference with parental authority: a comparative analysis of child protection measures* 48; RW Lee *An Introduction to Roman Dutch Law* Oxford University Press London (1915) 32.

²³² Lee *An Introduction to Roman Dutch Law* (1915) 32-33.

²³³ Kruger *Judicial interference with parental authority: a comparative analysis of child protection measures* 50-51; Lee *An Introduction to Roman Dutch Law* 31.

²³⁴ Van der Linden *Institutes* 1.4.3; Voet *Commentarius* 1.7.15; Hahlo & Kahn *Legal system* 446; Wessels *History* 420; Kruger *Judicial interference with parental authority: a comparative analysis of child protection measures* 49; Lee *An Introduction to Roman Dutch Law* 37.

²³⁵ T Hobbes *The Leviathan* (1651) Chapter XXVI “Of Civil Law” 8.

In view of the above, it was not readily accepted that children could be the bearers of rights and have capacities of their own. The only interests which children had, were that of furthering the interests of the family group as a whole, and in particular the family's property rights.²³⁶ The father represented these interests and in instances where a child was abducted from his family, he would have been compensated for the loss of services from the child that is due to the injury to the father's proprietary or even pecuniary interests in the child. There were no rules recognising the child's interests in receiving support from her parents and subsequently no action for compensation to a child due to the unlawful killing of her parent and breadwinner, existed.²³⁷ The only interests of children that could ever be protected, were those interests which were also shared with an adult. The protection thereof was only recognised through the adult's judgement of whether the child's interests should be protected.²³⁸ Furthermore, child bearing and child rearing were considered dangerous due to the high rates of infant and maternal mortality during childbirth. The accompanying lack of birth-control knowledge, the diminished food supply, loss of work and reduced interaction because of swaddling, all apparently added to rather negative parent-child relationships.²³⁹

In general, the attitude towards children started to change towards the 17th to 18th century²⁴⁰ and children were being valued for contributing to the family and also supporting their parents during their old age.²⁴¹ The Massachusetts Body of Liberties of 1641, being one of the first documents to recognise children's rights, for example, stipulated that parents were not to choose their children's spouses and to not use "unnatural severity" against their children.²⁴² Whilst children could complain to the authorities in instances of transgression, disobedience against parents by children

²³⁶ J Eekelaar "The Emergence of Children's Rights" in MDA Freeman (ed) *Children's Rights 1* (2004) 193-194 (but originally published in *OJLS* (1986) 6 161 163-164).

²³⁷ 193 (*OJLS* 163).

²³⁸ Richett & Hudson (1979) 6 *J Soc and Soc Welfare* 854.

²³⁹ SN Hart "From Property to Person Status" (1991) 46 *American Psychologist* 54.

²⁴⁰ Depending on which account of events is believed – that of Ariès placing it at around the 1800s and Stone and DeMause believing that it occurred at a later stage. De Mause described the period from the fourth to the thirteenth centuries as the "Abandonment Mode" and from the fourteenth to seventeenth centuries as the "Ambivalent Mode". See Van Bueren *The International Law on the Rights of the Child* 5.

²⁴¹ Hart (1991) *American Psychologist* 53.

²⁴² MDA Freeman "Introduction" in MDA Freeman (ed) *Children's Rights 1* (2004) xi.

older than 16 was still punishable with death. However, state interference with the parent-child relationship was viewed as being warranted in certain instances.²⁴³

Children were still much valued for their economic contributions and the labour of children was accepted as a social fact, not as a social problem.²⁴⁴ During the Industrial Revolution children, and in particular poor children, were exploited for their abilities to work in small spaces and provide cheap labour. Improved medical science and disease control, along with birth control,²⁴⁵ and the notion that children were the essential human resources who, in their mature form, would determine the future of society,²⁴⁶ all contributed to a movement towards the beginning of the 20th century in which child saving took on a new meaning.²⁴⁷ Children became the subject of nurturance and care and were considered a special class, worthy of education, protection and maintenance by their parents. This role of nurturance and care was subsequently also assumed by schools.²⁴⁸ Children's economic value was replaced by an appreciation for their sentimental value. State intervention also became more pronounced in the lives of families and children while labour laws, which were introduced, were aimed at regulating and prohibiting child labour.²⁴⁹ Furthermore, measures of protection in the form of legislation establishing minimum standards of health care, compulsory education and the prevention of abuse and neglect became more common during the first half of the twentieth century. Since these legislative measures provided a serious intrusion into family life and parental authority, this legislation aimed at protection was often the cause of much friction and debate within the societies it aimed to assist.²⁵⁰ Nevertheless, the state continued to assume its position as *parens patriae*, also in the establishment and development of a juvenile court system.²⁵¹

²⁴³ xi.

²⁴⁴ Hart (1991) *American Psychologist* 54.

²⁴⁵ 54. See also PS Fass "A Historical Context for the United Nations Convention on the Rights of the Child" (2011) 633 *Ann Am Acad Pol Soc Sci* 19 who describes factors such as medical breakthroughs which made birth less dangerous, sanitation and clean water reducing the threat and deaths caused by diarrhoea, typhus and cholera as well as vaccinations which undercut common deadly childhood diseases. More effective forms of birth control also made it easier to avoid conception which could hold positive financial implications for families who could not afford to have more children. As a whole, medical and scientific developments were improving the lives of children.

²⁴⁶ Hart (1991) *American Psychologist* 53.

²⁴⁷ 53; see also Freeman "Introduction" in *Children's Rights* xi-xii.

²⁴⁸ Hart (1991) *American Psychologist* 53.

²⁴⁹ 53.

²⁵⁰ Fass (2011) *Ann Am Acad Pol Soc Sci* 20.

²⁵¹ McGillivray (2011) *Int'l J Child Rts* 26. Hart (1991) 46 No 1 "From Property to Person Status" 54.

From the above it can be said that, at first, children did not have an own identity and were dependent on the mercy of the father figure. As a result, children's interests and rights at first did not exist. It was gradually accepted that children are human beings, who, from a philosophical and social perspective, are deserving of legal protection and participation, both on national and international levels. To be more specific, although the term of *the best interests of the child* was not yet acknowledged as a standard of interpretation, there was some recognition of the fact that children had interests which were to be safeguarded. The recognition and development of children's rights also led to the recognition of children's best interests — first as a principle of welfare and compassion and subsequently as a principle of empowerment.

2.3 The recognition of children's rights in international law

Despite the rather dismal start to the recognition of children's interests, the first international human rights declaration to be adopted by any inter-governmental organisation was that of the Declaration of the Rights of the Child, adopted by the League of Nations in 1924. This declaration preceded the adoption of the Universal Declaration of Human Rights by 24 years, thus dismissing the erroneous belief that international child law is a new development in international human rights law.²⁵² Despite its title, the principles of the 1924 Declaration connote the idea that children were regarded as the recipients of treatment, rather than being the bearers of rights.²⁵³ They were therefore still treated as objects and not subjects of international law, and only the most basic needs were addressed in this declaration.²⁵⁴ Shortly after the end of the Second World War and the dissolution of the League of Nations, the firm resolve to strengthen international unity and respect for human rights resulted in the drafting of a number of human rights documents. The most notable of these, the Universal Declaration of Human Rights, includes some references to children but never makes specific provision for them or recognise their specific needs.²⁵⁵

²⁵² Van Bueren *The International Law on the Rights of the Child* 5 and 8; Buck *International Child Law* 2005 47-48.

²⁵³ Van Bueren *The International Law on the Rights of the Child* 7-8. The author specifically refers to the text that the "the delinquent child must be reclaimed" which suggests that children needed some sort of salvation.

²⁵⁴ 8; Schäfer *Child Law in South Africa* 72. Para 2 of the Declaration, for example, provides that the hungry child must be fed and the sick child must be nursed.

²⁵⁵ Fortin *Children's Rights and the Developing Law* 33-34.

The 1959 Declaration of the Rights of the Child,²⁵⁶ in comparison to its 1924 predecessor, adopts a semblance of language of entitlement, and children began to emerge as subjects of international law, instead of being passive recipients.²⁵⁷ The 1924 and the 1959 Declarations may not have imposed any legal obligations upon any Member States but both these documents nevertheless laid a very important foundation in establishing an international standard for the promotion of children's rights.²⁵⁸ More importantly, the 1959 Declaration also introduced the standard of the best interests of the child as "the paramount consideration" whenever laws were enacted to provide special protection to children.²⁵⁹ Since the two declarations represented only one dimension, being the protection of the child, calls for a more systematic approach to children's rights were continuously made.

The idea that children were also the bearers of human rights gained momentum especially during the second half of the twentieth century and culminated in the almost universal ratification of the CRC.²⁶⁰ Despite the global recognition of this instrument of international law, the practical implementation of children's rights remains a controversial matter.²⁶¹ In particular there seems to be some disparity on a theoretical level as to what it means to promote the best interests of the child or how exactly this task can be achieved. It is furthermore apparent that, notwithstanding the 196 ratifications of Article 3 of the CRC, the practical implications of this imperative has not yet been fully appreciated.²⁶²

²⁵⁶ Also referred to as the UN Declaration on the Rights of the Child.

²⁵⁷ Van Bueren *The International Law on the Rights of the Child* 12.

²⁵⁸ 8.

²⁵⁹ Principle 2 of the Declaration.

²⁶⁰ Within nine months of its adoption the CRC acquired the 20 ratifications required for it to enter into force. See also "Fact Sheet No.10 (Rev.1), The Rights of the Child" <<http://www.ohchr.org/Documents/Publications/FactSheet10rev.1en.pdf>> (accessed 08-08-2011). The CRC holds the record for being the most ratified human rights treaty. To date there have been 196 ratifications to this convention, which means that, with the exception of the USA, all members of the UN have agreed to be bound by the provisions of the CRC. It must also be borne in mind that The Cook Islands, and Niue, which are not full members of the UN, as well as The Holy See, which is a permanent observer to the UN, also ratified the CRC. United Nations Treaty Collection "Status of Treaties: United Nations Convention on the Rights of the Child" https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&clang=_en (accessed 22-08-2016).

²⁶¹ Sutherland "Child Law: Respecting the Rights of Children" in *Private Law and Human Rights* 81-82 and 87-88.

²⁶² This becomes especially evident from a perusal of the State Parties Reports and the Committee on the Rights of the Child's response thereto, available at <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=5&TreatyID=10&TreatyID=11&DocTypeID=29&DocTypeCategoryID=4> (accessed 01-09-2015).

2.4 Justifying children's interests and rights in an era of human rights²⁶³

It is crucial to understand what it means to say that children have rights, why they are the bearers of such rights and the effect that such an acknowledgment has upon parents, the state, and society as a whole. This comprehension is vital to the argument that a clear policy framework must be adopted within which the marketing of food to children must take place. If it cannot be justified why it is said that children are the bearers of fundamental rights, no piece of policy or legislation, which promotes the rights of children, will have authority or legitimacy.²⁶⁴ It might therefore also prove useful to first examine the important role that rights play in the lives of adults as well as children.

Rights have been described by Bandman as something which “enables us to stand with dignity, ... to demand what is our due without having to grovel, plead or bet [sic]”.²⁶⁵ Rights have also been called “important moral coinage”, which can be used as “valuable commodities”.²⁶⁶ Without them, Feinberg argues, the world would experience great moral impoverishment: “no one would feel deserving of even decent treatment” but would feel that they were at the mercy of the whims of everyone else.²⁶⁷ A right is not merely a gift or a favour but something which “man [sic] can *stand* on, something that can be demanded or insisted upon without embarrassment or shame.”²⁶⁸ Feinberg continues to explain that in a world with (claim-)rights all persons are actual or potential claimants and are subsequent dignified objects of respect, both in their own views and that of others. This fact cannot be substituted with any amount of love, compassion, obedience to a higher authority or “*noblesse oblige*”.²⁶⁹ Rights

²⁶³ Full acknowledgment is given to Tobin for this title: J Tobin “Justifying Children’s Rights” (2013) *Int’l J Child Rts* 395-441.

²⁶⁴ S Human “The Theory of Children’s Rights” in CJ Davel (ed) *Child Law in South Africa* (2009) 244 aptly explains it as follows:

“Without a sound set of justificatory principles, assertions or legislation will fail to be persuasive, the idea of children’s rights will be challenged by notions of unfettered parental power and the concept of children’s rights will succumb to the romantic fallacy of adult decision-makers always acting in the best interests of children.”

²⁶⁵ B Bandham “Do children have any natural rights? A look at rights and claims in legal, moral and educational discourse” in MDA Freeman *Children’s Rights 1* (2004) 57 59 (but originally published as *Proceedings of the 29th Annual Meeting of the Philosophy of Education Society* (1973) 234 236).

²⁶⁶ MDA Freeman *The Moral Status of Children: Essays on the Rights of the Child* (1997) 83.

²⁶⁷ J Feinberg *Social Philosophy* (1973) 58; Wolfson “Children’s Rights: The Theoretical Underpinning of the ‘Best Interests of the Child’” in *The Ideologies of Children’s Rights* 8.

²⁶⁸ Feinberg *Social Philosophy* 58 (emphasis in the original).

²⁶⁹ 59.

therefore provide a sense of security: a claim may be made, and if done successfully, the interests of the claimant is protected.

The interests which rights seek to protect, are not merely superficial impulses of overly self-centred beings, nor are they desires to seek pleasure and to avoid pain.²⁷⁰ To act in someone's interests means that one is acting in a manner that is advantageous or beneficial to that person.²⁷¹ Acting in someone's best interests therefore entails that one is ensuring that the most beneficial result will ensue for such a person. It furthermore connotes the idea of a relationship of being concerned and affected by someone and for wanting what is good for that person. However, to act in someone's interests also is to do more than just doing what is good for that person: interests serve a purpose or an end to such a person's life.²⁷² These interests include those which make human life more fully human, which add to the quality and dignity of our lives and often our lives themselves.²⁷³ At the same time the idea of interests also relates to the existence of a right or a claim to something.²⁷⁴

No matter how "good" or "moral" everyone strives to be, conflicts of interests will always exist. People do not have the same interests, nor do they have the ability always to harmonise these interests. Rights strive to settle these conflicts of interests.²⁷⁵ Rights offer the vehicle to realise a vision of a life of dignity and self-worth by recognising those interests which matter for all human beings, including children.²⁷⁶ Chapter 4 will highlight some of the rights which, for the purposes of this research, are important to other beings, and in direct conflict with the interests and rights of the child.

To argue that children cannot be rights-holders since they do not have the capacity to exercise a choice over the exercise of a right,²⁷⁷ is to ignore the fact that children,

²⁷⁰ Wolfson "Children's Rights: The Theoretical Underpinning of the 'Best Interests of the Child'" *The Ideologies of Children's Rights* 9.

²⁷¹ Oxford English Dictionary "interest, n."

²⁷² C Kukathas "Do Children Have Interests?" (2015) *Academia* <https://www.academia.edu/12516733/Do_children_have_interests> (accessed 5).

²⁷³ Wolfson "Children's Rights: The Theoretical Underpinning of the 'Best Interests of the Child'" *The Ideologies of Children's Rights* 9.

²⁷⁴ Oxford English Dictionary: "interest, n."

²⁷⁵ Wolfson "Children's Rights: The Theoretical Underpinning of the 'Best Interests of the Child'" *The Ideologies of Children's Rights* 9.

²⁷⁶ Tobin (2013) *Int'l J Child Rts* 408 and 411.

²⁷⁷ The so-called "choice" or "will" theory, also sometimes referred to as the "power" or "claim" theory of rights", as advocated by, for example, Hart and Bentham, as cited in the text to n 2 of N MacCormick "Children's Rights: A Test-Case for Theories of Right" in MDA Freeman (ed) *Children's Rights: Essays in Legal and Political Philosophy 1* (2004) 71 (but originally published in *Archiv für Rechts-und Sozialphilosophie* (1976) 305-316). See also LW Sumner *The Moral Foundations of Rights* (1987); H Steiner *An Essay on Rights* 1994; J Fortin *Children's Rights and the Developing Law* (3 ed) 2009 12;

for the mere fact that they are human beings with interests which need protection, also demand respect. In terms of international human rights law, every human *being* is entitled to human rights and although children may, by some, only be regarded as human *becomings*, they are still entitled to human rights.²⁷⁸ MacCormick explains it as follows:

“[E]ach and every child is a being whose needs and capacities command our respect, so that denial to any child of the wherewithal to meet his or her needs and to develop his or her capacities would be wrong in itself.”²⁷⁹

The interests theory therefore do not deny children legal or moral rights until they have reached the capacity to make rational decisions but rather acknowledges the fact that children, like adults, have a number of interests which are worthy of protection.²⁸⁰

Freeman eloquently phrases it as follows:

“Children have interests to protect before they develop wills to assert, and others can complain on behalf of younger children when those interests are trampled upon.”²⁸¹

Fortin indeed observes that proponents of the interests theory often refer to children’s interests, rather than their rights, having the effect that the theory may be described as being too broad. One question that follows from this theory is to ask which interests can be seen to be moral rights, and consequently, which moral rights may be transformed into legal rights?²⁸² Eekelaar is of the view that whether or not children’s interests can also be said to be “rights” depends on the extent to which “it is generally believed that children have them and that they should be protected by law.”²⁸³ The irony is that during the drafting process of one of the most important legal documents

Human *Child Law in South Africa* 248. In terms of this will theory, O’Neill has explained that a child’s “main remedy is to grow up”. See Tobin (2013) *Int’l J Child Rts* 402.

²⁷⁸ Tobin (2013) *Int’l J Child Rts* 403.

²⁷⁹ MacCormick “Children’s Rights: A Test-Case for Theories of Right” in *Children’s Rights 76 (Archiv für Rechts-und Sozialphilosophie* (1976) 310; N MacCormick *Legal Right and Social Democracy: Essays in Legal and Political Philosophy* (1982) 160, as cited by Fortin *Children’s Rights and the Developing Law* 13.

²⁸⁰ Fortin *Children’s Rights and the Developing Law* 13; Archard *Children, Family and the State* 4-6.

²⁸¹ MBA Freeman “Taking Children’s Rights More Seriously” in MBA Freeman (ed) *Children’s Rights 1* (2004) 171 177 (but originally published in *IJLF* (1992) 52-71). In contrast to the interests-theory, the choice theory of rights denies the fact that it is “because children have a right to care and nurture that parents have the duty to care for them” and not the other way around. MacCormick “Children’s Rights: A Test-Case for Theories of Right” in *Children’s Rights 76 (Archiv für Rechts-und Sozialphilosophie* (1976) 313.

²⁸² Fortin *Children’s Rights and the Developing Law* 15.

²⁸³ J Eekelaar *Regulating Divorce* (1991) 103 as cited by Fortin *Children’s Rights and the Developing Law* 15.

proclaiming the rights of children, namely the CRC, the moral rights of children did not feature as a point of discussion.²⁸⁴ Van Bueren explains that “[i]n the context of the silent emergency of childhood deaths from malnutrition and disease, philosophical dialogue can appear too much like a game.”²⁸⁵ In an effort to address urgent needs of children all over the world, some, at least, may consequently forgive the drafters of the CRC, for not dissecting the conceptual foundations of children’s rights.²⁸⁶ To Freeman, however, evading this question of the philosophical grounds of rights demonstrates a lack of intellectual responsibility,²⁸⁷ therefore ignoring and undermining the legitimacy of human rights.²⁸⁸ To legitimise children’s rights, all three dimensions thereof, namely the legal, political and moral contexts, must be recognised. Ignoring a conceptual foundation of children’s rights may open them up for considerable manipulation, or in the words of Tobin, such rights “quickly [risk] becoming ... empty rhetorical vessel[s] into which subjective preferences or political agendas may be poured.”²⁸⁹

To Raz, only those interests that are of ultimate value to the wellbeing of an individual may qualify as a right.²⁹⁰ Eekelaar agrees by arguing that promoting a person’s rights is connected to the promotion of that person’s welfare or well-being²⁹¹ — something, which by the end of the nineteenth century, became known as the “welfare test” and formulated in the following terms:

“The word ‘welfare’ must be taken in its widest sense. The moral and religious welfare of the child must be considered as well as its physical well-being, *nor can the ties of affection be disregarded.*”²⁹²

It is to this concept of the promotion of the welfare of the child, including the eventual recognition of autonomy interests,²⁹³ that our attention must now turn.

²⁸⁴ Tobin (2013) *Int'l J Child Rts* 397. See also further at 399 where he describes how Sunstein named the process by which an agreement is reached by consensus in circumstances where is no agreement as to the principles underlying the agreement, as being an “incompletely theorized” agreement.

²⁸⁵ Van Bueren *The International Law on the Rights of the Child* 6.

²⁸⁶ Tobin (2013) *Int'l J Child Rts* 397.

²⁸⁷ M Freeman “The philosophical foundations of human rights” (1994) *Hum Rts Q* 491 493.

²⁸⁸ Tobin (2013) *Int'l J Child Rts* 397.

²⁸⁹ 398.

²⁹⁰ 407. See Tobin’s discussion in this regard.

²⁹¹ J Eekelaar “Personal Rights and Human Rights” (2002) 2 *Hum Rts L Rev* 181 185.

²⁹² *Re McGrath* [1893] 1 CH 143 as quoted by Eekelaar “The Emergence of Children’s Rights” in *Children’s Rights* 199, italics supplied by Eekelaar.

²⁹³ A phrase coined by Eekelaar – see Freeman (ed) *Children’s Rights* 201 and 207-2012.

2.5 Children's rights: protection, liberation and welfare

The brief description above of the historical context of the development of children's rights paints a rather bleak picture. Not only were children of the period of the rule of Roman law regarded as not worthy of any type of protection or benevolence, but they were also regarded as lacking legal capacity and in absolute subjection to their parents.²⁹⁴ The principle of promoting the welfare of the child necessitated a paradigm shift in terms of which the exclusive focus on parental and adult interests was substituted for one which also considered the interests of the child. Whereas at the turn of the twentieth century, the children's crusade was seen as a legitimate enterprise for upper middle class women,²⁹⁵ the children's rights movement started to recognise that the child is an individual and active member of society, also capable of making her own decisions.²⁹⁶ Liberal thinkers such as Holt²⁹⁷ and Farson²⁹⁸ drew attention to their seemingly radical ideas that children should have the right to do, in general, what any adult may legally do.²⁹⁹ To the so-called "kiddie libbers", the one sided approach of wrapping children in cotton wool and regarding them only as likely victims, impaired children's status and dignity.³⁰⁰ This type of thinking, however, never truly gained momentum among political and philosophical commentators³⁰¹ but rather gave way to a belief that protection and liberation should be viewed as the two sides of the same coin, namely the welfare of the child. During the second half of the twentieth century, it became evident that children's rights were theoretically no different to that of human rights in general.³⁰²

Nevertheless, a number of theories as to the different categories of children's rights exist, most noticeably formulated by Freeman, Eekelaar, MacCormick,³⁰³ Adler,³⁰⁴

²⁹⁴ McGillivray (2011) *Int'l J Child Rts* 23.

²⁹⁵ For whom child saving was a natural extension of their child-rearing role. CR Margolin "Salvation versus Liberation: The Movement for Children's Rights in a Historical Context" in MDA Freeman (ed) *Children's Rights 1* (2004) 7-9 (but originally published in *Social Problems* (1978) 441-452).

²⁹⁶ Human *Child Law in South Africa* 246-247.

²⁹⁷ J Holt "The Problem of Childhood" in MDA Freeman (ed) *Children's Rights 1* (2004) 143-147 (but originally published in *Escape from Childhood* (1975) 15-19).

²⁹⁸ RE Farson *Birthrights* (1974).

²⁹⁹ Holt "The Problem of Childhood" in *Children's Rights* 144.

³⁰⁰ Human *Child Law in South Africa* 247.

³⁰¹ Tobin (2013) *Int'l J Child Rts* 426. See for example also Archard's criticism in D Archard *Children: Rights and Childhood* 2 ed (2004) 70-84.

³⁰² Fortin *Children's Rights and the Developing Law* 35-36.

³⁰³ MacCormick "Children's Rights: A Test-Case for Theories of Right" in *Children's Rights* 71 (but originally published in *Archiv für Rechts-und Sozialphilosophie* (1976) 305-316).

³⁰⁴ RM Adler *Taking Juvenile Justice Seriously* (1985) 458.

Wald,³⁰⁵ Hafen,³⁰⁶ and Goodin and Gibson.³⁰⁷ Whereas Eekelaar distinguishes between three types of interests that children have, namely basic interests,³⁰⁸ developmental interests³⁰⁹ and autonomy interests,³¹⁰ Freeman classifies children's rights into four categories: rights to welfare,³¹¹ rights to protection,³¹² the right to be treated as an adult³¹³ and rights against parents.³¹⁴ Although these classifications may differ, they all share the basic ideology of rights that are linked to those interests considered to be required to live a life of dignity and self-worth.³¹⁵ They furthermore all seem to share a common notion of a balanced model of children's rights – one which is based on both elements of protection and liberation. This model was also extended to the CRC, a document which has been described by Veerman as “an important and easily understood advocacy tool – one that promotes children's welfare as an issue of justice, rather than one of charity.”³¹⁶

³⁰⁵ M Wald “Children's Rights: A Framework for Analysis” in MDA Freeman (ed) *Children's Rights 1* (2004) 113-140 (but originally published in *University of California, Davis Law Review* (1979) 255-282).

³⁰⁶ BC Hafen “Children's Liberation and the New Egalitarianism: Some Reservations about Abandoning Youth to their ‘Rights’” (1976) *BYU Educ & LJ* 605-665.

³⁰⁷ RE Goodin & D Gibson “Rights, young and old” (1997) 17 *OJLS*185-203.

³⁰⁸ Those interests which relate to claims of physical, emotional and intellectual care. Eekelaar “The Emergence of Children's Rights” in *Children's Rights* 201-202.

³⁰⁹ Interests for which, according to Eekelaar at least, the state is responsible (“[t]he duties lie primarily in the political domain”). These include education and medical services and are required so that no child may suffer “deprivations during childhood that he is disadvantaged disproportionately.” Eekelaar “The Emergence of Children's Rights” in *Children's Rights* 202-206.

³¹⁰ Interests in terms of which a “child may argue for the freedom to choose his own lifestyle and to enter social relations according to his own inclinations uncontrolled by the authority of the adult world, whether parents or institutions.” Eekelaar “The Emergence of Children's Rights” in *Children's Rights* 201 and 207-212.

³¹¹ Including the right to adequate nutrition, medical care, housing, entitlement to free education and equal opportunities, protection from all forms of cruelty, neglect and exploitation and the right to special treatment for the disabled. These fundamental rights are clearly enshrined in the CRC. MDA Freeman *The Rights and Wrongs of Children* (1983) 40-41.

³¹² 43-45. Since children are unable to care for themselves and need protection, parents and adults need to protect them from abuse and neglect.

³¹³ Although slightly sceptical of removing all age-related restrictions, since respect for children as persons requires that society provides a “childhood for every child”, based on sound empirical research in each individual case, children need to be treated equally to adults. Freeman *The Rights and Wrongs of Children* 22-23 and 45-46. See also Freeman “Taking Children's Rights More Seriously” *Children's Rights* 185-188 for some of his views on the role of paternalism in this equation.

³¹⁴ The rights to make independent and autonomous decisions, once again based on an individual assessment as to whether the required competency has been reached. As a result these rights include the provision of the necessary skills to be able to make these decisions and until such skills have been acquired, parents “ought to choose for [children], not as they might want, but in terms of maximising those interests that will make it possible for them to develop life plans of their own.” Freeman *The Rights and Wrongs of Children* 51. See also Human *Child Law in South Africa* 254-255.

³¹⁵ Tobin (2013) *Int'l J Child Rts* 408.

³¹⁶ PE Veerman *The Rights of the Child and the Changing Image of Childhood* (1992) 184.

The Committee on the Rights of the Child, the monitoring body established in terms of the CRC, identified four principles as the guiding principles of the Convention.³¹⁷ These are the general prohibition against discrimination;³¹⁸ the consideration of the best interests of the child as a primary consideration in all matters affecting the child;³¹⁹ the right to life and development;³²⁰ and the right of participation in decisions affecting the child.³²¹ Apart from these principles, the CRC enshrines all spheres of rights including civil, political, economic and social rights. It is therefore a distinct departure from the previous instruments of international law, which concentrated mainly on the welfare and protection of children. In fact, the substantive rights of the CRC may be described as being concerned with the four “P”s, namely the protection of children against all forms of abuse, exploitation and neglect; the prevention of harm to children; the provision of assistance for their basic needs; and the participation of children in matters affecting them.³²² The complementary implementation of all of these aspects in the daily lives of children must be the point of departure for every Member State that ratifies the CRC: it is not a choice between protection and participation, or between salvation and liberation, but rather an equal application of all facets.³²³ In this way, the CRC embodies a clear message that states must protect children and protect their fundamental freedoms, and also that it must devote resources to ensure their development into healthy and happy adults.³²⁴

³¹⁷ The United Nations Committee on the Rights of the Child General Comment No 5 (2003).

³¹⁸ Art 2.

³¹⁹ Art 3.

³²⁰ Art 6.

³²¹ Art 12. See also Fortin *Children's Rights and the Developing Law* 37.

³²² Van Bueren "The United Nations Convention on the Rights of the Child" in *Introduction to Child Law in South Africa* 203. Fortin *Children's Rights and the Developing Law* 38 also describes how many other classifications of the rights contained in the CRC have been made, including the classification by LeBlanc into “membership rights”, “survival rights”, “protection rights” and “empowerment rights”.

³²³ Van Bueren *The International Law on the Rights of the Child* 15.

³²⁴ Fortin *Children's Rights and the Developing Law* 37. Van Bueren explains how the Convention accomplishes five goals. Firstly, where no such rights previously existed, the CRC creates new rights under international law. Such rights include the right to preserve the child's identity and the right of indigenous children to practice their own culture. Furthermore, the CRC enshrines rights of a child, such as the right to be heard and to have her views taken into account, which were previously only informally acknowledged in an international, global treaty. This, in turn, establishes international binding standards, which, prior to the CRC, were only non-binding recommendations. Fourthly, the Convention imposes “new obligations” relating to the protection and provision of children, including the obligation upon member states to abolish traditional harmful practices and to provide for the rehabilitation of child victims of abuse and exploitation. Finally, the CRC provides express grounds by which member states are under a duty not to discriminate against children in their enjoyment of rights. Van Bueren *The International Law on the Rights of the Child* 16.

As is the case with the CRC, the ACRWC provides for the full range of rights of children and include categories which have been described as “survival rights”, “community rights”, “self-asserting rights”, “protection rights” and “development rights”.³²⁵ In addition, the Charter places emphasis on the responsibilities of both children³²⁶ and their parents.³²⁷ Once again, a number of guiding principles are contained within the ACRWC. These include the stipulation that in all actions concerning children, the best interests of the child “shall be the primary consideration”.³²⁸

The paradigm shift brought about by the guiding principle of the best interests of the child also requires that adults consider the evolving nature of childhood and the fact that children must be guided into gradually taking responsibility for their own lives.³²⁹ It is clear that, albeit an important aspect of children’s rights, protection is but one of the duties which adults have towards children.³³⁰ The process of gradual empowerment of children does not occur in a linear fashion or on a consistent basis but considers the changing needs of children.³³¹ This aspect will be briefly considered in chapter 4 of this thesis at 4.3. The process entails creating a more child-centred culture, one in which parents, commercial enterprises and the state regard all the best

³²⁵ F Viljoen “The African Charter on the Rights and Welfare of the Child” in T Boezaart (ed) *Child Law in South Africa* (2009) 337-339. The text of the Charter is available at <http://www.africa-union.org/official_documents/Treaties_%20Conventions_%20Protocols/a.%20C.%20ON%20THE%20RIGHT%20AND%20WELF%20OF%20CHILD.pdf> (accessed 08-08- 2011).

³²⁶ Article 31 of the African Charter.

³²⁷ Article 20.

³²⁸ Article 4. The African Charter clearly provides for more protection since it calls for the best interests to be *the* primary consideration, as opposed to a primary consideration which is required by Art 3 of the CRC. See furthermore also the Convention on the Elimination of All Forms of Discrimination against Women, 1979 in which the interests of children are described to be the “primordial consideration” (Art 5) or “paramount” (Art 16) in “all cases”. Reference is furthermore also made to the best interests in all three Optional Protocols to the CRC: Art 8 of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography provides that States Parties shall ensure that in the treatment of victims of sexual abuse, the best interest of the child shall be a primary consideration. The preamble to the Optional Protocol on the involvement of children in armed conflict explains that in raising the age of possible recruitment of persons into armed forces and their participation in hostilities, the principle of the best interests of the child is being implemented. The preamble to the third Optional Protocol (on a communications procedure) recognises that the best interests of the child should be a primary consideration to be respected in pursuing remedies for violations of the rights of the child; Art 2 provides that the Committee shall be guided by the principle of the best interests of the child; and Art 3 explains that rules of procedure must also consider the child’s best interests.

³²⁹ Van Bueren “The United Nations Convention on the Rights of the Child” in *Introduction to Child Law in South Africa* 205.

³³⁰ Sutherland “Child Law: Respecting the Rights of Children” in *Private Law and Human Rights* 81.

³³¹ Schäfer *Child Law in South Africa* 5.

interests of the child as an imperative consideration and the promotion of children's rights as their point of departure.³³²

3 The best interests: an analysis

3.1 General

Despite this discourse pertaining to rights and interests, some of which has been mentioned above, the meaning of the term "the best interests of the child" is not entirely clear. In fact, the best interests principle has frequently been criticised for being not only vague or open-ended but also for concealing the fact that it is the interests of others which are in actual fact being promoted.³³³ In 1973, Hillary Rodham critiqued the standard in the following manner:

"The best interests standard, initially followed in most state interventions and explicitly used as the standard for adjudicating children's interests, in proceedings evaluating parental care, is not properly a standard. Instead, it is a rationalization by decisionmakers justifying their judgments about a child's future, like an empty vessel into which adult perceptions and prejudices are poured."³³⁴

Similarly, in *Secretary, Department of Health and Community Services, v JWB and SMB* an Australian High Court judge expressed his reservations in the following terms:

"[I]n the absence of legal rules or a hierarchy of values, the best interests approach depends upon the value system of the decision-maker ... [creating] an unexaminable discretion in the repository of the power."³³⁵

This type of criticism has since been met with numerous attempts to provide some content and meaning to the concept of the best interests of the child. Inevitably, during an interpretation and implementation process of the best interests of the child, a number of practical questions need to be answered. Some of these practical concerns which the courts and academics alike have tried to address, include that of determining

³³² Van Bueren "The United Nations Convention on the Rights of the Child" in *Introduction to Child Law in South Africa* 205.

³³³ J Eekelaar "Beyond the welfare principle" (2002) 14 *CFLQ* 237. The author also appropriately remarks that it "is easier to criticise the principle than to come up with an alternative."

³³⁴ H Rodham "Children Under the Law" in MDA Freeman (ed) *Children's Rights 1* (2004) 29 49 (but originally published in *Harvard Educ Rev* (1973) 487-514.)

³³⁵ Brennan J in *Secretary, Department of Health and Community Services, v JWB and SMB* FLC 92-3 at 79, 191 (1992) as cited by S Parker "The Best Interests of the Child - Principles and Problems" (1994) 8 *IJLF* 26 26.

who decides what is in the best interests of a child; whether the proposed outcome should be in the interests of a particular child in particular circumstances or for all children as a group; whether the decision to be taken should meet the short, medium or long-term interests of a child; and what it means to use the best interests as a primary consideration,³³⁶ the primary consideration,³³⁷ or as a consideration of paramount importance.³³⁸ The notion of the best interests of the child has been hailed as evolutionary, responsive, and flexible but simultaneously, as mentioned above, also as vague, broad and indeterminate.³³⁹ These responses regarding the imprecise nature of the best interests can be interpreted as posing a danger to the full realisation of children's rights since the term's indeterminacy makes it viable for abuse. The term's flexibility could, nonetheless, also be seen as providing enough room to be responsive to the normative values of the CRC, the ACRWC and the Constitution, and in particular to the implementation thereof.

At this point it is important to highlight the fact that the welfare principle today still resonates very strongly with the best interests of the child, as a simple search for the latter term in an index of a book on the development of children's rights, illustrates.³⁴⁰ Indeed, Feinberg in 1980 remarked that people often speak of a child's "welfare" or her "interests", using the two words as synonyms.³⁴¹ In *Walker v Walker and Harrison Hardy-Boys J* described "welfare" in the following terms:

³³⁶ As provided in Art 3 of the CRC.

³³⁷ As provided in Art 4 of the ACRWC.

³³⁸ As provided in s 28(2) of the Constitution. Sutherland "Child Law: Respecting the Rights of Children" in *Private Law and Human Rights* 81 the text to n 3 and 4 refers to a list of "moral and legal philosophers" who have tried to find some of the answers to these questions, including T Campbell "The Rights of the Minor" in P Alston, S Parker & J Seymour (eds) *Children, Rights and the Law* (1992) 15; MacCormick "Children's Rights: A Test Case" in *Legal Right and Social Democracy* 154; J Eekelaar "The Emergence of Children's Rights" (1986) 6 *OJLS* 161; Freeman *The Rights and Wrongs of Children* and M Minow "Rights for the Next Generation: A Feminist Approach to Children's Rights" (1986) 9 *Harv Women's LJ* 1. In South Africa the Courts have had to provide answers in this context in cases such as *Minister of Welfare & Population Development v Fitzpatrick* 2000 3 SA 422 (CC); *Du Toit v Minister of Welfare & Population Development (Lesbian & Gay Equality Project as Amicus Curiae)* 2003 2 SA 198 (CC); *Bannatyne v Bannatyne (Commission for Gender Equality as Amicus Curiae)* 2003 2 SA 363 (CC); *AD v DW (Centre for Child Law as Amicus Curiae; Department for Social Development as Intervening Party)* 2008 3 SA 183 (CC); *S v M (Centre for Child Law as Amicus Curiae)* 2008 3 SA 232 (CC); *J v J* 2008 6 SA 30 (C); and *H v Fetal Assessment Centre* 2015 2 SA 193 (CC).

³³⁹ R Mnookin & E Szwed "The best interests syndrome and the allocation of power in child care" in H Geach and E Szwed (eds) *Providing Civil Justice for Children* (1983) 8 as cited by R Malherbe "The constitutional dimension of the best interests of the child as applied in education" (2008) *TSAR* 267 269.

³⁴⁰ The entry for "best interest test" refers one to the "welfare principle" in Fortin *Children's Rights and the Developing Law*.

³⁴¹ J Feinberg "The Child's Right to an Open Future" in M Freeman (ed) *Children's Rights* 1 (2004) 213 216 (but originally published in Aiken & LaFollette (eds) *Whose Child?* (1980) 124-153).

“‘Welfare’ is an all-encompassing word. It includes material welfare, both in the sense of an adequacy of resources to provide a pleasant home and a comfortable standard of living and in the sense of adequacy of care to ensure that good health and due personal pride are maintained. However, while material considerations have their place, they are secondary matters. More important are the stability and the security, the loving and understanding care and guidance, the warm and compassionate relationships, that are essential for the full development of the child’s own character, personality and talents.”³⁴²

Eekelaar has bemoaned the fact that the best interests expression may too often only be interpreted to refer to whatever it is that someone else thinks is “good for you”.³⁴³ He has highlighted the link between “interests” and “well-being”,³⁴⁴ expressing the opinion that the use of the concept of “well-being” may contribute to a more nuanced approach. To Eekelaar, the degree of success which a person has achieved in realising his significant goals, will indicate his well-being. In the case of children and the inexperienced, guidance towards achieving these goals forms an essential part of their well-being.³⁴⁵

A child’s welfare or interests can therefore be said to be those elements of her life which are required to live a life of dignity and self-worth, including both components of protection and liberation and encompassing all aspects of her moral, spiritual, and physical well-being. However, it must be emphasised that the traditional approach which equated the best interests of the child to a concept of “welfarism”, in terms of which focus was only placed on the protection, prevention of harm and provision of basic needs to children, has progressed into one in which the participatory rights of children are also strongly promoted.³⁴⁶

It could therefore be said that this type of approach is one that also underlies the CRC. Parents, members of the extended family and the community are to have the

³⁴² *Walker v Walker and Harrison* as cited by JA Robinson “Reflections on the conflict of interests of children and parents” (2013) 76 *THRHR* 400 401 (n4).

³⁴³ J Eekelaar (2002) *CFLQ* 243.

³⁴⁴ See also Art 2(3) of the CRC which provide for the protection and care of the child “as is necessary for his or her well-being”.

³⁴⁵ To Eekelaar this will include “the physical and mental health of the person necessary to achieve those ends; the opportunity to maintain and establish important personal relationships; the ability to benefit from educational, social and economic activity and to integrate into society; the ability to develop abilities and interests and to realise life plans.” J Eekelaar (2002) *CFLQ* 243 (footnotes omitted).

³⁴⁶ See Van Bueren *The International Law on the Rights of the Child* 203 description of the four “P”s as discussed above. See also R Robinson “An Introduction to the International Law on the Rights of the Child relating to the Parent-Child Relationship” (2002) 2 *Stell LR* 309 315 explaining that this “paternalistic approach to children’s rights was the very reason that the best interests principle was not incorporated into many human rights instruments, ... [since t]he ‘rights approach’ of these treaties was simply at odds with the traditional welfare approach, which in effect undermined the child’s autonomy.”

best interests of the child as their basic concern, while the child is being provided with the appropriate guidance and assistance. At the same time, the CRC also requires these adults to provide guidance and direction to the children in their care in a manner consistent with the evolving capacities of those children.³⁴⁷ This approach is one that should be applied to the questions of the religion, education, and medical treatment of the child. In addition, it should of course also be applied in the daily activities of children, including choices as to what to wear, when to go to sleep and, most importantly for the purposes of this research, what to eat and drink.

3.2 Article 3 of the CRC

The first draft of Article 3 of the CRC proposed by Poland in 1978 closely resembled the wording of Principle 2 of the 1959 Declaration of the Rights of the Child.³⁴⁸ In their submission, the Polish representatives proposed the following text in the draft:

“The child shall enjoy special protection and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration.”³⁴⁹

This original proposal clearly echoes some of the elements that have been identified as crucial to the child’s welfare. It also set a standard in terms of which the best interests were to be considered the “determinate” consideration, not merely the first or most important consideration.³⁵⁰ Subsequent comments and recommendations to this proposal eventually produced freestanding provisions, which have been adopted and included elsewhere in the CRC.³⁵¹ In 1979 France and the Federal Republic of

³⁴⁷ See arts 3, 5 and 18 of the CRC.

³⁴⁸ Principle 2 reads as follows:

“The child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration.”

³⁴⁹ Taken from the 1978 report of the Commission on Human Rights (34th session, document E/CN.4/1292, 124) as cited in the Office of the United Nations High Commissioner for Human Rights “Legislative History of the Convention on the Rights of the Child Vol 1” (2007) 335. <<http://www.ohchr.org/Documents/Publications/LegislativeHistorycrc1en.pdf>> (accessed 25-02-2014.) This proposal was originally included as Art 2.

³⁵⁰ MDA Freeman “Article 3 The Best Interests of the Child” in A Alen, J Vande Lanotte, E Verhellen, F Ang, E Berghmans, M Verheyde & B Abramson (eds) *A Commentary on the United Nations Convention on the Rights of the Child* (2007) 23.

³⁵¹ See, for example, the preamble to the CRC, calling for a child to “live an individual life in society and brought up in the spirit of the ideals proclaimed in the Charter of the United Nations and in particular in

Germany, for example, suggested that that the whole of Article 2 (as proposed by Poland in 1978) be moved to the Preamble,³⁵² whilst in 1981 the USA submitted a version which included a paragraph very similar to what now reads as Article 12. This proposed paragraph provided as follows:

“In all judicial or administrative proceedings affecting a child that has reached the age of reason, an opportunity for the views of the child to be heard as an independent party to the proceedings shall be provided, and those views shall be taken into consideration by the competent authorities.”³⁵³

Freeman views the decision by the Working Group to delete this paragraph – which provides for the consideration of the views of the child – from the original Article 2, to be a decision which separated the concept of the best interests and participation.³⁵⁴ However, it could also be argued that the drafters of the CRC were of the view that the child’s right to participation needs to be highlighted by the inclusion thereof in a separate provision, one which states that the child has “the right to express those views freely in all matters affecting the child”.³⁵⁵ For the purposes of this research, and as will be discussed below, it is important to note that two of the four provisions of the CRC which today are regarded as enshrining the general principles of the convention, are that of the best interests of the child and the right of children to participate in decisions which affect them.³⁵⁶ As a result, children have the right to participate as consumers in a commercial market, provided that their best interests are also being considered.

An important fact that needs to be mentioned here is that during the 11-year period it took to debate the final text of the CRC and in particular Article 3, not much guidance as to the meaning or content of the best interests of the child was given.³⁵⁷ New

the spirit of peace, dignity, tolerance, freedom, equality and solidarity”; Art 6 recognising the child’s right to life, survival and development; Art 17 urging the mass media to provide children access to information “aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health”; and Art 24 which enshrines the child’s right to health.

³⁵² Para 23 (e) of the 1979 report of the Working Group to the Commission on Human Rights (E/CN4/L1468), which is reproduced in paragraph 244 of the 1979 report of the Commission on Human Rights (E/CN4/1347) as cited in the OHNHCHR “Legislative History of the CRC 1” (2007) 337.

³⁵³ The 1981 report of the Working Group to the Commission on Human Rights (E/CN4/L1575, paras 19-38), which is reproduced in para 289 of the 1981 report of the Commission on Human Rights (E/CN4/1475) as cited in the OHNHCHR “Legislative History of the CRC 1” (2007) 338.

³⁵⁴ Freeman “Article 3 The Best Interests of the Child” in *A Commentary on the United Nations Convention on the Rights of the Child* 50.

³⁵⁵ See Art 12(1) of the CRC.

³⁵⁶ See 4.4 of this chapter below.

³⁵⁷ See also Freeman “Article 3 The Best Interests of the Child” *A Commentary on the United Nations Convention on the Rights of the Child* 44 which remarks:

Zealand in 1978, for example, commented that it presumed that “key phrases such as ‘special protection’, ‘healthy and normal manner’ and ‘the best interests of the child’ will be open ... to varied interpretations and will in fact be defined nationally in terms of the laws and the child-rearing practices which are adopted and acceptable in that nation.”³⁵⁸ It appears that representatives of the Member States were either familiar with the concept, due to its use in their own jurisdictions, or accepted that the concept was inherently subjective.³⁵⁹ Alston even went as far as to observe that “its meaning seems either to have been taken for granted or to have been considered unimportant”.³⁶⁰ As a result, none of the probable and anticipated debates as to the meaning of the phrase took place.³⁶¹

It furthermore seems remarkable that the Committee on the Rights of the Child has fairly often criticised Member States for the fact that the best interests principle is still not adequately defined and reflected in all legislation, court decisions and policies affecting children.³⁶² In fact, the Committee has itself been criticised for not providing sufficient guidance in this regard. As a result, the Committee at its 62nd session in January to February 2013 finally adopted their fourteenth General Comment, providing a legal and literal analysis of paragraph 1 of Article 3 of the CRC.³⁶³ By doing so, the Committee confirmed³⁶⁴ that the concept of the best interests of the child is a multifaceted one existing as (a) a substantive right; (b) a fundamental, interpretative legal principle and; (c) as a rule of procedure.³⁶⁵ Since it is a dynamic concept, encompassing a variety of issues, which are continuously evolving,³⁶⁶ the Comment provides a framework intended to promote a change in attitudes towards the respect for the rights of the child and not a general prescription of exactly what is best for a

“[I]t cannot be said that much assistance with construction can be found in the *travaux préparatoires*.”
³⁵⁸ CN4/1324/Add 5 as cited in the OHNHCHR “Legislative History of the CRC 1” (2007) 336.

³⁵⁹ Freeman “Article 3 The Best Interests of the Child” in *A Commentary on the United Nations Convention on the Rights of the Child* 26. This author’s witty observation here needs repetition:

“Familiarity is said to breed contempt: here it bred content.”

See also Alston (1994) *Int J Law Policy Family* 11.

³⁶⁰ 11.

³⁶¹ Freeman Freeman “Article 3 The Best Interests of the Child” in *A Commentary on the United Nations Convention on the Rights of the Child* 26.

³⁶² CRC/C/15/Add 157 para 31 in 2003 commenting on the Czech Republic’s report, as cited by Freeman “Article 3 The Best Interests of the Child” in *A Commentary on the United Nations Convention on the Rights of the Child* 52.

³⁶³ “General Comment No 14 (2013) 3 October 2013).

³⁶⁴ See for example Zermatten (2010) *Int’l J Child Rts* 483–499 offering many of the same views on the three facets of the concept.

³⁶⁵ General Comment No 14 (2013) 4.

³⁶⁶ 5.

child in a particular situation. The Committee makes it clear that in promoting the objective of the full application of the concept of the best interests, the development of a rights-based approach is required.³⁶⁷

Of particular importance is the fact that the Committee has reiterated that at all stages of the adoption of laws, policies, strategies, programmes, plans, budgets, legislative and budgetary initiatives and guidelines concerning children, due consideration must be given to their best interests.³⁶⁸ Such an assessment and determination of the best interests of the child require procedural guarantees. The justification for a decision must show that the right has been explicitly taken into account.³⁶⁹ This means that the child's best interests must be appropriately integrated and consistently applied in all implementation measures. Furthermore, it must be explained how the right has been respected in the decision, that is, what has been considered to be in the child's best interests; what criteria it is based on; and how the child's interests have been weighed against other considerations, be they broad issues of policy or individual cases.³⁷⁰

For the purposes of this research it is important to note that the Committee emphasised that State Parties to the CRC has, *inter alia*, the duty to ensure that the private sector, including those institutions providing services, or any other private entity making decisions that concern or impact the child, has assessed and considered the best interests of the child.³⁷¹ To this end, Member States must, *inter alia*, review and, where necessary, amend domestic legislation and other sources of law so as to incorporate Article 3(1) into their policies. Member States must therefore ensure that the requirement to consider the child's best interests is reflected and implemented in all national laws and regulations, provincial or territorial legislation, rules governing the operation of private or public institutions providing services or impacting on children, and judicial and administrative proceedings at any level. This must take effect both as a substantive right and as a rule of procedure.³⁷² As a result, it also means that all such policies upholding the child's best interests must be co-ordinated and implemented on a national, regional and local level.

³⁶⁷ 4.

³⁶⁸ 5.

³⁶⁹ 4.

³⁷⁰ 4.

³⁷¹ 5.

³⁷² 6.

It is therefore submitted that there is a clear mandate for the South African Government to consider the best interests of the child when food marketing techniques and its impact upon children are being assessed. The state has the duty to ensure that children's rights are being promoted and implemented in policies and legislative measures which regulate practices and effect the well-being of children in the most basic of manners, namely their physical health. The South African Government must furthermore ensure that food manufacturers and marketers also accept the role which they play in this obligation: these enterprises provide services to children and make decisions on a daily basis which affect children. Large corporations too have the responsibility to consider their young consumers' best interests as a matter of first priority.

3 3 Legal analysis of Article 3(1) of the CRC

Bearing the above in mind, an analysis of the phraseology found in Article 3 seems apposite. Article 3(1) of the CRC provides as follows:

“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”

3 3 1 “All actions”

Many of the terms of Article 3(1) have been given some content and interpretation by the General Comment issued in May of 2013. Thus, for example, the Committee on the Rights of the Child has settled the speculation by some authors³⁷³ of whether or not omissions are also to be considered “actions”.³⁷⁴ Inaction or the failure to act should also be regarded as an action and, as a result, institutions cannot argue that their failure to take action in cases of abuse need not have complied with the standard of the best interests of the child. Actions include decisions, acts, conduct, proposals, services, procedures and other measures.³⁷⁵ Every single action must guarantee that the best interests of children have been considered.³⁷⁶ Practically speaking, the

³⁷³ See for example Alston (1994) *Int J Law Policy Family* 13-14 and M Freeman (ed) *Article 3 The Best Interests of the Child* (2007) 45 arguing that it would “make no sense to exclude omissions from the best interests principle.”

³⁷⁴ General Comment No 14 (2013) 7.

³⁷⁵ 7.

³⁷⁶ The South African courts have also confirmed on a number of occasions that s 28(2) of the Constitution has expanded the application of the best interests from the traditional sphere of family law to “every matter concerning the child”. In *S v M (Centre for Child Law as Amicus Curiae)* 2008 3 SA 232

greater the impact which an action will have on a child or children, the greater the level of protection and of detailed procedures to consider their best interests will have to be applied.³⁷⁷

The draft of Article 3(1), which was submitted to the Working Group of the Commission on Human Rights in 1980, initially referred to “all official actions”.³⁷⁸ This proposal was made by the United States and explained as an effort not to regulate private family decisions but only official actions.³⁷⁹ After some discussion, the word “official” was deleted from the provision, but the phrase “legislative bodies” was inserted.³⁸⁰ During these discussions, there was quite some disagreement as to whether an international treaty could impose obligations upon parents and guardians. In terms of international law, State Parties to an international treaty must intervene where actions by private individuals infringe or threaten to infringe upon the rights enshrined by the particular document. States must act by means of preventative measures as well as remedial measures where a violation of rights has occurred.³⁸¹ International law and international treaties, however, do not traditionally directly impose obligations upon private individuals.³⁸² This fact leads us then to the question of who has the obligation to consider the best interests of children.

(CC) [25] the Constitutional Court held that “taken literally, it would cover virtually all laws and all forms of public action, since very few measures would not have a direct or indirect impact on children, and thereby concern them. Similarly, a vast range of private actions will have some consequences for children.”

³⁷⁷ General Comment No 14 (2013) 7. Freeman is even more pragmatic: he notes that a decision to go to war or to turn to nuclear power or to (fail to) address global warming will all concern children. So too will laws regarding cloning, pre-implantation genetic diagnosis, and abortion. Freeman (ed) *Article 3 The Best Interests of the Child* 46.

³⁷⁸ Freeman (ed) *Article 3 The Best Interests of the Child* 26. See also The 1981 report of the Working Group to the Commission on Human Rights (E/CN4/L1575, para 20), which is reproduced in para 289 of the 1981 report of the Commission on Human Rights (E/CN4/1475) as cited in the OHNHCHR “Legislative History of the CRC” (2007) 338.

³⁷⁹ OHNHCHR “Legislative History of the CRC 1” (2007) 339. The 1981 report of the Working Group to the Commission on Human Rights (E/CN4/L1575, para 20), which is reproduced in para 289 of the 1981 report of the Commission on Human Rights (E/CN4/1475) as cited in the OHNHCHR “Legislative History of the CRC” (2007) 338 explains the proposal as follows:

“The representative of the United States of America reintroduced a new article 3 which had been submitted by his delegation the year before but had not been considered owing to lack of time.”

³⁸⁰ OHNHCHR “Legislative History of the CRC” (2007) 339; Freeman (ed) *Article 3 The Best Interests of the Child* 47.

³⁸¹ O De Schutter *International Human Rights* (2010) 365.

³⁸² Exceptions to this rule exist only in very particular circumstances, as explained by A Jones & B Sufrin in *EU Competition Law: Text, Cases and Materials* (2014) 108 and R Schültze *Foreign Affairs and the EU Constitution: Selected Essays* (2014) 345-354.

3 3 2 *Who must consider the best interests?*

The reference to “parents” and “guardians” in one of the Polish drafts³⁸³ was eventually also deleted. The debate as to whether or not the duty may also be enforced against parents, guardians or temporary carers of children consequently continued long after the CRC was adopted.³⁸⁴ Both Freeman and Alston, for example, have questioned whether the principle would also apply in the context of the extended type of family arrangements or non-official entities taking any action which might impact children.³⁸⁵

In addition, these questions have also been asked bearing Article 4 of the ACRWC in mind. The provision of this treaty imposes the duty upon “any person or authority”, clearly including parents, guardians and all institutions in its scope. The Committee on the Rights of the Child has responded by explaining that although parents are not explicitly mentioned in Article 3 of the CRC, parents are also under an obligation since Article 18(1) provides that the best interests of the child will be parents’ basic concern.³⁸⁶ While this may be described as a bit of a “weak” extension, further underlined by the fact that the duty is imposed by the verb “will” instead of “shall”,³⁸⁷ Article 5 of the CRC further confirms the inference. This provision prescribes that State Parties must provide the necessary guidance and direction to parents and other members of the extended family so that they may give effect to the child’s rights in terms of the Convention. Therefore, even though there may have been no intention to regulate private family decisions,³⁸⁸ this general duty of promoting the best interests of the child may be firmly laid at the door of parents, caregivers and other adults responsible for the child.³⁸⁹ Chapter 4 of this thesis will explore this duty of such persons in further detail.

³⁸³ It reads:

“In all actions concerning children, whether undertaken by their parents, guardians, social or State institutions, and in particular by courts of law and administrative authorities, the best interest of the child shall be the paramount consideration.”

The 1981 report of the Working Group to the Commission on Human Rights (E/CN4/L1575, para 19), which is reproduced in para 289 of the 1981 report of the Commission on Human Rights (E/CN4/1475) as cited in the OHNHCHR “Legislative History of the CRC 1” (2007) 338.

³⁸⁴ See for example P Alston (1994) *Int J Law Policy Family* 14-15 and Freeman (ed) *Article 3 The Best Interests of the Child* 47-48.

³⁸⁵ Alston (1994) *Int J Law Policy Family* 15 and Freeman (ed) *Article 3 The Best Interests of the Child* 47.

³⁸⁶ General Comment No 14 (2013) 8.

³⁸⁷ Freeman (ed) *Article 3 The Best Interests of the Child* 48.

³⁸⁸ Alston (1994) *Int J Law Policy Family* 15.

³⁸⁹ The Committee has also drawn attention once again to the fact that the “family is the fundamental unit of society and the natural environment for the growth and well-being of its members, particularly children.” General Comment No 14 (2013) 14, recalling the Preamble to the CRC. This interpretation is

The Committee on the Rights of the Child has identified a second level of individuals and bodies responsible for considering the best interests, namely all institutions whose work and decisions affect children and the realisation of their rights. The Committee also refers to these institutions as “welfare institutions” and are explained to refer to organisations that play a role in the provision of services that are critical to children’s enjoyment of their rights. In addition, a third tier specifically mentioned in Article 3 as having the responsibility of bearing the child’s best interests in mind, are institutions such as courts of law,³⁹⁰ administrative authorities and legislative bodies. These bodies make decisions on a daily basis which may have an impact on children’s health, education, their environment and living conditions. Consequently, all of these decisions must consider the best interests of the child or children concerned. During the processes of the adoption of laws, regulations or collective agreements, which may have an impact on children in general, it must be explicitly explained how the welfare of the child might be affected by the potential legislation. In such instances, it must also be shown how these facts have been considered or incorporated into the relevant legislation. The obligation upon legislative bodies and administrative authorities accordingly also extends to, for example, the approval of budgets and demands a continuous process of child rights impact assessments (“CRIA”). A CRIA must predict the impact of any proposed law, policy or budgetary allocation on children and the

in line with the approach which has been adopted by the South African Legislature when it enacted the Children’s Act. In s 1 of the act, one of the responsibilities of a parent, namely that of “care”, is defined as, *inter alia*, “ensuring that the best interests of the child is the paramount concern in all matters affecting the child.” Apart from these clear guidelines it furthermore needs to be stressed that even prior to this general comment by the Committee, the South African Constitutional Court addressed the question as to who should raise the interests of children in court proceedings, particularly in instances where it may have not been properly raised or argued. Thus in the matter of *Van Der Burg v National Director of Public Prosecutions* 2012 2 SACR 331 para 68 the Court came to this conclusion:

“Of course, it is expected that parents must invoke the interests of their children in proceedings like these and it is important that they do so. But state institutions bear a responsibility to address this issue, even when the parents have not raised it.”

³⁹⁰ The Committee has prescribed that courts must in this regard provide for a consideration thereof in a procedural and substantive manner, “and must demonstrate that they have effectively done so.” General Comment No 14 (2013) 9. See also *Van Der Burg v National Director of Public Prosecutions* 2 SACR 331 where the Constitutional Court at para 68 confirmed this in the following manner:

“The high court is not only the upper guardian of children, but is also obliged to uphold the rights and values of the Constitution. In all matters concerning children, including applications for the forfeiture of property which provides a home or shelter to children, it is the duty of the court to consider the specific interests of the children. In this, officers of the court like the NDPP are expected to assist the court to the best of their ability with all relevant information at their disposal. The failure of parents to emphasise the interests of their children, or the possible manipulation of the children’s situation to suit the objectives of parents, may not be held against the children.”

enjoyment of their rights. A CRIA must furthermore be accompanied by a child rights impact evaluation to evaluate the actual impact of implementation of the legislation.³⁹¹

For the purposes of this thesis, it is important to note that the Committee in its sixteenth General Comment in which it discussed the impact of the business sector on children's rights, explained another crucial dimension to the above obligation.³⁹² It is clear that the food industry has a responsibility to ensure that their marketing practices do not violate children's rights. In its Comment, the Committee expressly acknowledges that there is no legally binding instrument on the business sector's responsibilities *vis-à-vis* human rights. Nevertheless, in practice the responsibility to respect the rights of the child and her best interests applies beyond the state and its state-owned enterprises: private actors and business enterprises also must meet their responsibilities towards children and the state must ensure their adherence.³⁹³ In this regard the necessary enabling and supportive environment for business enterprises are to be provided, including business relationships across any local or global operation and linked to any products or services.³⁹⁴ This would then mean that all business-related policies, legislation or administrative acts and decisions must be transparent, properly informed and include a full and continuous consideration of its impact on the interests and rights of children. Specifically, in instances of public procurement where the process of bidding and the award of tenders to private enterprises for the provision of public services take place, government departments must ensure that the successful bidders are committed to respecting and promoting children's rights. It is imperative that States should not invest public finances and other public resources in business activities which violate children's rights.³⁹⁵

In the fifth place, the Committee highlighted State Parties' obligations to engage in international cooperation for the realisation of children's rights beyond their territorial boundaries. The Preamble and numerous provisions of the CRC refer to the importance of international cooperation in order to improve the living conditions of children in every country but in particular in developing countries. Due to the almost universal ratification of the CRC, and bearing in mind that business enterprises

³⁹¹ General Comment No 14 (2013) 10.

³⁹² Committee on the Rights of the Child "General Comment No 16 (2013) on State obligations regarding the impact of the business sector on children's rights" CRC/C/GC/16 ("General Comment No 16 (2013)").

³⁹³ General Comment No 16 (2013) 4.

³⁹⁴ 4.

³⁹⁵ General Comment No 16 (2013) 8-9.

increasingly operate on a global scale through complex networks of subsidiaries, contractors, suppliers and joint ventures, it is essential that all of the different participants in the global market respect the best interests of the child.³⁹⁶ This would have the effect, for example, that if jurisdiction A in which a business operates, does not impose the stringent regulation which the business must adhere to in jurisdiction B, this enterprise should not use this lack of governance as *carte blanche* to disregard children's best interests. If jurisdiction B clearly promotes the best interests of children by the regulatory system which it employs, the business should rather try to implement this best practice in all of the jurisdictions in which it operates.

The state's obligation finally also extends to the informal business sector in which many products are manufactured and sold outside of the legal and institutional frameworks that regulate and protect rights. Member States must implement measures, which will ensure that the best interests of the child are also considered in this context. Such measures include, *inter alia*, awareness-raising; conducting research and gathering data on the impact of the informal economy upon children's rights; and supporting informal sector enterprises by providing skills training, registration facilities, effective and flexible credit and banking services and access to markets.³⁹⁷

3 3 3 "Children" and "the child"

A "child" is defined in Article 1 of the CRC as "every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier." This open-ended terminology which is used in this provision can be criticised, especially in light of Article 2 of the ACRWC which plainly provides that "a child means every human being below the age of 18 years", apparently not allowing much room for any exceptions.³⁹⁸ However, the age limit set by the CRC, defining children in general

³⁹⁶ See 11-13.

³⁹⁷ 11.

³⁹⁸ In South Africa both the Constitution, by means of s 28(3), and s 1 of the Children's Act defines a "child" as a person under the age of 18. However, there are many examples of age limits set by the law in South Africa in terms of which minors and infants (ie children) are provided with certain capacities or capabilities. Thus, for example, may a child over the age of ten be held criminally liable, a girl over the age of twelve may marry a man if the required consent is obtained, despite the fact that the age of sexual consent is set at 16, and children over the age of twelve who have reached a sufficient level of maturity and has the mental capacity to understand the benefits, risks, social and other implications of the treatment, may consent to their own medical treatment or surgery.

to refer to children as being people younger than 18, has become a generally accepted norm.

Whereas the best interests concept previously was used predominantly to assess the position of a child in a custody³⁹⁹ dispute of divorce setting, as explained above, the CRC introduced a child's rights approach, therefore also providing for the collective class of human beings. Article 3(1) of the CRC accordingly applies to children on an individual as well as a collective basis.⁴⁰⁰ This is evident from the use of the terminology of both "child" and "children" throughout the convention but also specifically in Article 3(1). Freeman and Alston agree that the use of the plural form indicates an intention of achieving a broader, rather than a narrow coverage of the standard.⁴⁰¹ This does not mean that when an assessment has to be made for an individual child, her particular circumstances must be ignored so that the interests of the broader class of children to which she belongs, take precedence over the individual child's rights. Heaton addresses this aspect when she argues for an individualised, contextualised and child-centred determination of the child's best interests.⁴⁰² The Committee on the Rights of the Child further affirms this approach by setting out the steps to be followed when assessing and determining the best interests of a child:

- "(a) First, within the specific factual context of the case, find out what are the relevant elements in a best-interests assessment, give them concrete content, and assign a weight to each in relation to one another;
- (b) Secondly, to do so, follow a procedure that ensures legal guarantees and proper application of the right."⁴⁰³

Therefore, despite the criticism which has been levied against the concept of the best interests being too vague and indeterminate, its ability to adapt is in actual fact also

³⁹⁹ In the South African context references to "custody" are interpreted to refer to "care" as defined by s 1 of the Children's Act.

⁴⁰⁰ General Comment No 14 (2013) 7-8. See also SW Sacino "Article 17 Access to a Diversity of Mass Media Sources" in A Alen, J Vande Lanotte, E Verhellen, F Ang, E Berghmans, M Verheyde & B Abramson (eds) *A Commentary on the United Nations Convention on the Rights of the Child* (2012) 16-17 and the text to n 13-16 explaining how the term "the child" which is used frequently throughout the text of the Convention, also refers to children in the plural form.

⁴⁰¹ See Freeman (ed) *Article 3 The Best Interests of the Child* 46 agreeing with Alston (1994) *Int J Law Policy Family* 14.

⁴⁰² J Heaton "An individualised, contextualised and child-centred determination of the child's best interests, and the implications of such an approach in the South African context" (2009) 34 *JJS* 1-15. This too was the call by the South African Constitutional Court in some of its previous decisions where it considered the best interests of the child. See, for example, *Minister of Welfare and Population Development v Fitzpatrick* 2000 3 SA 422 (CC) [18] and *S v M* 2008 3 SA 232 (CC) [24].

⁴⁰³ General Comment No 14 (2013) 12.

one of its assets: the flexibility of the concept allows it to be responsive to the situation of individual children and to evolve knowledge about child development.⁴⁰⁴ When taking collective decisions and, for example, when policy or legislative decisions are made, the interests of the group must be assessed and determined in the context of their particular set of circumstances. In both instances of assessing the best interests of the individual child and children as a group, regard must be had to the context, situation and needs of the children involved.⁴⁰⁵ To do this successfully, the assessment and determination must be done relying on the rights contained in the CRC.⁴⁰⁶

3 3 4 “A primary consideration”

As has been explained above, various international documents and pieces of legislation use different phrases as to the extent to which the best interests of the child should be considered.⁴⁰⁷ The CRC does not adopt the paramountcy test by describing the best interests to be “the primary consideration”. The use of “a primary consideration”, however, indicates that the best interests are not to be considered on the same level of consideration as other interests but must receive a higher level of priority.⁴⁰⁸ The best interests should be one of the first aspects to be considered and more weight should be attached to what will serve the child best.⁴⁰⁹ During the drafting process of the CRC, a proposal to consider the best interests as “the” primary consideration in matters concerning children’s welfare was rejected since this would have “unduly” narrowed the scope of protection afforded to children.⁴¹⁰ An alternative

⁴⁰⁴ 9. So too, for example, did the South African Constitutional Court in *S v M (Centre for Child Law as Amicus Curiae)* 2008 3 SA 232 (CC) at [24] declare that “it is precisely the contextual nature and inherent flexibility of s 28 [of the Constitution] that constitutes the source of its strength.” This aspect will be used as part of the argument in ch 8 and 9 in this thesis that in the context of food marketing, constant new research is required as to the impact of food marketing to children, overweight and obesity and consequences to the health and development of children.

⁴⁰⁵ General Comment No 14 (2013) 9.

⁴⁰⁶ 9. The relevant rights will be described below at 4 of this chapter.

⁴⁰⁷ See the discussion in the text to 1 2 above.

⁴⁰⁸ UNCRC General Comment No 14 (2013) 10.

⁴⁰⁹ 10. “[B]ut the question of weighted by how much is not answered.” A passage from a circular by the Lord Chancellor in England in 1975, as cited by Freeman (ed) *Article 3 The Best Interests of the Child* 61.

⁴¹⁰ Alston (1994) *Int J Law Policy Family* 12. In South Africa s 28(2) of the Constitution stipulates that a child’s best interests are of paramount importance in every matter concerning the child. The interpretation which the Constitutional Court provided to the meaning of “paramount importance” in the decision of *S v M (Centre for Child Law as Amicus Curiae)* 2008 3 SA 232 (CC) will be discussed in ch 7 below.

proposal to consider the best interests of “paramount” importance was also rejected.⁴¹¹ The Committee on the Rights of the Child explains the use of the terminology of “a primary consideration” as recognising a need for a degree of flexibility in the application of the best interests. This approach must be followed since there may be a range of conflicts, which may occur between different parties’ interests.⁴¹² For the purposes of this research, the role and prominence of competing interests in the context of food marketing to children will have to be assessed. Accordingly, such a description and assessment will follow in respectively chapters 4 and 8 of this thesis.

Finally, the word “consideration” connotes the understanding that this will be a factor or an aspect that will be genuinely taken into account. To consider something is to scrutinise or carefully think about it before a decision is made.⁴¹³ To consider the best interests of the child therefore means that all aspects of a child’s welfare and well-being will be carefully factored into the decision making process. As has been mentioned above, in order to consider the best interests of the child appropriately, this consideration must be performed whilst relying on the rights contained in the CRC and other instruments enshrining the rights of the child.⁴¹⁴ This should occur as a matter of first concern, especially in matters where a decision will have an impact on children. The Committee has also explained what it regards as procedural guarantees during this process of consideration: it must be explained how the right has been respected in the decision; what criteria the decision is based on; and how the child’s interests have been assessed against other considerations, be they broad issues of policy or individual cases.⁴¹⁵

4 Considering the best interests of the child when marketing food

4 1 Introduction

The final analysis in this chapter focussing on the best interests of the child needs to provide definition to the meaning of this standard within the food marketing context. In order to determine what it means to declare that the best interests of the child must

⁴¹¹ Alston (1994) *Int J Law Policy Family* 12. However, see for example Art 21 of the CRC which provides for the best interests of the child to be “the paramount consideration” in matters of adoption.

⁴¹² General Comment No 14 (2013) 10.

⁴¹³ The Oxford English Dictionary describes “consider” to mean “contemplate attentively, to survey, examine, inspect, scrutinize [sic]”.

⁴¹⁴ Comment No 14 (2013) 9.

⁴¹⁵ See the discussion at 3 2 above.

also be considered in the everyday occurrence of feeding a child, further guidance must be obtained from the rights that children have.⁴¹⁶ To do so, is to adopt the notion of interdependence and indivisibility of all human rights⁴¹⁷ while simultaneously giving practical content to the concept of the best interests of the child.⁴¹⁸

The following discussion will provide a very general overview of rights which may be affected by the marketing practices which are currently employed to promote food to children and which were described in chapter 2 of this thesis. The scope of this overview will be limited to the content and meaning of these rights, which are relevant to the topic of this research, and will therefore not provide a detailed analysis of what each of these rights entail. Particular emphasis will also be placed on these rights as enshrined in the CRC⁴¹⁹ while focussing on the content that the Committee on the Rights of the Child have given to these rights by means of their General Comments.

Although the General Comments of human rights bodies cannot be regarded as binding sources of international law, it provides general interpretative guidance to states, and in the process provides three functions, namely legal analysis, policy recommendation, and practice direction.⁴²⁰ The purpose of such comments or recommendations is to explain what the committee's understanding of a right or set of rights contained in instruments of international human rights law is, and the steps which it considers necessary to implement such rights.⁴²¹ In most instances these General Comments are published without creating any controversy or judgement.⁴²² In some instances, however, it has been argued that Committees have exceeded their mandates, causing the Government of the UK, for example, to observe that General

⁴¹⁶ General Comment No 14 (2013) 9. Van Bueren explains that the rights contained in the CRC may be used as signposts by which the best interests of the child may be identified. G van Bueren in *Introduction to Child Law in South Africa* 205.

⁴¹⁷ See J Tobin "Beyond the Supermarket Shelf: Using a Rights Based Approach to Address Children's Health Needs" (2006) 14 *Int'l J Child Rts* 275 281 explaining how this guiding principle is derived from the Vienna Declaration and Programme of Action adopted at the World Conference on Human Rights in 1993.

⁴¹⁸ See the Committee's Comments, discussed above in section 3 3 3.

⁴¹⁹ It must also be borne in mind that the list of rights which are contained in the CRC is an illustrative list and not an exhaustive one. Nonetheless the CRC will be used as a normative foundation from which to discuss the issues can be addressed. See also Tobin (2013) *Int'l J Child Rts* 416 who shares this view regarding the basis which the CRC provides.

⁴²⁰ Keller & Grover cited by P Gerber, J Kyriakakis & K O'Byrne "General Comment 16 on State Obligations Regarding the Impact of the Business Sector on Children's Rights: What is its Standing, Meaning and Effect?"(2013) 14 *Melb J Int'l Law* 101-102.

⁴²¹ Schäfer *Child Law in South Africa* 79.

⁴²² 79 – 80 notes three exemptions, one of which was the 8th General Comment by the Committee on the Rights of the Child, arguing that all forms of corporeal punishment of children, including parental chastisement, are prohibited in terms of the CRC.

Comments are not legally binding.⁴²³ The UK Government nevertheless confirmed that these documents “command great respect”, given the prominence and status given to the various treaties and their respective committees.⁴²⁴ In South Africa, many court judgments have considered and in fact relied on a number of General Comments and Recommendations made by various human rights committees.⁴²⁵ It can therefore be argued that such reliance by the South African courts connotes judicial recognition of the significant role which these General Comments play as a distinct source within international law.⁴²⁶

4 2 The right to health

One of the rights which serves a child’s well-being and welfare is that of her physical and mental health. It is difficult to disagree with the contention that to implement children’s right to health is to promote their best interests. The importance of this right is illustrated by the numerous international instruments which enshrine this right, including that of the Universal Declaration of Human Rights of 1948;⁴²⁷ the International Covenant on Economic, Social and Cultural Rights (“ICESCR”) of 1966;⁴²⁸ the International Convention on the Elimination of All Forms of Racial Discrimination of 1965;⁴²⁹ the Convention on the Elimination of All Forms of Discrimination against Women of 1979;⁴³⁰ the European Social Charter of 1961;⁴³¹ the African Charter on Human and Peoples’ Rights of 1981;⁴³² the Additional Protocol to

⁴²³ Schäfer *Child Law in South Africa* 80 referring to the observations made by the UK as a State Party to the International Covenant on Civil and Political Rights and in reaction to the Human Rights Committee’s 24th General Comment.

⁴²⁴ 80.

⁴²⁵ See for example *S v Williams* 1995 3 SA 632 (CC) finding substantial persuasive weight in the Human Rights Committee’s 20th General Comment; *Minister of Health v Treatment Action Campaign (No 2)* 2002 5 SA 721 (CC) considering the 3rd General Comment by the Committee on Economic, Social and Cultural Rights; and *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development* 2009 4 SA 222 (CC) considering the 5th and 7th General Comments of the Committee on the Rights of the Child with respect to the interpretation to be given to the best interests principle contained in s 28(2) of the Constitution.

⁴²⁶ Schäfer *Child Law in South Africa* 82.

⁴²⁷ See Art 25.1 which provides that “[e]veryone has the right to a standard of living adequate for the health of himself and of his family, including food, clothing, housing and medical care and necessary social services”.

⁴²⁸ Art 12.1 of the ICESCR recognises “the right of everyone to the enjoyment of the highest attainable standard of physical and mental health”, while Art 12.2 provides a number of “steps to be taken by the States parties ... to achieve the full realization of this right”.

⁴²⁹ In Art 11.1 (f).

⁴³⁰ Art 12.

⁴³¹ Art 11.

⁴³² Art 16.

the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights of 1988;⁴³³ the CRC of 1989;⁴³⁴ the ACRWC of 1990,⁴³⁵ and the Convention on the Rights of Persons with Disabilities of 2006.⁴³⁶ As a result, it is clear that the international human rights system provides an explicit and shared normative framework which should be used to assess national laws, policies and programmes.

The Office of the United Nations Commissioner for Human Rights and the World Health Organisation's Joint Fact Sheet No 31 has clarified one of the misconceptions about the right to health:⁴³⁷ The right includes the right to the highest attainable standard of physical and mental health, and not necessarily the unconditional right to be healthy. Since good health is influenced by several factors that are outside the direct control of governments, such as an individual's biological make-up, the right to health refers to the right to the enjoyment of a variety of goods, facilities, services and conditions necessary for its realisation.⁴³⁸ This also includes the right to receive information and guidance as to what will be in the interests of a person's health. The Committee on Economic, Social and Cultural Rights has furthermore paid attention to child and adolescent health in its fourteenth General Comment⁴³⁹ by commenting that Article 12 of the ICESCR, *inter alia*, directs States to ensure that children have access to child-friendly information about preventive and health-promoting behaviour and support to families and communities in implementing these practices.⁴⁴⁰

Article 24(1) of the CRC also stipulates that children have the right to the enjoyment of the highest attainable standard of health.⁴⁴¹ In pursuing the full implementation of this end, States Parties must take appropriate measures 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

⁴³³ Art 10.

⁴³⁴ Art 24, discussed below.

⁴³⁵ Art 14, discussed below.

⁴³⁶ Art 25.

⁴³⁷ Office of the United Nations High Commissioner for Human Rights "Fact Sheet No. 31: The Right to Health" (13-06-2008) *OHCHR* <<http://www.ohchr.org/Documents/Publications/Factsheet31.pdf>> (accessed 02-04-2014).

⁴³⁸ Office of the United Nations High Commissioner for Human Rights "The Right to Health" (13-06-2008) *OHCHR* 5.

⁴³⁹ Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: General Comment No. 14 (2000) - The right to the highest attainable standard of health (art 12 of the ICESCR).

⁴⁴⁰ E/C12/2000/4 7.

⁴⁴¹ Art 14(1) of the ACRWC provides that:

"Every child shall have the right to enjoy the best attainable state of physical, mental and spiritual health."

nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution”.⁴⁴² Once again the importance of the provision of information is emphasised: these measures must be implemented while also ensuring 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”.⁴⁴³

The Committee on the Rights of the Child has commented on this right contained in Article 24 on numerous occasions. It has described the realisation of the right to health as “indispensable” for the enjoyment of all the other rights in the Convention.⁴⁴⁴ Furthermore, the Committee has interpreted this right to health to be an “inclusive right [for children], extending not only to timely and appropriate prevention, health promotion, curative, rehabilitative and palliative services, but also to a right to grow and develop to their full potential and live in conditions that enable them to attain the highest standard of health through the implementation of programmes that address the underlying determinants of health.”⁴⁴⁵ The Committee on the Rights of the Child consequently has endorsed a holistic approach to health, and in doing so supports the approach by the WHO, regarding health as a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.⁴⁴⁶

From the above it is evident that the right to nutritious food and clean water plays a central role in the realisation of the right to health. Human beings need food and water to survive and without it, the right to life, survival and development cannot be sustained. The South African Constitution also describes the right to health in section 27 as a positive right in terms of which the government needs to ensure that everyone has access to sufficient food and water.⁴⁴⁷ However, in the same way in which some

⁴⁴² Art 24 (2)(c).

⁴⁴³ Art 14 similarly stipulates that States must “ensure the provision of adequate nutrition and safe drinking water” and that “all sectors of the society, in particular, parents, children, community leaders and community workers are informed and supported in the use of basic knowledge of child health and nutrition, the advantages of breastfeeding, hygiene and environmental sanitation and the prevention of domestic and other accidents”.

⁴⁴⁴ Committee on the Rights of the Child “General Comment No 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art 24)” CRC/C/GC/15 4 (“General Comment No 15 (2013)”).

⁴⁴⁵ General Comment No 15 (2013) 3.

⁴⁴⁶ 3, citing the Preamble to the Constitution of the World Health Organization (WHO) as adopted by the International Health Conference, New York, 22 July 1946, where the right to enjoyment of the highest attainable standard of health was first articulated. See also ch 5.

⁴⁴⁷ The title of s 27 of the Constitution is “Health care, food, water and social security” and provides that

sources of water may be polluted or not safe for consumption, not all products which can be classified as food may be classified as being nutritious or as being uncontaminated or untainted, including chemical alternations by means of preservatives.⁴⁴⁸ Many foodstuffs, which are marketed and consumed today, are nutritionally poor and consequently provide little more than many malnourishing calories and short-term relief from hunger.⁴⁴⁹ These foods have been described as being “obesogenic”⁴⁵⁰ foods since even a moderate intake of these products will cause an increase in weight.

Hence it is submitted that the right to food cannot be interpreted to mean anything else than the right to nutritious foods. At a special meeting between the UN Special Rapporteur on the Right to Food and the Committee on the Rights of the Child in June 2012, it was stressed that the right to food is not simply a right not to starve. This right is a right to have access to a range of foods that contribute to a balanced diet. The ingredients of a balanced diet will vary during different stages of a person’s development throughout her life.⁴⁵¹ Similarly the World Food Summit in 1996 described “food security” as existing “when all people at all times have access to

“(1) [e]veryone has the right to have access to (a) health care services, including reproductive health care; (b) sufficient food and water; and (c) social security, including, if they are unable to support themselves and their dependents, appropriate social assistance.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.”

This right is also confirmed in section 28(1)(c) which provides that children have the right to basic nutrition, shelter, basic health care services and social services. Of particular importance for the purposes of this thesis is section 13 of the Children’s Act which protects the child’s right to information on health care. Apart from the child’s right to be provided with all of the relevant information as to the prevention, causes and treatment of ill-health, the provision prescribes that any such information must be provided to children in a format which is accessible to them, bearing also in mind the needs of disabled children. It is submitted that in the context of the labelling of food products, this provision places an important duty on the state and food manufacturers. This argument will again be explored below at 4 5, as well as in ch 7 and 8.

⁴⁴⁸ See also PA Diller “Combating Obesity with a Right to Nutrition”(2012-2013) 101 *The Geo LJ* 969 990.

⁴⁴⁹ Diller (2012-2013) *Geo LJ* 979.

⁴⁵⁰ Connoting the idea that they cause obesity. As was explained in ch 1, the causes of obesity are of course not that simple to explain and the excessive intake of these foodstuffs is but one of the main contributing factors to the problem of obesity.

⁴⁵¹ International Baby Food Action Network “The Right to Food and Adequate Diets: A Meeting Between the CRC Committee and the Special Rapporteur on the Right to Food” (07-06-2012) *International Baby Food Action Network* <http://www.srfood.org/images/stories/pdf/otherdocuments/report%20of%20the%20meeting%20crc%20and%20sr%20on%20the%20rtf_final.pdf> (accessed 15-01-2015). At the meeting, the Special Rapporteur presented the findings of his report A/HRC/19/59 submitted to the Human Rights Council at its nineteenth session in Feb – March 2012. This report is available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/19session/A.HRC.19.59_English.pdf> (accessed 15-01-2015).

sufficient, safe, nutritious food to maintain a healthy and active life”.⁴⁵² As a result, one of the pillars of food security is that food be used based on a sound knowledge of basic nutrition and care, as well as adequate water and sanitation.⁴⁵³ The importance of nutrition has been explained as follows by MacMaoláin:

“The first element of quality is actually nutritional value, yet ... nutritional value has remained for the most part outside the factors that are taken into account in determining what qualifies as safe or high quality food. ... As a consequence of this misinterpretation of the extent to which the [European Union] is responsible for the protection of human health through the consumption of safe or quality food, the issue of nutrition has become sidelined, when in fact it should be the key component of any food quality programme.”⁴⁵⁴

In its *General Comment No 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art 24)*, the Committee has in particular emphasised that the matter of obesity should be addressed by Member States. The Committee expressed its concern regarding the increased prevalence of obesity since it is associated with hypertension, early markers of cardiovascular disease, insulin resistance, psychological effects, a higher likelihood of adult obesity, and premature death.⁴⁵⁵ It also recommended that children’s exposure to fast foods that are high in fat, sugar or salt, energy-dense and nutritionally poor, and drinks containing high levels of caffeine or other potentially harmful substances should be limited. To this end, the Committee is of the view that the marketing of these products and especially when such marketing is targeted towards children, should be regulated and their availability in schools and other places controlled.⁴⁵⁶ The use of child images when marketing these products is also discouraged⁴⁵⁷ and the co-operation from the private business sector, and the mass media in particular, is consequently regarded as crucial to realising this goal. This issue is furthermore also addressed in the Committee’s *General Comment on Adolescent health and development in the context of the Convention on the Rights of the Child* where concern is expressed over the influence which marketing practices by manufacturers of unhealthy products and lifestyles have

⁴⁵² World Health Organisation “Trade, foreign policy, diplomacy and health: Food Security” (2011) *World Health Organisation* <<http://www.who.int/trade/glossary/story028/en/>> (accessed 15-01-2015).

⁴⁵³ World Health Organisation “Trade, foreign policy, diplomacy and health: Food Security” (2011) *World Health Organisation*.

⁴⁵⁴ C MacMaoláin *EU Food Law: Protecting Consumers and Health in a Common Market* (2007) 223 and 224 as cited by Alemanno & Garde (eds) *Regulating Lifestyle Risks* 11-12 (footnotes omitted).

⁴⁵⁵ General Comment No 15 (2013) 12.

⁴⁵⁶ 12.

⁴⁵⁷ 18.

on adolescent health.⁴⁵⁸ Moreover, in its sixteenth General Comment the Committee once again referred to the possible long-term impact which the marketing of products such as cigarettes, alcohol, and foods and drinks high in saturated fats, trans-fatty acids, sugar, salt or additives may have on children's health.⁴⁵⁹ Children may regard marketing messages as truthful or unbiased and may not realise what possible harm may ensue from the consumption of these products. In addition, the use of unrealistic body images in advertisements, such as the very slim and happy model tucking into a packet of crisps or a chocolate bar, may influence children's self-esteem and cause great confusion. States consequently have the obligation to minimise adverse impacts by means of appropriate regulation and encouraging business enterprises to adhere to codes of conduct. States should furthermore encourage the use of clear and accurate product labelling and information that allow parents and children to make informed consumer decisions.⁴⁶⁰

Children are a particularly vulnerable group, especially during the crucial first stages of life when communicable diseases may have severe long-term effects on a child's life. Adolescents are normally considered to be a healthier population group but are also children who are at risk. It is during adolescence when teenagers are most susceptible to external influences, peer pressure and risky behaviour.⁴⁶¹ At this stage of life, body image and individual identity becomes vital.⁴⁶² Many forms of bullying – both physical and emotional – seem to dominate the lives of children, often also with devastating and even fatal consequences.⁴⁶³ The Committee on the Rights of the

⁴⁵⁸ General Comment No 4 (2003) 7.

⁴⁵⁹ General Comment No 16 (2013) 6-7.

⁴⁶⁰ 16-17.

⁴⁶¹ Committee on the Rights of the Child "General Comment No 4 (2003) Adolescent health and development in the context of the Convention on the Rights of the Child" CRC/GC/2003/4 1 ("General Comment No 4 (2003)"). See also Office of the United Nations High Commissioner for Human Rights "The Right to Health" (13-06-2008) *OHCHR* 14-15.

⁴⁶² See for example also S Giordano "Anorexia Nervosa and its Moral Foundation" in M Freeman (ed) *Children's Health and Children's Rights* (2006) citing studies which found that eating disorders occur "most commonly in adolescent girls and young women, but adolescent boys and young men may also be affected, as may children approaching puberty". The author argues here that, despite the suggestions that advertising play a contributory role in the incidence and prevalence of *anorexia nervosa*, "fashion and the media are not a cause but an effect." The real causes for eating disorders, ..., are found in *morality*." (Emphasis in original).

⁴⁶³ See for example A DeSmet, B Deforche, A Hublet, A Tanghe, E Stremersch "Traditional and cyberbullying victimization as correlates of psychosocial distress and barriers to a healthy lifestyle among severely obese adolescents – a matched case-control study on prevalence and results from a cross-sectional study" (2014) 14 *BMC Public Health* 1; J Stevelos "Bullying, Bullycide and Childhood Obesity" (latest update 2016) *Obesity Action Coalition* <<http://www.obesityaction.org/wp-content/uploads/Bullying-and-Bullycide.pdf>> (accessed 03-04-2014) citing a 2004 study of bullying behaviour in 5 749 boys and girls (eleven to sixteen years old). This study showed that overweight and

Child, for example, has expressed its concern about the high rate of suicide among children which are very often related to, *inter alia*, eating disorders and self-destructive behaviours.⁴⁶⁴ It is therefore essential that the information and messages that children receive regarding the relationship between food intake and nutrition, weight control and the prevention of non-communicable diseases are accurate and not misleading at any level.

Within the context of adolescents, and bearing in mind the evolving capacities of children, the effect of marketing and peer pressures may be combated by providing practical implementation to children's right to adequate information on how to protect their health and development and practice healthy behaviours.⁴⁶⁵ This information must be made physically accessible, understandable and appropriate to children's age and educational level.⁴⁶⁶ In addition, information must, in particular, include information and life skills addressing healthy eating and the promotion of physical activity, sports and recreation. This information is to be provided to parents, the extended family and other caregivers through different methods, including through health clinics, parenting classes, and by means of public information leaflets, professional bodies, community organizations and the media.⁴⁶⁷ Such life skills, in the context of adolescents, should include self-care skills such as how to plan and prepare nutritionally balanced meals.⁴⁶⁸

4.3 The right to life, survival and development

The right to health and to food and water is furthermore inextricably linked to the right to life, and the survival and development of the child. One of the other provisions of the CRC, which has been identified as one of the four core or guiding principles of the convention, is that of Article 6. This provision states that:

obese school-aged children were more likely to be the victims and perpetrators of bullying behaviour than their normal-weight peers. See furthermore one of many disturbing stories such as that of overweight Ashlynn Conner: L Matthews "Ashlynn Conner, 10, Allegedly Commits Suicide Because of Bullying" (14-11-2011) *International Business Times* <<http://www.ibtimes.com/ashlynn-conner-10-allegedly-commits-suicide-because-bullying-369832>> (accessed 03/-4-2014). At the other end of the scale children may also be bullied into developing eating disorders such as *anorexia* or *bulimia*: see SG Gowers & A Shore "Development of weight and shape concerns in the aetiology of eating disorders"(2001) 179 *Br J Psychiatry* 236-242.

⁴⁶⁴ General Comment No 4 (2003) 6.

⁴⁶⁵ 7.

⁴⁶⁶ General Comment No 15 (2013) 14.

⁴⁶⁷ 14.

⁴⁶⁸ General Comment No 4 (2003) 7.

- “1. States Parties recognize that every child has the inherent right to life.
2. States Parties shall ensure to the maximum extent possible the survival and development of the child.”

The importance of the right to development is also confirmed by the numerous references to it in other provisions of the CRC. These include Article 18 in which it is explained how both parents have common responsibilities for the upbringing and development of the child; Article 23 where the disabled child's right to full social integration and individual development, including his or her cultural and spiritual development, is protected; Article 27 recognising the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development; Article 29 describing how a child's education must contribute to the various aspects of a child's development; and Article 32 prescribing that a child may not perform work which may be harmful to the child's health or physical, mental, spiritual, moral or social development.

The socio-economic conditions in which a child grows up play a vital role in a child's life, survival and development. Poverty and a lack of resources have an effect on a child's standard of living, education, the quality of the right to play and rest, access to information and her health.⁴⁶⁹ Article 27 provides further support for this right to development by instructing Member States in this regard to assist parents and others who have the primary responsibility to secure (within their abilities and financial capacities) the conditions of living necessary for the child's development. States have to, in particular, implement this right by providing material assistance (where necessary) and support programmes, specifically with regard to nutrition, clothing and housing.

In respect of early childhood development, the Committee on the Rights of the Child has described the time of early childhood as a time during which children experience the most rapid period of growth and change. During the first years of their lives, children must make sense of the physical, social and cultural dimensions of their worlds and they continuously learn from their activities and interactions with others, both with other children as well as with adults. A young child's earliest years are also the foundation for her physical and mental health, her emotional security, and

⁴⁶⁹ For a discussion of how these and other aspects affect a child's right to development, see N Peleg “Time to Grow Up: The UN Committee on the Rights of the Child's Jurisprudence of the Right to Development” in MDA Freeman *Law and Childhood Studies: Current Legal Issues* 14 (2011).

developing competencies, as well as her cultural and personal identity.⁴⁷⁰ The Committee noted with concern that malnutrition and preventable diseases continue to be major obstacles in realising rights in early childhood. It is also important to highlight the fact that the Committee furthermore recommended that “[f]rom an early age, children should themselves be included in activities promoting good nutrition and a healthy and disease-preventing lifestyle.”⁴⁷¹ It is consequently essential that all children, even the very young ones, are exposed to the correct information regarding nutrition, a healthy weight and the effect which foods high in fat, sugar and salt may have on their healthy development.

4 4 The right to express her view and to have that opinion be heard

The Committee on the Rights of the Child has emphasised that one aspect that cannot be ignored during an assessment of a child’s best interests, is respect for the child’s views. In other words, if the requirements of Article 12 of the CRC are not adhered to, Article 3(1) cannot be correctly applied.⁴⁷² Adults cannot be regarded as the sole adjudicators of children’s best interests since the evolving capacities of the child must be borne in mind.⁴⁷³ Article 12 in particular is an example of the fact that the CRC does not perceive children only as victims in need of protection but acknowledges them to be evolving agents who are capable of making their own decisions.⁴⁷⁴

Article 12 of the CRC prescribes that the views of a child who is capable of forming his own opinion, must be expressed freely in all matters affecting the child and given due weight in accordance with the age and maturity of the child. It is submitted that even very young children have the ability to express themselves: they have opinions and ideas about many things and are very capable of communicating these views. However, the CRC clearly states that these views should only be considered and given due weight in accordance with the age and level of development of the child. As a child matures, and the more a child understands and has experienced life, the greater

⁴⁷⁰ Committee on the Rights of the Child “General Comment No 7 (2005) Implementing child rights in early childhood” CRC/C/GC/7 3 (“General Comment No 7 (2005”).

⁴⁷¹ 4.

⁴⁷² General Comment No 14 (2013) 11. The Committee also described how Art 3 aims to realise the best interests while Art 12 provides the mechanism by giving children the voice to express what they think are in their best interests.

⁴⁷³ Tobin (2013) *Int’l J Child Rts* 431.

⁴⁷⁴ 427-428. See also the discussion in section 2 3 above.

weight should be afforded to her views.⁴⁷⁵ Article 12 does not imply that children are presumed to know what are in their best interests – to the contrary, children will very often act contrary to their best interests – but children should at least be provided the opportunity to express their opinion regarding matters that affect them. Whereas adults are presumed to know that harm may follow from a particular decision, children need guidance, experience and information to enable them to arrive at this point of awareness or understanding.⁴⁷⁶ It is of course also true that, as is the case with the freedom of speech of adults, this right of children too may be restricted in certain instances.⁴⁷⁷

The Royal Society for Public Health expressly gave effect to this right by conducting research as to what children think the solutions to the obesity crisis may be.⁴⁷⁸ 570 children between the ages of 13 and 18 completed a national online survey and suggested a number of possible initiatives, which they thought might have an impact on childhood obesity. Some of their very practical and clear recommendations include that the format in which nutritional information is displayed on food should be of such

⁴⁷⁵ See in this regard the eloquent description offered by the Committee on the Rights of the Child in General Comment No 7 (2005) 8:

“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. Respecting young children’s evolving capacities is crucial for the realization of their rights, and especially significant during early childhood, because of the rapid transformations in children’s physical, cognitive, social and emotional functioning, from earliest infancy to the beginnings of schooling. Article 5 contains the principle that parents (and others) have the responsibility to continually adjust the levels of support and guidance they offer to a child. These adjustments take account of a child’s interests and wishes as well as the child’s capacities for autonomous decision-making and comprehension of his or her best interests. While a young child generally requires more guidance than an older child, it is important to take account of individual variations in the capacities of children of the same age and of their ways of reacting to situations. Evolving capacities should be seen as a positive and enabling process, not an excuse for authoritarian practices that restrict children’s autonomy and self-expression and which have traditionally been justified by pointing to children’s relative immaturity and their need for socialization. Parents (and others) should be encouraged to offer “direction and guidance” in a child-centred way, through dialogue and example, in ways that enhance young children’s capacities to exercise their rights, including their right to participation (art 12) and their right to freedom of thought, conscience and religion (art 14).”

⁴⁷⁶ Tobin (2013) *Int'l J Child Rts* 426-434 provides an excellent analysis of the relationship between the need to protect children from harm, the instruction by the CRC to provide them with the tools which will enhance their development and to facilitate children’s participation.

⁴⁷⁷ Art 13 of the CRC provides that a child’s freedom of expression may be limited in instances where it is necessary to “respect of the rights or reputations of others; or ... [f]or the protection of national security or of public order (*ordre public*), or of public health or morals.”

⁴⁷⁸ The Royal Society for Public Health “The Child’s Obesity Strategy: How our young people would solve the childhood obesity crisis” (23-06-2016) *The Royal Society for Public Health* <<https://www.rsph.org.uk/about-us/news-listing/ban-fast-food-deliveries-to-schools.html>> (accessed on 24/06/2016). 570 children between the ages of 13 and 18 completed a national online survey.

a nature that children could understand it.⁴⁷⁹ Thus, for example, they were of the view that illustrations of sugar cubes should be included on soft drinks, indicating how much sugar the whole of the product contains, and not just a portion of it, such as 100 grams or a serving size.⁴⁸⁰ These children furthermore said that food containing high amounts of fat, salt or sugar should include a health warning about the risks of obesity, should not be available for purchase as takeaways delivered at schools, and that advertising such foods on public transport such as on the side of a bus or on bus tickets “undoubtedly encourages young people to visit the nearest fast food chain and get something unhealthy.”⁴⁸¹ The children were also of the view that “junk food” should be positioned on higher shelves away from the eye-line of children; that supermarkets should give out “wonky” fruit and vegetables,⁴⁸² and develop a loyalty card rewarding healthy choices.⁴⁸³

4 5 The right to education, information and a variety of media sources

Apart from the express right to education, which is, *inter alia*, enshrined in Articles 28 and 29 of the CRC, Article 24 provides that the child also has the right to be educated regarding her health and nutrition.⁴⁸⁴ In addition, this right is complemented by the

⁴⁷⁹ Nigham Jahangiri and Shannon Cottell explained, for example:

“Nutrition information is often written in small and inconspicuous font, which makes it difficult to read how unhealthy the product is or the harmful effects. By making simple changes to the layout on food packaging and how it is presented, we can make a huge impact to how children are fed and what food choices they make.”

The Royal Society for Public Health “The Child’s Obesity Strategy: How our young people would solve the childhood obesity crisis (23-06-2016) *The Royal Society for Public Health* 10.

⁴⁸⁰ The children said that people often consume a whole product in its entirety and not just a portion. “Per serving amounts often give people the impression that the food contains less sugar than it actually does.” The Royal Society for Public Health “The Child’s Obesity Strategy: How our young people would solve the childhood obesity crisis” (23-06-2016) *The Royal Society for Public Health* 9.

⁴⁸¹ Malik Thomas quoted in The Royal Society for Public Health “The Child’s Obesity Strategy: How our young people would solve the childhood obesity crisis” (23-06-2016) *The Royal Society for Public Health* 12.

⁴⁸² This term refers to fruit and vegetables which are perfectly edible but often rejected by supermarkets due to blemishes or an unusual shape. Thomas Munnally explained it in the following manner:

“Supermarkets could give out free “wonky fruit and veg” to children with their parents, when they enter the store or in little bags to take away and eat at home. This would help tackle childhood obesity as the children would be less likely to ask their parents for unhealthy snacks that they may see in the store (as this is usually what children do) as they would be preoccupied eating their ‘wonky’ fruit or veg.”

The Royal Society for Public Health “The Child’s Obesity Strategy: How our young people would solve the childhood obesity crisis” (23-06-2016) *The Royal Society for Public Health* 13.

⁴⁸³ The Royal Society for Public Health “The Child’s Obesity Strategy: How our young people would solve the childhood obesity crisis” (23-06-2016) *The Royal Society for Public Health* 13.

⁴⁸⁴ Art 24(2)(e) of the CRC provides that State Parties must “ensure that all segments of society, in particular parents and children, are informed, have access to education and are supported in the use

child's right to a diverse range of sources of information, which is explicitly enshrined in Article 17 of the CRC:

"States Parties recognize the important function performed by the mass media and shall ensure that the child has access to information and material from a diversity of national and international sources, especially those aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health. To this end, States Parties shall:

(a) Encourage the mass media to disseminate information and material of social and cultural benefit to the child and in accordance with the spirit of article 29;

(b) Encourage international co-operation in the production, exchange and dissemination of such information and material from a diversity of cultural, national and international sources;

...

(e) 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."

Sacino explains that the right contained in Article 13 of the CRC has actually been incorrectly phrased as the right to "freedom of expression", since the right includes both the right to communicate with others, thus expressing oneself, whilst it also embraces the right to receive another's communication.⁴⁸⁵ It is therefore essential to stress that this freedom to communicate includes the right to seek, receive and impart information and ideas of all kinds.⁴⁸⁶

Moreover, an important point, which must never be ignored in the discussion surrounding children and food marketing, is the fact that children are also consumers. As consumers of food products, they are entitled to an economic environment that protects their rights to information in order to make informed choices, to be protected from hazards to their well-being and safety and to participate in decision-making processes concerning the marketplace and the interests of consumers.⁴⁸⁷ The right to

of basic knowledge of child health and nutrition, the advantages of breastfeeding, hygiene and environmental sanitation and the prevention of accidents."

⁴⁸⁵ Sacino "Article 17 Access to a Diversity of Mass Media Sources" in *A Commentary on the United Nations Convention on the Rights of the Child* 6.

⁴⁸⁶ See Art 12 and 13 of the CRC. Art 13 provides that children have the right to "to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice.

2. The exercise of this right may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others; or

(b) For the protection of national security or of public order (*ordre public*), or of public health or morals."

⁴⁸⁷ See the Preamble to the Consumer Protection Act 68 of 2008 ("CPA").

receive communication is essential in the marketplace. Every consumer needs to have the appropriate knowledge and the correct information in order to make informed decisions regarding the products that they consume. This also applies in the instances where children participate in the commercial market by consuming food.

As a result, children are entitled to express their views also within this context. Since children are often left politically voiceless⁴⁸⁸ in a global marketplace where numerous decisions are being made without input from the people most affected by these decisions, children are to be provided with the mechanisms to obtain remedies when their rights have been violated.⁴⁸⁹

At the time of the drafting of the CRC in the late 1970s the mass media was generally understood to include the printed media – in the format of newspapers and magazines – and the broadcast media, consisting of television and radio programming. Whereas the original Polish proposal placed much greater emphasis on the possible harmful influences of the media, other delegates were of the opinion that freedom of speech should not be curtailed. It was explained that emphasis should rather be placed on the informative and educational role which the media may play in children's lives.⁴⁹⁰ It is clear that the drafters of the Convention acknowledged the positive and significant role that the media plays in children's lives. Nearly 40 years later, children are even more dependent on media products. Both adults and children do not use the media solely for the purposes of entertainment, but also as a main source of information, networking and socialising. While the various forms of media may pose new threats, which were not possible in the 1970s and 1980s, the valuable and constructive role which the media can play in children's lives still need to be encouraged and developed today.

Article 17 clearly places an obligation upon State Parties to motivate and support the mass media industry in distributing information to children that will promote a healthy lifestyle.⁴⁹¹ Since the child's right to freedom of communication, enshrined by, *inter alia*, Article 13 of the CRC, is inextricably linked to this provision,⁴⁹² Article 17

⁴⁸⁸ General Comment No 16 (2013) 3.

⁴⁸⁹ 3.

⁴⁹⁰ J Todres, ME Wojcik, C Revaz *The United Nations Convention on the Rights of the Child: An Analysis of Treaty Provisions and Implications of U.S. Ratification* (2006) 178.

⁴⁹¹ It is submitted that this obligation is similarly found in s 32 of the Constitution in which it is explained that everyone has the right to access information if that information is held by someone else and this information is required to exercise or protect any rights.

⁴⁹² Sacino points out that Art 13 is an example of a negative liberty right, whereas Art 17 imposes a duty upon the State to ensure a variety of mass media sources. Sacino "Article 17 Access to a Diversity of

recognises that children's exposure to certain material may be limited in certain circumstances. It expressly refers to the fact that some media content may be inappropriate or harmful to children.⁴⁹³ The obligation upon Member States therefore further extends to encouraging the development of regulatory guidelines which will explain which material may be considered detrimental to a child's welfare. However, the use of the word "encourage" places a very low level of duty in terms of international human rights law.⁴⁹⁴ Since the state has to encourage others to do so, this part of the provision therefore seemingly prefers voluntary and self-regulatory measures of the media industry, rather than legislative measures. As a result, Article 17 seems to provide that it is best left to the publishers and broadcasters to decide what material may be considered harmful to children. Although this provision may not impose the duty upon the state to provide such guidelines, it cannot be said that the state may never impose guidelines. Here the provisions of Article 13, in terms of which expression may be limited, must be borne in mind.⁴⁹⁵

Article 17 furthermore provides that the development of such guidelines should also bear in mind that parents have the primary responsibility for the upbringing and development of the child.⁴⁹⁶ State Parties are to provide parents with the necessary guidance and assistance so that they may decide what type of media exposure would be appropriate for their children.⁴⁹⁷ Article 17 therefore once again confirms the fact that, ultimately, it is for parents to decide what the terms and conditions of their children's media usage are. The CRC nevertheless obliges State Parties to assist parents by providing them with the correct and appropriate information as to the content of the television programmes, DVDs, computer and digital games, social media networks and other online platforms which their children may be exposed to. This information must enable parents to make informed decisions as to what would be in their children's best interests, since this must be their basic concern.⁴⁹⁸

Mass Media Sources" in *A Commentary on the United Nations Convention on the Rights of the Child* 8.

⁴⁹³ Art 17(e).

⁴⁹⁴ Sacino "Article 17 Access to a Diversity of Mass Media Sources" in *A Commentary on the United Nations Convention on the Rights of the Child* 27.

⁴⁹⁵ As referred to above, also at 4 4.

⁴⁹⁶ As provided by Art 18(1).

⁴⁹⁷ Art 18(2) read with Art 17(e).

⁴⁹⁸ See also R Hodgkin & P Newell *UNICEF Implementation Handbook for the Convention on the Rights of the Child* (3 ed) (2007) Geneva "Child's access to appropriate information" 217 – 229. See also the discussion regarding parental responsibilities and rights in section 4 of ch 4 of this thesis.

4.6 The right to play, leisure and cultural rights

Another aspect, which is essential for a child's healthy mental and physical development, is that of play. Already in 1959 the Declaration of the Rights of the Child it was acknowledged that children should have full opportunity for play and recreation.⁴⁹⁹ Today Article 31 of the CRC⁵⁰⁰ protects the child's right to rest and leisure and to engage in recreational activities, cultural life and the arts.⁵⁰¹ The value of free and creative play is widely accepted as essential for any child's development since through play children both enjoy and challenge their current capacities.⁵⁰² Play is a process of learning: through play children develop a number of skills such as self-confidence, self-efficacy as well as physical, social, cognitive and emotional strength and skills.⁵⁰³ Recreational activities such as sports, games, hiking and camping, music, arts and crafts and other hobbies may be organised (by adults) but it is preferable that recreation should be left to the free imagination of the child.⁵⁰⁴

It is therefore not surprising that the Committee on the Rights of the Child expressed its dismay at the influence that the commercialisation of play and the growing role of the media have on the child's right to play. Marketing has been named as a particular concern.⁵⁰⁵ Bearing in mind the significant amounts of time which children spend interacting with marketing environments, the Committee has identified a number of potential risks associated with these activities. These include cyberbullying, aggressive behaviour towards others due to the use of violent video games, and the lack of a reflection of cultural diversity in the media.⁵⁰⁶ In particular, however, the Committee recognised the growing dependence on screen-related activities and the

⁴⁹⁹ Principle 7 reads:

"The child shall have full opportunity for play and recreation, which should be directed to the same purposes as education; society and the public authorities shall endeavour to promote the enjoyment of this right."

⁵⁰⁰ Art 12 of the ACRWC provides for this right in the regional treaty.

⁵⁰¹ Although the right is not found in the Constitution, one of the general principles set out in s 6 of the Children's Act recognises a child's need for development and to engage in play recreational activities appropriate to the child's age. See s 6(2)(e).

⁵⁰² General Comment No 7 (2005) 15.

⁵⁰³ Committee on the Rights of the Child "General Comment No 17 (2013) on the right of the child to rest, leisure, play, recreational activities, cultural life and the arts (art. 31)" CRC/C/GC/17 4 ("General Comment No 17 (2013)").

⁵⁰⁴ 6.

⁵⁰⁵ 14-15.

⁵⁰⁶ See also the discussion of the report of the Special Rapporteur in the field of cultural rights which follows below.

associated reduction in levels of physical activity, an increase in poor sleeping patterns, growing levels of obesity and other related illnesses as a specific concern. Its warning against the marketing and commercialisation of play, however, warrants a *verbatim* repetition:

“The Committee is concerned that many children and their families are exposed to increasing levels of unregulated commercialization and marketing by toy and game manufacturers. Parents are pressured to purchase a growing number of products which may be harmful to their children’s development or are antithetical to creative play, such as products that promote television programmes with established characters and storylines which impede imaginative exploration; toys with microchips which render the child as a passive observer; kits with a pre-determined pattern of activity; toys that promote traditional gender stereotypes or early sexualization of girls; toys containing dangerous parts or chemicals; realistic war toys and games. Global marketing can also serve to weaken children’s participation in the traditional cultural and artistic life of their community.”⁵⁰⁷

It is submitted that food-marketing practices as described in chapter 2 above, are contributing to the commercialisation of childhood. Through food marketing techniques such as advergames, the inclusion of toys with meals, various cross-promotions and embedded marketing practices, children are conditioned into particular methods of play, certain types of games, into desiring particular television characters which often promote certain stereotypes and which restrict their creative or imaginative play. The sponsorship of recreational activities such as sport furthermore impedes the child’s right to free and uncommercialised play.

It seems rather apposite at this point to once again draw attention to the Committee’s sixteenth General Comment in which it analysed the impact of the business sector on children’s rights.⁵⁰⁸ As was explained above, the responsibility to respect the rights of the child and her best interests extends beyond the state to also include private actors and business enterprises. With respect to the child’s right to play, food and beverage manufacturers must correspondingly consider the child’s right to creative and free play, including the right to partake in sports and leisure activities that are free from commercial pressures and advertisements.

It is furthermore important to note that Article 29(c) of the CRC provides that Member States have to ensure that the education of the child shall be directed to the development of respect for the child’s parents, his or her own cultural identity,

⁵⁰⁷ General Comment No 17 (2013) 15.

⁵⁰⁸ General Comment No 16 (2013). See also the discussion in section 3.3.2 above.

language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own. This provision must also be read with Article 31 of the Convention which recognises and promotes the child's right to participate freely in cultural life and the arts, while encouraging the provision of appropriate and equal opportunities for cultural, artistic, recreational and leisure activity.

Cultural rights have been described as the rights of each person to develop and express his or her humanity, her worldview and the meanings such a person assigns to his or her existence and development through, *inter alia*, values, beliefs, convictions, languages, knowledge and the arts, institutions and ways of life.⁵⁰⁹ In a report submitted at the 69th session of the United Nations General Assembly, the Special Rapporteur in the Field of Cultural Rights reported on the increasing and concerning impact that commercial advertising and marketing practices have on cultural diversity.⁵¹⁰ The Rapporteur noted that the dominance of certain universal narratives and world views promoted through commercial advertising and marketing in public and private spheres, combined with an increased use of techniques that may influence people at a subconscious level — such as those described in chapter 2 of this thesis — raises particular concerns in terms of freedom of thought, opinion and, more widely, cultural freedom.⁵¹¹ In the report, the Special Rapporteur also referred to two United Nations Educational, Scientific, and Cultural Organization (“UNESCO”) reports which confirmed that the increase in consumerism promoted by skilful advertising, was having a significant impact on local cultures. Theories of consumer culture and cultivation in fact expose the cultivation of values such as materialism through the media and advertising.⁵¹² It has been reported that global advertising campaigns promoting one single advertising message for all countries, have an even more detrimental impact on cultural diversity, including linguistic diversity.⁵¹³

The report furthermore pays attention to the promotion of detrimental behaviours and attitudes and, in particular, to the role which food advertising have played in shifting dietary patterns.⁵¹⁴ In respect of advertising to children, the Report by the

⁵⁰⁹ Shaheed *Report of the Special Rapporteur in the Field of Cultural Rights* 3.

⁵¹⁰ 3.

⁵¹¹ 3.

⁵¹² 11.

⁵¹³ 12.

⁵¹⁴ 12.

Special Rapporteur specifically refers to the General Comment by the Committee on the Rights of the Child, which found that the commercialisation of the environments in which children play, influences how children engage in recreation, cultural and other artistic activities.⁵¹⁵ The Special Rapporteur raised particular concern over new forms of marketing, including the use of children as brand ambassadors on social media, and the nature of embedded, viral and native advertising. In this respect the Report highlights the studies which disproves the argument that children of a certain age have developed adequate “cognitive defences” which enables them to implicitly process and resist commercial messages.⁵¹⁶ It furthermore also notes with concern the numerous studies which found that commercial advertising heightens children’s insecurities, accentuates inequalities and distorts gender socialisation.⁵¹⁷ It is submitted that this is especially true bearing in mind the sensitivity which children of this age have surrounding body image and self-worth.

The Report makes a number of recommendations, most notably for the purposes of this research, also in respect of marketing practices to children. It recommends that certain spaces, including schools and kindergartens, universities, nurseries, hospitals, cemeteries, parks, sports facilities and playgrounds, as well as cultural heritage sites and such cultural institutions as museums, should be completely free of advertising. States should also consider the banning or drastic limitation of outdoor advertising as an option.⁵¹⁸ The Special Rapporteur furthermore recommends that all forms of advertising in all media and to children younger than 12 years of age should be prohibited. In this regard, the Report specifically explains that States should preferably consider such a ban to children under the age of 16, and also prohibit the use of children as brand ambassadors on social media.⁵¹⁹

The concerns raised by the Special Rapporteur in the Field of Cultural Rights and the Committee on the Rights of the Child highlight the impact which food-marketing practices have on children’s rights to play, leisure and to cultural identity. Due to the global commercialisation of food, and in particular foods which are high in fat, sugar and salt – foods which are foreign to many cultures – it is submitted that cultural diversity and freedom of thought are being influenced and invaded. It is furthermore

⁵¹⁵ 14. See General Comment No 17 (2013), as discussed above.

⁵¹⁶ Shaheed *Report of the Special Rapporteur in the Field of Cultural Rights* 14-15.

⁵¹⁷ 14.

⁵¹⁸ 23.

⁵¹⁹ 23.

submitted that food marketers exploit children's natural inclination towards play by luring them with messages of fun and excitement, and promises and the provision of toys, games and other appealing items. The association between food and fun is based on an emotional appeal and one which marketers know children will find incredibly hard to resist. Since children lack the cognitive abilities to understand this appeal, and the lack of a rational link between the purpose of food and the enticement to collect a series of toys, it is submitted that such practices exploit the natural preferences which children have towards play.

4.7 The right to not be exploited

The Oxford English Dictionary defines "exploitation" as the act of utilizing someone or something for one's own ends, and to treat a person "selfishly as mere workable material; to 'make capital out of'".⁵²⁰ Muntarbhorn has explained, albeit in the context of sexual exploitation, that the basis of exploitation is the unequal power and economic relationship between a child and adult, with the effect that a child is exploited for her youth.⁵²¹ It is exactly for the reason of their youth that children are treated as a particularly vulnerable group of people. Their vulnerability makes them easy prey to unscrupulous marketing practices.

There are five provisions in the CRC that enshrines the child's right to not be exploited.⁵²² These articles are predominantly couched in terms seeking to protect the child from sexual exploitation and degradation while the research pertaining to these provisions focusses on the cruel and abusive relationships which too many children have to endure. However, for the purposes of this research, Article 36 in particular is applicable. It reads:

"States Parties shall protect the child against all other forms of exploitation prejudicial to any aspects of the child's welfare."

Article 36 refers to all other forms of exploitation since Articles 19 and 34 protect the child against specific forms of exploitation such as sexual abuse and trafficking while Article 32 recognises the child's right against commercial exploitation by prohibiting

⁵²⁰ Oxford English Dictionary "exploit, v."

⁵²¹ V Muntarbhorn *Sexual Exploitation of Children* United Nations Publication Sales No E.96.XIV.7 (1996) 1 [3] as cited by S Detrick *A Commentary on the United Nations Convention on the Rights of the Child* (1999) 593.

⁵²² Namely Arts 19, 32, 34, 36 and 39.

hazardous and harmful labour practices. Article 39 provides for the support and rehabilitation of children who have been exploited. It is interesting to note that the CRC's *travaux préparatoires* indicates that the phrase "prejudicial to any aspects of the child's welfare" was a compromise between the various Member States representatives who wanted to protect children against "social exploitation", exploitation "prejudicial to the moral, spiritual, mental or physical integrity of the child" or against "all forms of exploitation that may be prejudicial to any aspect of the child's integrity".⁵²³ Bearing in mind the relationship which exists between the child's welfare and her interests — as was explained above at 2.5 — it can be said that Article 36 prohibits all forms of exploitation of the child which will compromise her best interests.

One of the main reasons why the youth are worthy of special protection is the fact that children lack the cognitive ability to (fully) appreciate the consequences of their actions.⁵²⁴ Cameron J of the Constitutional Court explained this need to protection as follows:

"The Constitution draws this sharp distinction between children and adults not out of sentimental considerations, but for practical reasons relating to children's greater physical and psychological vulnerability. Children's bodies are generally frailer, and their ability to make choices generally more constricted, than those of adults. They are less able to protect themselves, more needful of protection, and less resourceful in self-maintenance than adults."⁵²⁵

This group of people has not fully developed yet, both physically and mentally, and especially since cognitive development is still taking place throughout even the last stages of adolescence, children's credulity, vulnerability and their lack of comprehension may not be exploited. In the matter of *Graham v The State of Florida* the American Medical Association and the American Academy of Child and Adolescent Psychiatry have testified in this regard as follows:

"Although adolescents can and on occasion do, exhibit adult levels of judgment and control, their ability to do so is limited and unreliable compared to that of adults. Adolescents, as a

⁵²³ See Detrick *A Commentary on the United Nations Convention* 610-614.

⁵²⁴ It is therefore an established principle of South African law that the *infans* (a child younger than 7) has no capacity to act (Voet 4.4.52, 26.8.4 and 26.8.9) while the *minor* (a child between the ages of 7 and 18) has limited capacity to act (Voet 26.8.2-26.8.4; Van Leeuwen *Censura Forensis* 1.1.17.10, 1.4.3.2, *Rooms-Hollands-Regt* 1.16.8, 4.2.3; Van Der Linden 1.4.1; Grotius 1.8.5, 3.1.26, 3.6.9, 3.48.10; Van Der Keessel *Theses Selectae* 128. See also J Heaton *The South African Law of Persons* 4 ed (2012) 89 and the text to n 66-67 and the authority cited there. The CRC itself recognises this fact by providing in Art 5 that parents and other care-givers are to provide the necessary guidance and direction to children consistent with their evolving capacities.

⁵²⁵ *Centre for Child Law v Minister of Justice & Constitutional Development* 2009 6 SA 632 (CC) [26].

group, are less capable than adults of accurately assessing risks and rewards; controlling their impulses; and recognizing and regulating emotional responses – in short, they are less consistent in their ability to self-regulate their behaviour.”⁵²⁶

As a result, if it is taken into account that children lack the cognitive development to understand the true intention of marketing — being that of persuading a consumer into buying a product — it may be argued that all forms of marketing practices aimed at children are misleading, deceptive and exploiting children.⁵²⁷ In particular, marketing messages which relate nutritionally poor food with fun, popularity and happiness are exploiting children’s vulnerability and credulity and generally provide them with no truthful information regarding the nature and price of the product offered.

For children to be able to understand the purpose of an advert, they must first be able to distinguish between (television) programming and advertising content.⁵²⁸ Many experts believe that children under the age of seven to eight years are unable to make a distinction between programming and advertising.⁵²⁹ At this age, children are also likely to accept commercial claims as being truthful and accurate because they fail to understand a marketer’s motive to exaggerate. Furthermore, the fact that older children understand advertisers’ persuasive intent and are able to recognise bias or deception in advertisements, does not mean that they can automatically defend themselves against these methods of persuasion.⁵³⁰ In addition, when the nature and intent of newer forms of marketing, such as product placements, advergames, viral marketing, and sponsorships are taken into account, it is even more difficult for children to withstand the marketing onslaught.

⁵²⁶ *Amicus brief* in the matter of *Graham v The State of Florida* United States Supreme Court 23 July 2009 4. Available at <https://www.aacap.org/App_Themes/AACAP/docs/Advocacy/amicus_curiae/Graham_v_Florida_Amici_Brief.pdf> (accessed 12-04-2015) (footnotes omitted). The US Supreme Court in this matter accepted their evidence and ruled that juvenile offenders cannot be sentenced to life imprisonment without parole for non-homicide offenses. *Graham v Florida* 560 US 48 (2010) available at <<https://www.law.cornell.edu/supct/html/08-7412.ZO.htm>> (accessed 12-04-2015). The AMA and the AACAP furthermore explained (at 7 of their brief) that research suggests that adolescents take more risks, not because they are necessarily less able to appreciate risks, but because they overvalue potential reward.

⁵²⁷ JL Pomeranz “Television Food Marketing to Children Revisited: The Federal Trade Commission has the Constitutional and Statutory Authority to Regulate” (2010) 38 *J Law Med Ethics* 98 99.

⁵²⁸ Boyland *Television Food Advertising to Children* 74.

⁵²⁹ 74-75 and Pomeranz (2010) *J Law Med Ethics* 103-104 citing various studies, including that of The American Psychological Association’s Task Force on Advertising and Children.

⁵³⁰ Pomeranz (2010) *J Law Med Ethics* 99 quotes a study by DR John which found that “older children’s advertising knowledge can serve as a cognitive defence only when the knowledge is accessed during commercial viewing.” Thus, because children generally have difficulty retrieving stored information, studies show that they need a prompt to access the scepticism of advertising’s persuasive intent, and still lack knowledge about the nature and efficacy of advertising.”

In this regard it is important to note that the Canadian Supreme Court accepted a body of evidence explaining children's inability to digest marketing, submitted to the court in the matter of *Irwin v Quebec*.⁵³¹ In reaching its decision that a prohibition of advertising to children under the age of 13 in Quebec is a justified limitation upon the right of freedom of commercial speech, the court relied on a 1981 report by the FTC. The court quoted from the report which, *inter alia*, found the following:

"In summary, the rulemaking record establishes that the specific cognitive abilities of young children lead to their inability to fully understand child-oriented television advertising, even if they grasp some aspects of it. They place indiscriminate trust in the selling message. They do not correctly perceive persuasive bias in advertising, and their life experience is insufficient to help them counter-argue. Finally, the content, placement and various techniques used in child-oriented television commercials attract children and enhance the advertising and the product. As a result, children are not able to evaluate adequately child-oriented advertising."⁵³²

The Canadian Supreme Court came to the conclusion that the FTC report provided a sound basis to hold that television advertising directed at young children is *per se* manipulative. The court found that such advertising aims to "promote products by convincing those who will always believe."⁵³³

In 2016, the Brazilian Superior Court of Justice found that the "É Hora de Shrek (It's Shrek time)" marketing campaign run by Pandurata's, amounted to "unconscionable advertising to children".⁵³⁴ It held that food marketing that targets children, directly or indirectly, amounts to abuse. It furthermore found that abusive advertising campaigns manipulate children's recreational universe and thus endorsed the provisions of the Brazilian Consumer Protection Code.⁵³⁵

It can therefore be argued that the heavy marketing of foods high in fats, sugar and salt, which can ultimately be detrimental to a child's health, is a practice which uses

⁵³¹ *Irwin Toy Ltd v Quebec (Attorney General)* [1989] 1 SCR 927; 1989 CanLII 87 (SCC).

⁵³² 988 citing from 34-35 of the FTC report.

⁵³³ 988.

⁵³⁴ The Alana Institute "Brazil's Superior Court of Justice publishes unprecedented decision on ending advertising aimed at children" (April 2016) *The Alana Institute* <http://criancaconsumo.org.br/wp-content/uploads/2014/02/Ac%C3%B3rd%C3%A3o_STJ_ENG.pdf> (accessed 19-07-2016). In terms of the campaign, children had to purchase five cookies and pay a further €5 in order to receive a Shrek branded watch. Migalhas "Judgment history: STJ prohibits advertising to children" (10-03-2016) *Migalhas* <<http://www.migalhas.com.br/Quentes/17,MI235576,101048-Julgamento+historico+STJ+proibe+publicidade+dirigida+as+criancas>> (accessed 19-07-2016).

⁵³⁵ The Alana Institute "Brazil's Superior Court of Justice publishes unprecedented decision on ending advertising aimed at children" April 2016) *The Alana Institute*. The relevant provisions of this piece of legislation will be described in ch 6 below.

children as workable material in order to gain capital from them. This type of practice is clearly proscribed in terms of the CRC.

5 Conclusion

From the above analysis, it is clear that the best interests of the child have been established as a universally accepted standard. Whilst the term remains flexible and adaptable to the particular circumstances of a child, it no longer can be said that it is a vague and indeterminate concept. Today, in contradistinction to the statement by Rodham in 1973,⁵³⁶ it is evident that children's fundamental rights provide content to the meaning of the phrase, whilst the best interests of the child are simultaneously being used as a substantive right in itself. In certain instances, it may prove difficult to define the term precisely but in the context of marketing food to children, certain rights which definitely play a role, have been identified in this chapter. It is submitted that if these rights of the child are fulfilled, the best interests of the child will be effected.

The best interests have also proven to be an essential element in the process of implementing the rights of children, using it as an interpretative tool and as a matter of procedure. Since the principle has been firmly entrenched and elevated to a primary consideration of paramount importance, it is also very difficult to criticise it for being open for abuse or using it to elevate other interests than those of the child. In applying the principle of the best interests of the child in all spheres which affect children, public and private institutions – including parents and businesses – must promote the welfare of the child.

It is also accepted today that children's welfare does not only consist of wrapping them into cotton wool and protecting them from all forms of harm. Participatory and developmental rights are particularly critical to the promotion of the best interests of children. The child's right to express her view, to have that opinion respected and to increasingly consider giving effect to that opinion will provide content to the child's right to life, survival and development. Similarly, as an integral part of a child's right to health is the child's right to information and education as to what is considered to be healthy, nutritious and wholesome.

This chapter has furthermore shown that the state has a crucial role to play in the implementation and realisation of children's best interests. Although at first the state

⁵³⁶ See 3.1 above.

turned a blind eye to any harms which may have fallen upon children during the early periods of the rule of Roman law, it became clear that the state had to reduce the absolute power of the *paterfamilias* over his children. The state started to play an increasingly important role in providing guidance and establishing certain normative standards. Since it has a vested interest in promoting the health and welfare of its citizens, including its future generations of citizens, the state has acted as *parens patriae*, intruding upon a private relationship when circumstances required it to do so. Nevertheless, it should be emphasised that an unwarranted intrusion upon the private domain is neither desirable nor acceptable. The state furthermore has an obligation to protect all fundamental rights, including that of children, but not only that of children.

The following chapter will provide a brief consideration of other important interests and rights of stakeholders that play a role in the food-marketing domain. Although the point of departure for this research is that of the best interests of the child, other perhaps conflicting rights, may not be merely disregarded and must be considered. Yet, the best interests of the child still remain the most important concern to be balanced in this complex relationship. As has been explained in chapter 3, Member States to the CRC has the duty to ensure that both parents and other caregivers, as well as the private or commercial sectors of society provide a full and continuous consideration of the interests and rights of children. In particular, in all matters concerning children, undertaken by public or private institutions, courts, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

CHAPTER 4: COMPETING RIGHTS

1 Introduction

In chapter 3 it was explained how the principle of the best interests of the child has been an essential component in the recognition and development of children's rights. Whereas the best interests of the child was traditionally used as an instrument for the protection of the welfare of children, the principle is today also recognised as a method of interpretation and a procedural guarantee. Moreover, the best interests of the child is now recognised as a substantive right and will consequently have to be balanced against any other conflicting fundamental rights. However, whenever any such an assessment is made, the best interests of the child will have to enjoy priority — either as a primary consideration, or as a matter of paramount importance.

This does not mean that other rights are not relevant or that competing rights can simply be ignored for the sake of protecting children's rights. In an analysis of the implementation of the best interests of the child relating to the regulation of food marketing, the competing fundamental rights to freedom of commercial speech and intellectual property have to be considered, and the exercise of parental responsibilities and rights must be balanced in a pragmatic manner. The rights of the other stakeholders must be carefully weighed against the rights of the child — as was described in chapter 3 — whilst bearing in mind the international and national imperatives which are attached to the best interests of the child. This chapter will provide some context to the basis for the recognition of these other rights and describe their importance in various national constitutions and legislation. The chapter will in particular focus on the means which have been employed in various jurisdictions in balancing competing rights. This entails a discussion of the various methods in which any limitation upon rights and freedoms are assessed. It also includes an explanation as to the approach, which has been followed in curtailing expression in the form of commercial speech, and limiting the use of trade marks in order to protect public health. In this respect, two case studies found in the context of the infant formula and the tobacco industries, will be discussed. The chapter will also explore the role of parents in the promotion of the best interests of the child by explaining what their parental responsibilities and rights in this context entail. Consequently, this chapter will describe the duties of parents when making dietary choices on behalf of their

children, including the duty to provide the required education and guidance to their children that will enable them to make such decisions for themselves.

2 Commercial speech

2.1 The protection and limitation of freedom of speech in constitutional democracies

Chapter 2 of this thesis describes the various marketing methods used by the food industry to entice children into consuming their products. When doing so, the industry is exercising the right to expression, and in particular the right to commercial speech. The right to have an opinion and to give expression to that opinion through words, visual presentations or actions is regarded as essential to a free and equal society.⁵³⁷ Throughout history, the right to freedom of expression has been closely associated with the values and freedoms of democracy.⁵³⁸ For this reason it has been accepted that “[i]n a free state, tongues too should be free.”⁵³⁹ In fact, a number of documents of international law protects freedom of speech, as one of the basic human rights. The Universal Declaration of Human Rights, for example, recognises this right in Article 19 where it provides as follows:

“Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”⁵⁴⁰

Freedom of expression may be limited in some instances, as is the case with any other fundamental right. This aspect is also acknowledged by international law. The

⁵³⁷ See too the definition of ‘expression’ “as indicating a state of feeling” Oxford English Dictionary “*expression, n.*” It must also be noted that many of the views expressed here in respect of freedom of speech and commercial speech, are also contained in an article where I discuss the implications of the imposition of regulatory measures upon infant formula and complementary foods: L Mills “The Regulations Relating to Foodstuffs for Infants and Young Children (R991): A Formula for the Promotion of Breastfeeding or Censorship of Commercial Speech” (2014) 17 *PELJ* 253.

⁵³⁸ The Inter-American Court of Human Rights has, for example, explained that “[f]reedom of expression is a cornerstone upon which the very existence of a democratic society rests.” T Mendel “Restricting Freedom of Expression: Standards and Principles (Background Paper for Meetings Hosted by the UN Special Rapporteur on Freedom of Opinion and Expression)” (10-07-2010) *Law and Democracy* <<http://www.law-democracy.org/wp-content/uploads/2010/07/10.03.Paper-on-Restrictions-on-FOE.pdf>> (accessed 10-04-2014) citing *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85 of 13 November 1985, Series A, No 5, para 70.

⁵³⁹ D Erasmus *The Education of a Christian Prince* (1516) 232 Translated by LK Born [c 1936].

⁵⁴⁰ The text of the Universal Declaration of Human Rights available at <<http://www.un.org/en/documents/udhr/>> (accessed 12-05-2015).

International Covenant on Civil and Political Rights (“ICCPR”), for example, states that the right to freedom of expression may be subject to certain restrictions, including those used to respect the rights or reputations of others and for the protection of national security, public order, public health or morals.⁵⁴¹ Similar provisions protecting freedom of speech, made subject to some limitations, are found in Article 10 of the European Convention on Human Rights,⁵⁴² Article 13 of the American Convention on Human Rights,⁵⁴³ and Article 9 of the African Charter on Human and Peoples’

⁵⁴¹ Art 19 of the ICCPR is formulated as follows:

“1. Everyone shall have the right to hold opinions without interference. 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice. 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.”

The right to freedom of speech is furthermore curtailed in that incitement of discrimination, hostility or violence based on national, racial or religious hatred, as well as propaganda for war is proscribed by Art 20 of the ICCPR. Text of the ICCPR available at <<https://treaties.un.org/doc/Publication/UNTS/Volume%20999/volume-999-I-14668-English.pdf>> (accessed 12-05-2015).

⁵⁴² Art 10 provides that:

“1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises. 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

“European Convention for the Protection of Human Rights and Fundamental Freedoms” <http://www.echr.coe.int/Documents/Convention_ENG.pdf> (accessed 03-07-2014).

⁵⁴³ It reads:

“1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice. 2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure: 1. respect for the rights or reputations of others; or 2. the protection of national security, public order, or public health or morals. 3. The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions. 4. Notwithstanding the provisions of paragraph 2 above, public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence. 5. Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law.”

Rights.⁵⁴⁴ Children, in particular, are also afforded this right since both the CRC and the ACRWC protect their freedom of expression and specifically provide for the opportunity of children to express their opinions in any matters which affect them.⁵⁴⁵

One of the best-known examples of the protection of the right to expression found in a national constitution is that of the First Amendment to the Constitution of the United States of America (“USA Constitution”). In terms of this provision, no law may be made which abridges freedom of speech.⁵⁴⁶ The courts in the USA have been rigorous in ensuring that this freedom is not curtailed but American jurisprudence has nonetheless acknowledged that the protection of speech cannot be absolute. Even though the USA Constitution does not contain a general limitation clause,⁵⁴⁷ the Supreme Court has on numerous occasions confirmed that certain classes of speech, including obscenity, child pornography, incitement and libel fall outside of the scope of the first amendment’s protection.⁵⁴⁸ Any limitation placed upon the freedom of speech, however, must be very narrowly formulated and absolutely necessary for the purpose

“American Convention on Human Rights (“Pact of San Jose, Costa Rica”)” <https://www.oas.org/dil/access_to_information_American_Convention_on_Human_Rights.pdf> (accessed 04-07-2014).

⁵⁴⁴ This provision states:

“1. Every individual shall have the right to receive information. 2. Every individual shall have the right to express and disseminate his opinions within the law.”

“The African Charter on Human and Peoples' Rights (Banjul Charter)” <<http://www.humanrights.se/wp-content/uploads/2012/01/African-Charter-on-Human-and-Peoples-Rights.pdf>> (accessed 04-07-2014).

⁵⁴⁵ As was described in ch 3 at 4 4 of this thesis. Article 12 of the CRC enshrines the right of the child capable of forming her own views to express those views while Art 13 provides that:

“1. The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice. 2. The exercise of this right may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; or (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.” Article 7 of the ACRWC combines these rights by merely stating that “Every child who is capable of communicating his or her own views shall be assured the rights to express his opinions freely in all matters and to disseminate his opinions subject to such restrictions as are prescribed by laws.”

⁵⁴⁶ The full text of the First Amendment reads:

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”

Cornell University Law School “US Constitution: First Amendment” (latest update 2016) *Cornell University Law School* <http://www.law.cornell.edu/constitution/first_amendment> (accessed 04-07-2014).

⁵⁴⁷ Comparable to s 1 of the Canadian Charter or to s 36 of the Constitution. Both these provisions will be discussed below.

⁵⁴⁸ J Pomeranz “No Need to Break New Ground: A Response to the Supreme Court’s Threat to Overhaul the Commercial Speech Doctrine” (2012) 45 *Loy LA L Rev* 389 398-399 and the cases cited at ns 46-51. These include *Miller v California* 413 US 15 (1973); *Gertz v Robert Welch, Inc* 418 US 323 (1974); *United States v Stevens* 130 S Ct 1577, 1584 (2010); and the seminal *Chaplinsky v New Hampshire* 315 US 568, 571–72 (1942). See also KW Saunders *Saving Our Children from the First Amendment* 2003 19.

it seeks to achieve.⁵⁴⁹ The courts have been tasked with providing the necessary guidance in this respect and have done so by formulating relevant tests to assess these limitations. These guidelines developed by the USA courts will be discussed below in this chapter in the context of the limitation upon commercial speech.⁵⁵⁰

The Canadian Charter of Rights and Freedoms protects the right to freedom of speech by providing in section 2(b) that everyone has the “freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication”.⁵⁵¹ The Canadian Charter, however, also provides in section 1 that the freedoms contained in the Charter are subject to “reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”⁵⁵² This means that societal interests may play a role in the assessment of a restriction placed upon freedom of speech. Canadian rights and freedoms are therefore also not absolute and the courts have some flexibility in trying to reach a just result in any particular situation.⁵⁵³ In *RJR-MacDonald, Inc v Canada (Attorney General)*⁵⁵⁴ LaForest J of the Canadian Supreme Court explained that “it is implicit in the wording of s[ection] 1” that the courts must strike a delicate balance between individual rights and community needs. This is a balance which cannot be achieved in the abstract, “with reference solely to a formalistic test uniformly applicable in all circumstances.”⁵⁵⁵

Nevertheless, a general test for the constitutional validity of a limitation upon any right contained in the Canadian Charter of Rights and Freedoms is found in *R v Oakes*.⁵⁵⁶ In terms of this test the objective of the limitation must be sufficiently important to warrant intrusion upon a constitutionally protected right or freedom. Furthermore, the means employed must be reasonable and justified. Such an assessment is made by means of a three-part proportionality test, in terms of which:

- a) The measures employed must be rationally connected to the objective.

⁵⁴⁹ Pomeranz (2012) *Loy LA L Rev* 398-399 and 408-409.

⁵⁵⁰ See 2 3 below.

⁵⁵¹ Text of the “Canadian Charter of Rights and Freedoms” <<http://publications.gc.ca/collections/Collection/CH37-4-3-2002E.pdf>> (accessed 15-07-2014).

⁵⁵² “Canadian Charter of Rights and Freedoms” <<http://publications.gc.ca/collections/Collection/CH37-4-3-2002E.pdf>> (accessed 15-07-2014)

⁵⁵³ KK Gower “Looking Northward: Canada's Approach to Commercial Expression” (2005) 10 *Comm L & Pol'y* 29 37.

⁵⁵⁴ *In RJR-MacDonald, Inc v Canada (Attorney General)* [1995] 3 SCR 199.

⁵⁵⁵ Para 82.

⁵⁵⁶ *R v Oakes* [1986] 1 SCR 103, also known as the *Oakes*-test.

- b) The measures should limit the freedom no more than is necessary to accomplish the objective.
- c) The effects of the limitation must be proportionate to the objective sought.

Similarly, in the EU, any measure of restriction upon a fundamental right such as freedom of speech, must meet the principle of proportionality.⁵⁵⁷ The courts have on numerous occasions explained that legislation in the EU is proportionate when it is both suitable and necessary to achieve its declared goal. Limitations should therefore (a) not exceed the limits of what is suitable or appropriate in order to attain the legitimate objective pursued by the legislation in question; and (b) be the least onerous method of restriction should there be a choice between several appropriate measures.⁵⁵⁸

The Constitution of South Africa also explicitly protects the right to freedom of expression. Section 16(1) provides that everyone has the right to freedom of expression, which includes freedom of the press and other media; freedom to receive or impart information or ideas; freedom of artistic creativity; and academic freedom and freedom of scientific research. This freedom may specifically be restricted in instances where the speech is used as propaganda for war; incitement of imminent violence; or advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.⁵⁵⁹ South African courts have on numerous occasions stressed the importance of this right, especially considering the country's historical context.⁵⁶⁰ As a result, the courts have been rigorous in protecting this

⁵⁵⁷ Art 5(4) of the Treaty on the European Union states that “[u]nder the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.” Official Journal of the European Union “Consolidated Version of the Treaty of on the European Union” (09-05-2008) *Official Journal of the European Union* <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:115:0013:0045:en:PDF>> (accessed 08-04-2015).

⁵⁵⁸ A Garde & A Allemano “European Union” in T Voon, AD Mitchell & J Liberman(eds) *Regulating Tobacco, Alcohol and Unhealthy Foods: The Legal Issues* (2015) citing case 11/70, *Internationale Handelsgesellschaft* [1970] ECR 1125; Joined Cases C-96/03 and C-97/03, *Tempelman and van Schaijk* [2005] ECR I-1895, [48]; Case C-86/03 *Greece v Commission* [2005] ECR I-10979 [96]; Case C-504/04 *Agrarproduktion Staebelow* [2006] ECR I-679, [37]; Case T-13/99, *Pfizer Animal Health v Council* [2002] ECR II-3305, [411] as well as the parallel Case T-70/99 *Alpharma v Council* [2002] ECR II-3495; Case C-58/08 *Vodafone* [2010] ECR I-4999 [53].

⁵⁵⁹ S 16(2) of the Constitution. See also Mills (2014) *PELJ*.

⁵⁶⁰ Thus, for example, in *S v Mamabolo (E TV, Business Day and the Freedom of Expression Institute Intervening)* 2001 3 SA 409 (CC) [37] the Constitutional Court explained that

“Freedom of expression, especially when gauged in conjunction with its accompanying fundamental freedoms, is of the utmost importance in the kind of open and democratic society the Constitution has set as our aspirational norm. Having regard to our recent past of thought control, censorship

fundamental right.⁵⁶¹ Nevertheless, as explained above, this very important constitutional right may, in certain circumstances, be curtailed. The test of reasonableness and proportionality is provided by the Constitution itself by means of section 36 thereof and is comparable to the tests used by the courts in the USA, Europe and Canada. In *S v Makwanyane* the South African Constitutional Court provided guidelines to the “two stage approach” to be adopted in such a section 36 test:

“The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality. ... Principles can be established, but the application of those principles to particular circumstances can only be done on a case-by-case basis. This is inherent in the requirement of proportionality, which calls for the balancing of different interests. In the balancing process the relevant considerations will include the nature of the right that is limited and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy and, particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question. In the process regard must be had to the provisions of s 33(1) and the underlying values of the Constitution,^[562] bearing in mind that, as a Canadian Judge has

and enforced conformity to governmental theories, freedom of expression — the free and open exchange of ideas — is no less important than it is in the United States of America. It could actually be contended with much force that the public interest in the open market-place of ideas is all the more important to us in this country because our democracy is not yet firmly established and must feel its way. Therefore we should be particularly astute to outlaw any form of thought control, however respectably dressed.”

See furthermore also para 27 of *Islamic Unity Convention v Independent Broadcasting Authority* 2002 5 BCLR 433 (CC) where Langa DCJ (as he then was) explained that:

“Notwithstanding the fact that the right to freedom of expression and speech has always been recognised in the South African common law, we have recently emerged from a severely restrictive past where expression, especially political and artistic expression, was extensively circumscribed by various legislative enactments. The restrictions that were placed on expression were not only a denial of democracy itself, but also exacerbated the impact of the systemic violations of other fundamental human rights in South Africa. Those restrictions would be incompatible with South Africa’s present commitment to a society based on a ‘constitutionally protected culture of openness and democracy and universal human rights for South Africans of all ages, classes and colours’.”

(Quoting from *Shabalala v Attorney-General, Transvaal* 1996 1 SA 725 (CC) para 26.) Other footnotes omitted.

⁵⁶¹ See, for example *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division* 2004 1 SA 406 (CC); *Khumalo v Holomisa* 2002 5 SA 401 (CC); *Islamic Unity Convention v Independent Broadcasting Authority* 2002 4 SA 294 (CC); *S v Mamabolo (E TV Intervening)* 2001 3 SA 409 (CC); *South African National Defence Union v Minister of Defence* 1999 4 SA 469 (CC) para 7; *S v Zuma* 1995 2 SA 642 (CC) and *S v Williams* 1995 3 SA 632 (CC).

⁵⁶² The Constitution of the Republic of South Africa Constitution Act 200 of 1993 (“Interim Constitution”). S 33 of the Interim Constitution contained a provision similar to the one now included in s 36 of the Constitution.

said, 'the role of the Court is not to second-guess the wisdom of policy choices made by legislators'.⁵⁶³

This assessment was originally adopted by the Constitutional Court in *S v Zuma*⁵⁶⁴ and confirmed by South African courts on a number of occasions, including in the recent decision by the Supreme Court of Appeal ("SCA") in *British American Tobacco South Africa (Pty) Limited v Minister of Health ("BATSA")*⁵⁶⁵, which will be discussed below.⁵⁶⁶

From the above it is evident that there are a number of similarities between the approaches to the protection of freedom of speech in the jurisdictions referred to above. Any limitation placed upon this freedom must be proportional to the end, which it seeks to achieve and justifiable as striking a reasonable balance between the relevant competing interests. Despite some differences in the approach to commercial speech in each country, the three jurisdictions of the USA, Canada and South Africa have relied upon each other for guidance in achieving such a balance.

2.2 The importance of commercial speech

Commercial speech, and in particular advertising, falls within the ambit of speech which receives constitutional protection. The South African courts have recognised this in a number of decisions⁵⁶⁷ taking their cue mainly from case law from the USA and Canada.⁵⁶⁸ In the past commercial speech has been described as being of "peripheral value".⁵⁶⁹ This idea of "lesser speech" was originally formulated in *Central Hudson Gas and Electric Corp v Public Service Commission of New York* ("Central

⁵⁶³ *S v Makwanyane* 1995 3 SA 391 (CC) footnote inserted.

⁵⁶⁴ 1995 2 SA 642 (CC).

⁵⁶⁵ [2012] 3 All SA 593 (SCA).

⁵⁶⁶ [2012] 3 All SA 593 (SCA). See section 2.3 below.

⁵⁶⁷ *City of Cape Town v Ad Outpost (Pty) Ltd* 2000 2 SA 733 (C) 749; *North Central Local Council and South Central Local Council v Roundabout Outdoor (Pty) Ltd* 2002 2 SA 625 (D) 633; and *Independent Outdoor Media (Pty) Ltd v City of Cape Town* 2013 JDR 0664 (SCA) (unreported, also referred to as [2013] ZASCA 46, 28 March 2013; available online at <http://www.saflii.org/za/cases/ZASCA/2013/46.html>) para 25; and *BDS South Africa v Continental Outdoor Media (Pty) Ltd* 2015 1 SA 462 (GJ).

⁵⁶⁸ See for example *City of Cape Town v Ad Outpost* 2000 2 SA 733 (C) 748-749 and *North Central Local Council v Roundabout Outdoor* 2002 2 SA 625 (D) 633.

⁵⁶⁹ *North Central Local Council v Roundabout Outdoor* 2002 2 SA 625 (D) 634 and D Milo, G Penfold & A Stein "Freedom of Expression" in S Woolman & M Bishop (eds) *Constitutional Law of South Africa III* 2 ed 165.

Hudson)⁵⁷⁰ and based on the justification that commercial speech does not necessarily implicate the political and creative freedom typically thought to be the essence of USA First Amendment protection.⁵⁷¹ However, the notion that this form of speech “bears less constitutional recognition”⁵⁷² has been denounced on a number of occasions.⁵⁷³

In the first decision in the United States in which it was acknowledged that commercial speech is also protected under the First Amendment, the Supreme Court in *Virginia State Board of Pharmacy v Virginia Citizens Consumer Council* defined commercial speech as “speech which proposes a commercial transaction”.⁵⁷⁴ *Central Hudson* provided a further definition to commercial speech in that it was described as “expression related solely to the economic interests of the speaker and its audience”.⁵⁷⁵ In Canada, it has been explained that this type of expression deserves to be protected since it protects both listeners and speakers while playing a significant role in enabling individuals to make informed economic choices. As a result, it can be said that commercial expression is important because it informs consumers about products and services, providing them with the information which will allow them to take part in the free market economy.⁵⁷⁶ Both the rights of the speaker and the receiver of the information need protection. The US Supreme Court in *Central Hudson* explained it in clear terms:

⁵⁷⁰ “The Constitution therefore accords a lesser protection to commercial speech than to other constitutionally guaranteed expression.” *Central Hudson Gas and Electric Corp v Public Service Commission of New York* 447 US 557 (1980) 563.

⁵⁷¹ In the decision of *Valentine v Chrestensen* (1942) 316 US 52 54 the US Supreme Court refused to provide protection to commercial speech since the Court was of the opinion that “the Constitution imposes no restraint on government as respects purely commercial advertising. Whether, and to what extent, one may promote or pursue a gainful occupation in the streets, to what extent such activity shall be adjudged a derogation of the public right of user, are matters for legislative judgment.” See also S Rauer “When the First Amendment and Public Health Collide: The Court’s Increasingly Strict Constitutional Scrutiny of Health Regulations that Restrict Commercial Speech” (2012) 38 *Am JL & Med* 690 692-693.

⁵⁷² See for example also L Johannessen “Freedom of expression and information in the new South African constitution and its compatibility with international standards” (1994) *SAJHRs* 216 222 who reasons that “[e]xpression that is not political eg commercial speech will be subject of less protection than political speech.” See also *North Central Local Council v Roundabout Outdoor* 2002 2 SA 625 (D) 635 where Kondile J states that “commercial speech occupies a subordinate position in the scale of constitutional rights values.”

⁵⁷³ See for example *City of Cape Town v Ad Outpost* 2000 2 SA 733 (C) 749 and the authorities cited there by Davis J. See also *RJR MacDonald Inc v Canada (Attorney General)* [1995] 3 SCR 199 paras 75 and 77.

⁵⁷⁴ *Virginia State Board of Pharmacy v Virginia Citizens Consumer Council* 425 US 748, 761 (1976).

⁵⁷⁵ *Central Hudson Gas and Electric Corp v Public Service Commission of New York* 447 US 557, 561 (1980) 561.

⁵⁷⁶ Milo *et al* “Freedom of Expression” in *CLOSA III* 161-169 164; A Garde “Freedom of Commercial Expression and Public Health Protection in Europe” (2010) 12 *CYELS* 226 and 229.

“Commercial expression not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information. In applying the First Amendment to this area, we have rejected the ‘highly paternalistic’ view that government has complete power to suppress or regulate commercial speech. ‘[P]eople will perceive their own best interests if only they are well enough informed, and . . . the best means to that end is to open the channels of communication rather than to close them.’”⁵⁷⁷

The ability to make informed decisions is clearly crucial to individual self-fulfilment and personal autonomy.⁵⁷⁸ In the EU the protection of commercial expression is also viewed as an essential element of consumer protection. Here too the Courts have consistently recognised the right to receive commercial communications as an integral part of the right of freedom of speech, based on the assumption that consumers must be informed in order to be sufficiently confident to engage in the European internal market.⁵⁷⁹ As a result, commercial operators must have the ability to break down jurisdictional barriers, preventing consumption habits along national lines and granting consumers more choice.⁵⁸⁰ The regulatory technique, which is seemingly the preferred option in the EU, is that of the information paradigm: the more (truthful) information consumers receive, the more responsibility consumers will bear in deciding what is good for them. This method has the advantage of minimal interference in personal choices whereas protection is provided by compelling manufacturers and traders to divulge the necessary information.⁵⁸¹ Across the Atlantic Ocean, the argument has been increasingly forwarded that the US Supreme Court applies a strict scrutiny analysis when evaluating public health regulations restricting commercial speech, since these types of limitations, when subjected to the *Central Hudson* test, are almost always invalidated in the USA.⁵⁸²

⁵⁷⁷ *Central Hudson Gas and Electric Corp v Public Service Commission of New York* 447 US 557 (1980) 561-562.

⁵⁷⁸ *Ford v Quebec (Attorney General)* [1988] 2 SCR 712, 767.

⁵⁷⁹ Garde (2010) *CYELS* 225 and 231 at n 13 and the numerous cases cited there.

⁵⁸⁰ 232.

⁵⁸¹ 233. The author also cites E Barend *Freedom of Speech* 2 ed (2005) 412 who explains that “disclosure requirements are hardly controversial ... Since the best arguments for freedom of commercial speech are based on the interests of consumers in finding out attributes of the goods and services they want to buy, rather than speakers’ rights, there is no good reason for holding that advertisers have any right not to provide information. The recipients’ interests do justify a limit on the speakers’ rights, for the latter are derivative from the former. Unlike free speech in the context of politics and the arts, they are primarily not the rights of the speaker, but of the consumer or client.”

⁵⁸² Rauer (2012) *Am JL & Med* 691-692.

2.3 Commercial speech in the courts

In *Central Hudson*, the US Supreme Court formulated a four-prong test to determine whether a restriction placed on commercial speech violates the First Amendment. In terms of the test, a court will have to establish whether a) the commercial speech concerns lawful activity and was not false or misleading; b) the asserted governmental interest sought to be achieved, is substantial; c) the means or restriction identified to advance the governmental interest, does in fact do so; and d) does so in the least burdensome or restrictive manner. Should the restrictions meet all of the above requirements, there would be no violation of the First Amendment. In this particular instance of *Central Hudson*, the court found that the government had a substantial interest in conserving energy and that the regulation, which banned promotion or advertising of electricity, directly served that interest. The regulation failed to meet the fourth requirement of the test in that the regulation would also ban advertising, which was unrelated to overall energy use, and was consequently overly restrictive. From the time when this decision was handed down, the courts in the USA have struck down laws, which banned advertising of alcoholic beverages;⁵⁸³ liquor prices;⁵⁸⁴ tobacco products;⁵⁸⁵ and recently proposed legislative amendments which would require cigarette packages to contain graphic health warnings.⁵⁸⁶ In 2011, it also found Vermont's Prescription Confidentiality Law, restricting pharmacies from sharing information about doctors' prescribing habits with drug manufacturers, without the doctor's consent, to place an undue restriction upon freedom of speech.⁵⁸⁷

The courts in the USA have been careful in not approving limitations upon consumers' right to information about products that are not prohibited. In the decision of *Greater New Orleans Broadcasting Association Inc v United States*⁵⁸⁸ the Supreme Court of the USA invalidated a federal ban on radio and television advertisements of casino gambling. It ruled that in states where casino gambling is legal, it is an infringement of free speech to prohibit anyone from advertising it. Put differently, "if you can buy it, you can advertise it."⁵⁸⁹ In *44 Liquormart, Inc v Rhode Island* the court

⁵⁸³ *Rubin v Coors Brewing Company* 514 US 476 (1995).

⁵⁸⁴ *44 Liquormart, Inc v Rhode Island* 517 US 484 (1996).

⁵⁸⁵ *Lorillard Tobacco Co et al v Reilly, Attorney General of Massachusetts, et al* 533 US 525 (2001).

⁵⁸⁶ *RJ Reynolds Tobacco Co v FDA* 823 F Supp 2d 36 (DDC 2011) aff'd 696 F 3d 1205 (DC Cir 2012).

⁵⁸⁷ *Sorrell v IMS Health Inc* 131 S Ct 2653 (2011). See also Rauer (2012) *Am JL & Med* 691-692.

⁵⁸⁸ 149 F 3d 334 (5th Cir 1998).

⁵⁸⁹ S Nel "Freedom of commercial speech: evaluating the ban on advertising of legal products such as tobacco" (2004) *CILSA* 65 69.

ruled that Rhode Island could not ban truthful, non-misleading advertising of the price of alcohol beverages, seemingly also implying that promotional activities may only be restricted to ensure that they are not misleading and not necessarily that the product may not be the best alternative.⁵⁹⁰

In Canada, the Supreme Court in *RJR-MacDonald, Inc v Canada* held that the ban on the advertisement of tobacco products was rationally connected to the government's interest in reducing tobacco use but concluded that the ban was overbroad. The court emphasised that consumers had the right to obtain information relevant to their decisions, finding that the ban "deprives those who lawfully choose to smoke of information relating to price, quality, and even health risks associated with different brands."⁵⁹¹ It went on by making the following findings:

"[The ban] extends to advertising which arguably produces benefits to the consumer while having little or no conceivable impact on consumption. Purely informational advertising, simple reminders of package appearance, advertising for new brands and advertising showing relative tar content of different brands — all these are included in the ban. Smoking is a legal activity yet consumers are deprived of an important means of learning about product availability to suit their preferences and to compare brand content with an aim to reducing the risk to their health."⁵⁹²

The Canadian Legislature reacted with the promulgation of the Tobacco Act of 1997. This act included a broad prohibition on tobacco advertising but created an exception for "information advertising or brand preference advertising".⁵⁹³ The act specifically prohibited "lifestyle advertising", defined as "advertising that associates a product with ... a way of life such as one that includes glamour, recreation, excitement, vitality risk or daring."⁵⁹⁴ As Berman explains, "tobacco companies [can] advertise only the 'cold, hard, facts' about their products – and only to adult consumers."⁵⁹⁵

For the purposes of this research, it is of particular importance to note that the question of limiting commercial speech by restricting advertising to children has been

⁵⁹⁰ 69-70.

⁵⁹¹ *In RJR-MacDonald, Inc v Canada (Attorney General)* [170].

⁵⁹² [162].

⁵⁹³ Tobacco Act, SC 1997 c 13 §22(2). See also ML Berman "Commercial Speech Law and Tobacco Marketing: A Comparative Discussion of the United States and Canada" (2013) 39 *Am JL & Med* 218 229. "Information advertising" was defined to mean advertising about a product's availability and/or price, while "brand-preference advertising" was defined to be advertising about a product's brand characteristics.

⁵⁹⁴ Berman (2013) *Am JL & Med* 229.

⁵⁹⁵ 229.

assessed by the Canadian courts. Applying the *Oakes*-test⁵⁹⁶ in the decision of *Irwin Toy Ltd v Quebec (Attorney General)*⁵⁹⁷ the Canadian Supreme Court found that a statutory provision prohibiting all forms of advertising directed to children under the age of thirteen in Quebec was a reasonable limitation upon the right to freedom of speech. In this decision, the court had to decide whether or not sections 248 and 249 of the Quebec Consumer Protection Act stood in violation of section 2(b) of the Canadian Charter of Rights and Freedoms and section 3 of the Quebec Charter of Human Rights and Freedoms. The court found that the objective of regulating advertising directed at children aligns with a general aim of consumer protection legislation, namely to protect a group that is most vulnerable to commercial manipulation. From evidence submitted in this application, it was clear to the majority of the court that children up to the age of thirteen are manipulated by advertising and that children are not as equipped as adults to evaluate the persuasive force of advertising.⁵⁹⁸ The court accordingly found that there was a rational connection between the prohibition and the objective of protecting children against advertising. Since the limitation upon commercial speech was aimed only at those persons who were unable to understand its persuasive content and not a complete ban of advertising of children's products, the court held that the ban imposed a minimal impairment of free expression consistent with the pressing and substantial goal of protecting children against manipulation. As to the final part of the *Oakes*-test, the Supreme Court of Canada found that third component of the proportionality test was easily satisfied since there was no suggestion that the effects of the ban are so severe as to outweigh the government's pressing and substantial objective.⁵⁹⁹

It is important to stress that the court in *Irwin* did not consider the best interests of the child in its assessment of this limitation upon freedom of speech. One of the reasons for this failure perhaps lies in the fact that this court decision was taken on 27 April 1989 whilst Canada ratified the CRC on 13 December 1991.⁶⁰⁰ The decision by

⁵⁹⁶ As was discussed at 2.1 above.

⁵⁹⁷ *Irwin Toy Ltd v Quebec (Attorney General)* [1989] 1 SCR 927; 1989 CanLII 87 (SCC). See also ch 3 at 4.7.

⁵⁹⁸ At 990-991.

⁵⁹⁹ At 1000.

⁶⁰⁰ United Nations Treaty Collection "Convention on the Rights of the Child: Status" (20-11-1980) *United Nations Treaty Collection* <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&lang=en#EndDec> (accessed 22-03-2016). The original application by *Irwin Toy Ltd* was brought in November 1980.

the Canadian Supreme Court was based purely on the proportionality test, as formulated by the court in *Oakes*.⁶⁰¹

In Europe, the issue of tobacco advertising and the required information to be provided to the consumer has also been a matter that the courts have had to address. In 2002, British American Tobacco Limited and Imperial Tobacco Limited challenged the validity of EU Directive 2001/37/EC in terms of which tobacco manufacturers have to disclose the ingredients of their products and include a health warning covering at least 30 to 35 percent of the front of the packet. The Directive also allows Member States to require additional warnings in the forms of coloured photographs or illustrations on the packaging of tobacco products.⁶⁰² In terms of Article 7 of the Directive texts, names, trade marks and figurative or other signs suggesting that a particular tobacco product is less harmful than others are not allowed to be used on the packaging of tobacco products.⁶⁰³ The European Court of Justice (“ECJ”) found that Article 95EC (which has since been replaced with Article 114 of The Treaty on the Functioning of the European Union) provided the legal basis for such measures and that the EU Legislature had therefore not exceeded its discretionary limits.⁶⁰⁴ In fact, the ECJ found that such measures have been recognised as means of encouraging consumers to reduce their consumption of tobacco products.⁶⁰⁵ It furthermore held that the prohibition laid down in Article 7 of the Directive was necessary in order to ensure that consumers be given objective information concerning the toxicity of tobacco products and that there was no alternative and equally efficient measure which would have ensured the same objective. This type of measures was found to be the least

⁶⁰¹ As discussed in section 2 1 above.

⁶⁰² Arts 5 and 6 of the Directive. See the judgment of *British American Tobacco and Imperial Tobacco* [2002] ECR I-11453 [17] and [18].

⁶⁰³ Terms such as “light”, “low-tar” and “mild” are, as a result, prohibited. See the judgment of *British American Tobacco and Imperial Tobacco* [2002] ECR I-11453 [19].

⁶⁰⁴ [131]. Para 3 of art 95 EC provides as follows:

“The Commission, in its proposals envisaged in paragraph 1 concerning health, safety, environmental protection and consumer protection, will take as a base a high level of protection, taking account in particular of any new development based on scientific facts. Within their respective powers, the European Parliament and the Council will also seek to achieve this objective.”

“Treaty establishing the European Community (Nice consolidated version) - Part Three: Community policies - Title VI: Common rules on competition, taxation and approximation of laws - Chapter 3: Approximation of laws - Article 95 - Article 100a - EC Treaty (Maastricht consolidated version)” *EUR-Lex.europa.eu*

<<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12002E095:EN:HTML>> (accessed 09-04-2015). See also Garde (2010) *CYELS* 233.

⁶⁰⁵ *British American Tobacco and Imperial Tobacco* [2002] ECR I-11453 [131].

restrictive of the rights of the manufacturers of tobacco products and as a result, the provisions of the Directive were declared proportional to the intended objective.⁶⁰⁶

The ECJ has since also upheld the validity of national regulatory measures prohibiting the advertising of alcoholic beverages and gambling services.⁶⁰⁷ However, Garde is of the opinion that the ECJ has, in subsequent cases, left a particularly broad and unfettered discretion to Member States and their national courts to decide on matters of restricting commercial speech. The author is of the view that in decisions such as *Germany v Council and the European Parliament*,⁶⁰⁸ *Gourmet*,⁶⁰⁹ and *Karner*,⁶¹⁰ the ECJ neglected its duty to perform a rigorous assessment that the principle of proportionality requires. In each of these judgments, the court neglected to review and engage with the existing evidence, provided very brief reasoning and in the end ruled that it was the task of the national court to decide whether the objective sought might be achieved by less extensive prohibitions or restrictions. Garde is therefore of the opinion that the ECJ neglected to provide the guidance necessary to assist the national authorities in discharging their duty to ensure that EU law is upheld.⁶¹¹

The SCA in South Africa has also pronounced its views on the limitation of freedom of speech in order to protect public health in the *BATSA* matter. It will be argued elsewhere in this thesis that in this matter the SCA too failed in its duty to properly assess the proportionality of the limitation.⁶¹² The original application submitted by *BATSA* in the North Gauteng High Court, was for an order declaring that the prohibition contained in section 3 of the Tobacco Products Control Act 83 of 1993 (“Tobacco Products Control Act”)⁶¹³ does “not apply to one-to-one communications between tobacco manufacturers, importers, wholesalers and retailers on the one hand and

⁶⁰⁶ *British American Tobacco and Imperial Tobacco* [2002] ECR I-11453 [139]-[141].

⁶⁰⁷ Case C-405/98 *Gourmet* [2001] ECR I-1795 and case C-429/02 *Bacardi France* [2004] ECR I-6613.

⁶⁰⁸ In which arts 3 and 4 of Directive *Germany v Council and the European Parliament* [2006] ECR I-11573 were found to not be disproportional to their objective of reducing the appeal of smoking by imposing a complete ban on sponsorship and advertising of tobacco products.

⁶⁰⁹ Case C-405/98 *Gourmet* [2001] ECR I-1795. In this case the ECJ was asked to rule on whether the Swedish ban on alcohol advertising was contrary to the provisions on the free movement of goods and on the freedom to provide services.

⁶¹⁰ Case C-71/02 *Karner* [2004] ECR I-3025.

⁶¹¹ A Garde (2010) *CYELS* 249-251.

⁶¹² See ch 8. See also Mills (2014) *PELJ* 253 for a discussion of the decision.

⁶¹³ As amended by the Tobacco Products Amendment Act 63 of 2008.

consenting adult tobacco consumers on the other.”⁶¹⁴ In the alternative, *BATSA* sought an order declaring section 3 of the act to be unconstitutional.⁶¹⁵ Having failed in obtaining such orders,⁶¹⁶ the SCA was approached to assess the constitutionality of the prohibition contained in section 3.

Section 3(1)(a) of the Tobacco Products Control Act provides the following:

“No person shall advertise or promote, or cause any other person to advertise or promote, a tobacco product through any direct or indirect means, including through sponsorship of any organisation, event, service, physical establishment, programme, project, bursary, scholarship or any other method.”

The act furthermore provides a definition of “advertisement” in relation to a tobacco product to be as follows:⁶¹⁷

“(a) ... any commercial communication or action brought to the attention of any member of the public in any manner with the aim, effect or likely effect of –

- (i) promoting the sale or use of any tobacco product, tobacco product brand element or tobacco manufacturer's name in relation to a tobacco product; or
- (ii) being regarded as a recommendation of a tobacco product;

(b) includes product placement; and

(c) excludes commercial communication between a tobacco manufacture or importer and its trade partners, business partners, employees and shareholders and any communications required by law.”

“Advertise” has a corresponding meaning. “Promotion” is in turn defined by the Act as being:

“the practice of fostering awareness of and positive attitudes towards a tobacco product, brand element or manufacturer for the purposes of selling the tobacco product or encouraging tobacco use, through various means, including direct advertisement, incentives, free distribution, entertainment, organised activities, marketing of brand elements by means of related events and products through any public medium of communication including cinematographic film, television production, radio production or the internet, and 'promote' has a corresponding meaning.”

⁶¹⁴ *British American Tobacco South Africa (Pty) Ltd v Minister of Health*, as yet unreported decision NGHC 19-05-2011 case number 60230/2009. See also *British American Tobacco South Africa (Pty) Ltd v Minister of Health* [2012] 3 All SA 593 (SCA) [8].

⁶¹⁵ In such an event, the order would have been suspended for 18 months “in order to allow Parliament to enact legislation to cure the unconstitutionality.” *British American Tobacco South Africa (Pty) Ltd v Minister of Health* NGHC 19-05-2011 case number 60230/2009. See also *British American Tobacco South Africa (Pty) Ltd v Minister of Health* [2012] 3 All SA 593 (SCA) [8] where the court provides some contextual background prior to litigation.

⁶¹⁶ The Gauteng High Court found that the limitation on freedom of speech was justified in terms of s 16(1) of the Constitution.

⁶¹⁷ S 1 of the Act.

On appeal it was conceded by the Minister of Health that section 3 of the act limited the appellant's right to freedom of speech and the right of tobacco users to receive information on an individual basis, as protected by section 16 of the Constitution.⁶¹⁸ *BATSA* submitted that the Minister of Health however, failed to show that the limitation could be justified in terms of section 36 of the Constitution, bearing in mind:

“(a) the nature of the communication;⁶¹⁹ (b) the degree to which the limitation impacted on the appellant's freedom of expression; (c) the failure by the Minister to justify the limitation of the right to freedom of expression and (d) the interpretative argument, to see if the impugned provision can be read down so as to allow for one-to-one communication between the appellant on the one hand and the consenting adult consumers of tobacco products on the other.”⁶²⁰

In its judgment, the SCA once again confirmed the importance of the right of freedom of expression, the right to communicate freedom of information and ideas and the role which these rights play in asserting the moral autonomy of individuals in a democratic society.⁶²¹ Writing for the majority of the court,⁶²² Mthiyane DP explained how commercial free speech, in the form of advertising,

“allows the manufacturer, importer and other trader to impart information concerning its product. It also enables the consumer to receive such information and make consequent informed choices. As it was said, '[t]he need for such expression derives from the very nature of our economic system, which is based on the existence of a free market. The orderly operation of that market depends on businesses and consumers having access to abundant and diverse information'. Freedom of commercial expression thus entails not only the right to impart information but also the right to receive it.”⁶²³

The court then proceeded to assess the limitation placed on this fundamental right by the Tobacco Products Control Act. The question which a court has to answer is whether such a limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account relevant

⁶¹⁸ See *British American Tobacco South Africa (Pty) Ltd v Minister of Health* [2012] 3 All SA 593 (SCA) [12].

⁶¹⁹ *BATSA* submitted that the information which it sought to communicate regarding its products was factual and truthful. See [17] of the judgment.

⁶²⁰ [11].

⁶²¹ [13].

⁶²² Farlam, Malan, Tshiqi JJA and McLaren AJA concurring. This judgment also contains the order of the Court. Farlam JA also wrote another judgment in which he added some further considerations (Malan, Tshiqi JJA and McLaren AJA concurring) but agreed with the order provided in the judgment of Mthiyane DP.

⁶²³ Para 13, footnotes omitted.

factors, including the nature of the right, the nature and extent of the limitation⁶²⁴ as well as the effect of the limitation, taking into account that less restrictive means may be available to achieve the same purpose.⁶²⁵ This means that a court has to engage in a balancing exercise based on proportionality. In this case, in particular, the court had to consider the right of *BATSA* to communicate information of its products to consumers, the rights of consumers to receive such information, and the obligation of the government “to take steps to protect its citizens from the hazardous and damaging effects of tobacco use”.⁶²⁶

Turning to the justification for the limitation, the SCA rejected *BATSA*'s argument that the respondent failed to provide any justification for the prohibition. It accepted the Minister of Health's explanation that, in accordance to its commitment “to limiting and preventing the spread of tobacco usage among South Africans” a policy was initiated in response to the global concern regarding the “extremely harmful effects of tobacco on those who consumed it and those exposed to secondary smoke.”⁶²⁷ The Tobacco Products Control Act consequently sought “to stem and prevent the growing incidence of tobacco usage, particularly by youth; ... [s]econd, to reduce the numbers of existing smokers; ... [t]hird, to ensure that those who had stopped smoking, did not begin smoking again; and [f]ourth, to protect non-smokers from being exposed to second hand smoke.”⁶²⁸ The act was furthermore also complying with South Africa's obligations in terms of the WHO Framework Convention on Tobacco Control⁶²⁹ which provides that parties to the Framework Convention undertake “a comprehensive ban of all tobacco advertising, promotion and sponsorship.”⁶³⁰ Mthiyane DP found that the Minister and the Legislature were obliged to regard the Framework Convention when considering what steps to take to deal with the risks of tobacco use.⁶³¹ Apart from its

⁶²⁴ See [15] and the reference to *Glenister v President of the Republic of South Africa* 2011 3 SA 347 (CC) para 203 included there.

⁶²⁵ *British American Tobacco South Africa (Pty) Ltd v Minister of Health* [2012] 3 All SA 593 (SCA) [16] and the reference to *Christian Education South Africa v Minister of Education* 2000 4 SA 757 (CC) [31] included there.

⁶²⁶ [16].

⁶²⁷ [20], quoting from the answering affidavit of the Minister of Health.

⁶²⁸ [20], quoting from the answering affidavit of the Minister of Health.

⁶²⁹ [20], quoting from the answering affidavit of the Minister of Health.

⁶³⁰ [23], quoting from art 13 of the Framework Convention. The Framework Convention came into force on 27 February 2005 and South Africa ratified it on 19 November 2005.

⁶³¹ The SCA held that, since the Constitutional Court in *Glenister v President of the Republic of South Africa* 2011 3 SA 347 (CC) found that the relevant conventions were binding on the Republic, this court too had to give weight to the Framework Convention. See however, M Bishop & J Brickhill “Constitutional Law: Freedom of Speech” (April – June 2012) 2 *JQR* and their argument there as to why

obligations in terms of international law, the court also held that it was important to consider the recent jurisprudence on the matter in foreign jurisdictions. Reference was made, for example, to the ruling by the Canadian Supreme Court in *Canada (Attorney General) v JTI-MacDonald Corp*⁶³² where it was found that, since tobacco “is now irrefutably accepted as highly addictive and as imposing huge personal and social costs, ... that half of smokers will die of tobacco related diseases and that the costs to the public health system are enormous”, public health considerations must sometimes outweigh the right to commercial speech. The court also quoted the Canadian Court’s seminal pronouncement in this regard:

“When commercial expression is used ... for the purpose of inducing people to engage in harmful and addictive behaviour, its value becomes tenuous.”⁶³³

The court consequently found that the Minister was meeting the government’s obligation to protect its citizens from the harm of smoking and established that the prohibition on advertising and promotion of tobacco products is reasonable and justified.⁶³⁴

As to the question of whether or not a less restrictive means is available to address the issue, the SCA was of the view that a blanket ban on advertising and promotion was the only way possible. The court found that, as was the case in *Prince v President, Cape Law Society*,⁶³⁵ it was impossible to carve out an exception in respect of consenting adult tobacco users. It could furthermore not agree with the argument by *BATSA* that the impugned provision should be interpreted in a way that would allow for individual communication to take place. Mthiyane DP found that the information which the appellant wished to communicate to consenting adult customers,⁶³⁶ seeks to advertise and promote tobacco products. The SCA found that public health

it is dangerous to merely accept that South African courts are bound by the provisions of a Convention, especially one which limits a constitutional right.

⁶³² 2007 SCC 30 [9].

⁶³³ Para 47.

⁶³⁴ Para 26.

⁶³⁵ 2002 2 SA 794 (CC).

⁶³⁶ These are listed in [7] of the judgment and include the following: (a) packaging changes, which communication will generally be aimed at ensuring that the consumer is aware that the changes to the package are authentic and that an illicit trade package is not being purchased; b) brand migrations when a product line is discontinued (ie the brands that are most similar in taste and other characteristics to the discontinued product); (c) product developments, which may, for example, be driven by legislative requirements (eg reductions in tar or nicotine levels) or may be made in order to ensure that the product is protected against illicit trade; (d) the launch of new products and new types of products, such as snus; (e) that a particular tobacco product is less harmful than another tobacco products; and (f) other distinguishing features of a particular tobacco product.

considerations and the right to a healthy environment justified the limitation on freedom of speech in these circumstances in a manner required by section 36 of the Constitution and no words needed to be read into the provision.⁶³⁷ Farlam JA furthermore found that, similar to the legislative provisions in Canada, the UK and Mexico, the prohibition in section 3 of the Tobacco Products Controls Act was aimed against advertising and promotion and not against the manufacturer answering requests for information from the public regarding products.⁶³⁸ Since the right to receive information about tobacco products is only limited in respect of information sent on the initiative of *BATSA* and not that which is requested by a person to whom the communication is made, Farlam JA was of the opinion that the requirements for justification in section 36 of the Constitution were clearly met.⁶³⁹

From a perspective of promoting public health and the interests in the well-being of all members of society, the decision by the SCA in the *BATSA* judgment is certainly encouraging. For the purposes of this thesis, this judgment by the court is particularly valuable and supportive of the argument that commercial speech may be limited in the interest of promoting the health and other rights of children. Nevertheless, it is important to note that the SCA held that it did not require the government to provide empirical research of how effective the ban of advertising of tobacco products would be. It relied on the decision by the Constitutional Court in *Minister of Home Affairs v Nicro* in which it found that when policy is at issue, it may not always be possible to prove that such a policy will be effective in its purpose.⁶⁴⁰ This argument will be discussed in chapter 8 of this thesis but at this point it should be emphasised that the SCA was fairly emphatic in its approach that a restriction upon the promotion of products which are harmful to human health, can be justified in terms of the Constitution. In some instances, such as the case with tobacco products, it may be easier to accept the harmful effects which the consumption of such products may have. In other examples, such as the consumption of certain types of foods or infant formula, the harm may not be as apparent. It must also be stressed that the South African courts have not yet had the opportunity to assess any limitation upon freedom of speech whilst considering the best interests of the child to be of paramount

⁶³⁷ *Prince v President, Cape Law Society* [28].

⁶³⁸ [35]-[36].

⁶³⁹ [39]-[40].

⁶⁴⁰ 2005 3 SA 280 (CC) [35].

importance in such a matter. However, if the approach by the SCA in the *BATSA* decision is to be followed, it is submitted that the South African courts should not have much difficulty in justifying a limitation upon freedom of speech in order to promote the best interests of children. It is furthermore submitted that the introduction of Regulations R991, discussed below, has already provided another example of legislative measures that place a restriction upon commercial speech in order to promote public health, but in this instance in order to promote the health of children.

2.4 A case study: limiting commercial speech by prohibiting the promotion of infant formula, certain milks and food utensils designed for infants

The Regulations Relating to Foodstuffs for Infants and Young Children R991 (“Regulations Relating to Foodstuffs for Infants and Young Children”) were published in 2012 and came into operation during 2013 to 2015.⁶⁴¹ These regulations prohibit all promotional practices in respect of infant⁶⁴² and follow-up formula,⁶⁴³ infant or follow-up formula for special dietary or medical purposes; liquid milks, powdered milks, modified powdered milks, or powdered drinks marketed or otherwise represented as suitable for infants or young children; feeding bottles, teats and feeding cups with spouts, straws or teats,⁶⁴⁴ or any other products that the Minister may publish by notice in the Gazette.⁶⁴⁵ Although it is not clearly stated in the regulations, it can be reasonably deduced that the purpose of Regulations R991 is to promote breastfeeding amongst South African parents. At the time of the publication of the regulations in December 2012, the Department of Health’s Director for Nutrition

⁶⁴¹ The Regulations Relating to Foodstuffs for Infants and Young Children R991 (“Regulations Relating to Foodstuffs for Infants and Young Children”), published in terms of s 15(1) of the Foodstuffs, Cosmetics and Disinfectants Act 54 of 1972 (“Foodstuffs, Cosmetics and Disinfectants Act”). The regulations were published in GN R991 in GG 35941 of 06-12-2012. There have been previous attempts at regulating the promotion of these particular products in South Africa: one such example is found in the GN R1328 GG25473 of 26-09-2003. The original dates for the coming into operation of regulations R991 (on 6 December 2012, 6 June 2013 and 6 December 2013) were extended by means of an extension notice (GN R433 in GG 36579 of 18-06-2013). These regulations are the topic of discussion in Mills (2014) *PELJ* 253.

⁶⁴² An infant is defined by the Regulations as “a person not more than 12 months of age”. Infant formula means “a formulated product specially manufactured in accordance with the applicable Codex standard to satisfy, by itself, the nutritional requirements of infants during the first months of life up to the introduction of appropriate complementary feeding”.

⁶⁴³ Defined by the Regulations as “suitable for an infant from six months on or a young child”.

⁶⁴⁴ It appears from the definition of “teat” that a device which an infant suckles on but which is not used to feed her, also known as a pacifier (colloquially known as a “dummy”) is not included in the list of products to which these regulations apply.

⁶⁴⁵ Regulation 7(1), which came into effect on 6 December 2013.

explained that exclusive breastfeeding rates in South Africa is at an all-time low of 8 percent⁶⁴⁶ and infant mortality rates stand at 40 per 1 000 live births.⁶⁴⁷ As a result, it was explained that “South Africa needs to put into place a comprehensive legal framework that protects parents and health professionals from aggressive or inappropriate marketing of breast milk substitutes”.⁶⁴⁸ It is presumed that regulations R991 forms part of this legal framework that protects consumers.

Despite the fact that regulation 1 provides a definition of what it means to “promote”⁶⁴⁹ regulation 7(2) describes the list of prohibited practices of promotion to include, *inter alia*:

- (a) sale devices such as rebates, benefits in kind, kickbacks or any other pecuniary advantages; special displays to promote sales; advertisements about the availability of the product at a specific retail outlet and the price of the product; tie-in sales; discounts in any form; competitions with prizes; or any other incentives and gifts;
- (b) direct or indirect contact between company personnel and members of the public in furtherance of or for the purpose of promoting the business of the company with regard to the products referred to in sub-regulation 7(1) and for purposes of these

⁶⁴⁶ However, this percentage should be given context by referring also to the other statistics released by the Medical Research Council regarding the breastfeeding statistics in South Africa. From the 2 120 children used for the study, 8,3% of children were exclusively breastfed up to the age of six months. 18,6% of the just more than 2 000 children younger than six months were also given water to drink, and were therefore not “exclusively breastfed”. 19,1% were drinking also “other milk”. 83% of these infants were breastfed within the first day after their birth. Of the children younger than two months 16,9% were not breastfed at all and this number increased to 39,7% by the time they reached the age of five months. See The South African Medical Research Council *South Africa Demographic and Health Survey 2003: Full report* (2004), in particular ch 8: Infant and Child Feeding Practices <http://www.mrc.ac.za/bod/sadhs2003part3.pdf>.

⁶⁴⁷ See for example J Heymann, A Rauba & A Earle “Breastfeeding policy: a globally comparative analysis” (2013) 91 *WHO Bulletin* 398:

“Since malnutrition contributes to half of all infant deaths, breastfeeding helps to reduce infant mortality. Studies around the world in affluent and poor nations alike have shown a 1.5 to five-fold decrease in mortality among breastfed infants.”

In contrast, however, see also S Ip, M Chung, G Raman, P Chew, N Magula, D DeVine, T Trikalinos & J Lau “Breastfeeding and Maternal and Infant Health Outcomes in Developed Countries” Evidence Report/Technology Assessment No 153 (Prepared by Tufts-New England Medical Center Evidence-based Practice Center, under Contract No 290-02-0022) AHRQ Publication No 07-E007, Rockville, MD: Agency for Healthcare Research and Quality (April 2007) where at 5 it is stated:

“Because of the limited data in this area, the relationship between breastfeeding and infant mortality in developed countries remains unclear.”

⁶⁴⁸ T Kahn “Department of Health publishes baby milk ad controls” *Business Day Live* (13-12-2012).

⁶⁴⁹ “[P]romote” means to employ any method scheme or design, of encouraging or enticing a person or group of persons, in whatever form, to purchase or use a designated product, and includes but is not limited to, advertising, point-of-sale advertising, the giving of samples, special sales, free supplies, donations, sponsorships, gifts, whether related or unrelated to purchases of designated products, free utensils or other articles, prizes, carrier bags with pack-shots or product logos, prizes or special displays at retail outlets, discount coupons, premiums, loss-leaders, tie-in sales, rebates and other give-aways.”

regulations "indirect contact" specifically includes internet sites hosted on behalf of a South African entity or an entity that does business in South Africa, television and radio, telephone or internet help lines and mother and baby clubs but excludes contact in regards to product quality complaints and adverse events;

(c) the distribution of any information or educational material on the nutrition or feeding of infants and young children, except in accordance with sub-regulation 7(4);⁶⁵⁰

(d) promotional items such as stationery, T-shirts or other items of clothing, headgear, household utensils, and household linens that refer to products contained in sub-regulation 7(1) of these regulations;

(e) the brand name of a product referred to in sub-regulation 7(1) when used at any event for the general public;

(f) advertisements in written publications, television, radio, film, electronic media, email, video, telephone displays, exhibitions and outdoor advertisements such as billboards, posters, signs and electronic signs.

The list of products may furthermore also not be promoted by means of the provision of research grants, financial assistance, donations or the distribution of any equipment, or sponsorships unless the Director-General of the Department of Health has given its prior approval.⁶⁵¹ Regulation 7(3) also explicitly prohibits the sale, promotion or advertisement of the listed products, as well as that of complementary foods,⁶⁵² through health care personnel or health establishments. An institutional pharmacy in a private health establishment may, however, sell a designated product but has to refrain from promoting or advertising it.⁶⁵³

⁶⁵⁰ Reg 7(4) provides that "[n]o manufacturer, distributor, retailer, importer or person on behalf of the aforementioned shall produce or distribute any educational material on infant and young child feeding that promotes any products referred to in sub-regulation 7(1)." Reg 7(5) proceeds by providing that "[n]o manufacturer, distributor, retailer, importer or person on behalf of the aforementioned shall produced [sic], distribute and present educational information relating to infant and young child nutrition." It is submitted that it is not entirely clear how these provisions are to be read together since the latter provision is rather comprehensive in its scope.

⁶⁵¹ Reg 7(2)(g)-(j).

⁶⁵² "[C]omplementary food" is defined by the Regulations as being "any foodstuff, whether in liquid, solid or semi-solid form, given to an infant from the age of six months as part of the transitional process during which an infant learns to eat food appropriate for his or her developmental stage while continuing to breastfeed or be fed with an appropriate formula."

⁶⁵³ In its National Department of Health "Draft Guidance for Industry: The Regulations Relating to Foodstuffs for Infants and Young Children, R 991 of 6 December 2012" (2013) *National Department of Health* <http://www.doh.gov.za/docs/regulations/2013/Draft_Guidance_Notes_Regulation_R991.pdf> (accessed 20-08-2013), the Department of Health explains that a health care provider may communicate a range of available products to the client and not only one specific brand because this

Regulation 7(4) prohibits any manufacturer, distributor, retailer, importer or person on behalf of such, from producing or distributing any educational material on infant and young child feeding that promotes any of the identified products. Regulation 7(5) extends even further by prohibiting any of the above-mentioned persons from producing, distributing or presenting educational information relating to infant and young child nutrition.⁶⁵⁴

The label of the relevant products may also not refer to, or promote or advertise any other designated product. Any incentive, enticement or invitation of any nature, which might encourage consumers to make contact with the manufacturer or distributor of a designated product which might result in the sale or the promotion of a designated product for infants or young children, is proscribed from appearing on the label or in the marketing of such a product.⁶⁵⁵ Apart from other strict instructions relating to the appearance and wording of the labelling, the regulations also contain a mandatory provision that the words “[t]his product shall only be used on the advice of a health professional” shall appear on the front main panel of the label of a designated product.⁶⁵⁶ This is followed by an instruction that a prominent statement printed in bold letters of at least 3mm in height stating “USE UNDER MEDICAL SUPERVISION” shall also appear on the label. In terms of regulation 17, all non-compliant products had to be removed from the market by 12 December 2015.

The penalties applicable to the contravention of any of the regulations are found in section 18 of the Foodstuffs Act. It prescribes that “[a]ny person convicted of an offence under this Act shall ... be liable (a) on a first conviction, to a fine or to imprisonment for a period not exceeding six months or to both a fine and such imprisonment; (b) on a second conviction, to a fine or to imprisonment for a period not exceeding twelve months or to both a fine and such imprisonment; (c) on a third or subsequent conviction, to a fine or to imprisonment for a period not exceeding twenty-four months or to both a fine and such imprisonment.”

The promotion of breastfeeding is a vital and laudable goal to pursue. The practice of this very natural and basic method of nursing holds health benefits for both mother

would be considered promotional. See, however, see Mills (2014) *PELJ* 253 for comments critical of the effect of this provision.

⁶⁵⁴ See, however, also the text to n 650 above.

⁶⁵⁵ Reg 2(14).

⁶⁵⁶ Reg 3(1)(a)(iii)(a).

and child.⁶⁵⁷ Consequently the Minister and the Department of Health are indeed attempting to improve public health in South Africa and in essence, to promote the best interests of children. Nonetheless, the attempt to do so by means of Regulations R991 can be criticised for a number of reasons.⁶⁵⁸ It has been argued that some of the provisions of these regulations will not pass constitutional scrutiny.⁶⁵⁹ I have argued elsewhere that the prohibition of all forms of advertising to adult consumers, including the publication of the price of these particular designated products is an overbroad and disproportionate limitation upon commercial speech and one which will not necessarily promote breastfeeding.⁶⁶⁰ This is also true in respect of the prohibition which is placed upon the manufacturers of these products preventing them from actually promoting breastfeeding by prohibiting the manufacturers from providing educational information relating to infant and young child nutrition.⁶⁶¹ It has been argued that the effect which these prohibitions will have on consumers' right to information regarding products, which most parents will have to rely on at some point during their children's lives, is excessive and unwarranted.⁶⁶² The regulations also ban the promotion of products which are to be used for children who are no longer, even in terms of the WHO guidelines, to be exclusively breastfed or breastfed at all: the regulations prohibit the promotion of feeding bottles, feeding cups and teats, as well as follow-up formula and milks formulated for children aged from six to 36 months.⁶⁶³

The critical aspect, which should furthermore be borne in mind, is that the marketing practices prohibited in terms of Regulations R991 are aimed at adult consumers whom are presumed to understand the aim of marketing. The value of the example of regulations R991 is found in the fact that the Department of Health has introduced public health regulations curtailing the freedom of commercial speech, apparently without any objections from the infant feeding industry. While the extent of the

⁶⁵⁷ Ip *et al* "Breastfeeding and Maternal and Infant Health Outcomes in Developed Countries" (April 2007).

⁶⁵⁸ See in this regard Mills (2014) *PELJ* 275-281

⁶⁵⁹ Mills (2014) *PELJ* 274-280.

⁶⁶⁰ As proposed by Reg 7. Compare, for example, cl 1.3.1 of Appendix E of the Code of Conduct of the Advertising Standards Authority of South Africa: "Advertisements promoting the use or benefits of breast milk substitutes will not be permitted. This will not preclude the advertising of the availability and price, without further sales phraseology, of such products."

⁶⁶¹ Reg 7(5).

⁶⁶² Mills (2014) *PELJ* 276-277.

⁶⁶³ "Follow-up formula" is defined as "a product formulated ... and marketed or otherwise represented as suitable for an infant from six months on or a young child" whereas "young child" is defined as a child "older than 12 months but younger than the age of 36 months (three years)".

limitation which Regulations R991 place upon commercial speech have not been challenged in a court, it is submitted that it should be contested that this extensive ban on the promotion of these products will achieve its purpose and encourage mothers to breastfeed. It is crucial that the government does not lose sight of its obligation not to infringe upon other fundamental freedoms in a manner that is unreasonable and unjustifiable, even if the limitation seeks to promote the best interests of the child.

3 Intellectual property

3 1 The protection and limitation of intellectual property

Another fundamental right that enjoys constitutional protection is that of intellectual property. The World Intellectual Property Organisation (“WIPO”) describes intellectual property rights as “the legal rights which result from intellectual activity in the industrial, scientific, literary and artistic fields.”⁶⁶⁴ Intellectual property has also been described as the tangible or intangible property “resulting from creative thoughts and intellectual human efforts”.⁶⁶⁵ In 1967 the Convention Establishing the World Intellectual Property Organization (WIPO) concluded that intellectual property includes rights relating to literary, artistic and scientific works; performances of performing artists; phonograms and broadcasts; inventions in all fields of human endeavour; scientific discoveries; industrial designs; trade marks, including service marks and commercial names and designations; protection against unfair competition; and all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields.⁶⁶⁶ From the description of the numerous food-marketing practices aimed at children in chapter 2 of this thesis, it is clear that the food industry spends huge amounts of money in establishing, developing and promoting their brand names and trade marks. Any imposition upon these practices will necessarily have an impact on the intellectual property of food manufacturers.

⁶⁶⁴ World Intellectual Property Organisation (WIPO) “Chapter 1 - Introduction” in *WIPO Intellectual Property Handbook: Policy, Law and Use* 2 ed (2004) 3. Once again it must be noted that many of the views expressed here in respect of intellectual property, are also contained in an article where I discuss the implications of the imposition of regulatory measures upon infant formula and complementary foods: Mills (2014) *PELJ* 253.

⁶⁶⁵ P Kanagavel “Intellectual Property Rights: A Comprehensive Overview” “Intellectual Property Rights: A Comprehensive Overview” (2003) *J Pat Trademark Off Soc* 663 663-685.

⁶⁶⁶ World Intellectual Property Organisation (WIPO) “Chapter 1 - Introduction” in *WIPO Intellectual Property Handbook: Policy, Law and Use* 3.

In many countries intellectual property is protected in order to promote creativity, encourage fair trading and thus promote economic and social development as part of government policy. States protect intellectual property by means of legislation in order to give effect to the moral and economic rights of creators which corresponds with the protection also afforded to these rights in international law. Article 27(2) of the Universal Declaration of Human Rights, for example, protects the right to “moral and material interests resulting from any scientific, literary or artistic production of which [someone] is the author.”⁶⁶⁷ The corresponding right of people to enjoy each other’s creative works is enshrined in Article 27(1) of the Declaration. Article 17 furthermore provides that no one may be arbitrarily deprived of their property.

A number of international treaties are furthermore devoted specifically to the protection of intellectual property, including The Paris Convention on Industrial Property of 1883; The Berne Convention for the Protection of Literary and Artistic Works of 1886; The Madrid Agreement Concerning the International Registration of Marks of 1891, and the Protocol Relating to that Agreement, adopted in 1989; and the Agreement on Trade-Related Aspects of Intellectual Property Rights of 1994 (“TRIPS”).⁶⁶⁸ The purpose of many of these documents is to simplify practice by following international standard procedures and by a mutual recognition of rights and duties.⁶⁶⁹ Member States to a convention furthermore agree to grant to the citizens of other member countries the same protection as they grant to their own.⁶⁷⁰

In South Africa section 25 of the Constitution protects the right to property but does not explicitly define the term “property”. Although section 25(4) provides that for the purposes of this section “property is not limited to land”, the question as to whether intellectual property is also afforded constitutional protection has been the topic of considerable discussion.⁶⁷¹ Most authors now agree that section 25 of the Constitution

⁶⁶⁷ Office of the High Commissioner: United Nations Human Rights “Text of the Declaration” *UNHR* <<http://www.un.org/en/documents/udhr/>> (accessed 23-01-2015).

⁶⁶⁸ For a discussion of the full range of applicable international documents, see World Intellectual Property Organisation (WIPO) “Chapter 5 – International Treaties and Conventions on Intellectual Property” in *WIPO Intellectual Property Handbook: Policy, Law and Use* 2 ed (2004).

⁶⁶⁹ World Intellectual Property Organisation (WIPO) “Chapter 1 - Introduction” in *WIPO Intellectual Property Handbook: Policy, Law and Use* 7.

⁶⁷⁰ 7.

⁶⁷¹ See the so-called First Certification Case: *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*, 1996 1996 4 SA 744 (CC) [75]; OH Dean “The Case for the Recognition of Intellectual Property in the Bill of Rights” (1997) 60 *THRHR* 105 106 and 110; T Roux “Property” in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (2003) 46-1 – 46-37 and 46-15; GS Alexander *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence* (2006) 163; AJ van der Walt *Constitutional*

has scope to also include intellectual property rights.⁶⁷² Section 25(1) of the Constitution provides that no one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property. Expropriation of property is allowed in terms of section 25(2) but only in terms of law of general application and only if that expropriation is for a public purpose or in the public interest; and furthermore, only if compensation has been paid, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.

The procedure to be followed in instances of deprivation and expropriation of property was set out by the Constitutional Court in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* (the *FNB-case*).⁶⁷³ The court also defined deprivation to be “any interference with the use, enjoyment or exploitation of private property.”⁶⁷⁴ To determine whether deprivation was arbitrary, the court explained that it needs to test whether the law of general application, referred to in section 25, provided sufficient reason for the particular deprivation or if the law is procedurally unfair.⁶⁷⁵ Mostert and Badenhorst interpret this to mean that there should be a rational connection between a legitimate governmental purpose and the manner in which the deprivation should be achieved, as well as an adequate cause for a deprivation.⁶⁷⁶ If there was an arbitrary deprivation, the second step is to determine whether section 36(1) may still justify such a deprivation.

In the event that the deprivation passes the arbitrariness test, or is found to be a justified limitation, the next question to be answered is whether the interference with the property amounts to expropriation. Mogoeng CJ, in *Agri South Africa v Minister for Minerals and Energy* explained that, in order to prove expropriation, a claimant must establish that the state has acquired the substance or core content of what it was deprived of.⁶⁷⁷ He explained further:

Property Law (2005) at 85–87; T Roux & D Davis “Property” in H Cheadle, D Davis & N Haysom (eds) *South African Constitutional Law: The Bill of Rights* 2 ed (2008) 20-1 – 20-28 and 20-17; Van der Walt *Constitutional Property Law* 143–50; and especially the discussion by M du Bois “Intellectual property as a constitutional property right: The South African approach” (2012) 24 *SA Merc LJ* 177-192.

⁶⁷² Du Bois (2012) *SA Merc LJ* 192 and the authorities cited there in n 82.

⁶⁷³ 2002 4 SA 768 (CC).

⁶⁷⁴ [57].

⁶⁷⁵ [100].

⁶⁷⁶ H Mostert & PJ Badenhorst *Property and the Bill of Rights* (2006) para 3FB7.1.2(b) 49.

⁶⁷⁷ *Agri SA v Minister for Minerals and Energy* 2013 4 SA 1 (CC).

“In other words, the rights acquired by the state do not have to be exactly the same as the rights that were lost. There would, however, have to be sufficient congruence or substantial similarity between what was lost and what was acquired There can be no expropriation in circumstances where deprivation does not result in property being acquired by the state.”⁶⁷⁸

Expropriation, as a “species” of the “genus” of deprivation, will have to meet two additional requirements, namely, that it can only be performed pursuant to a public interest and it must be accompanied by the payment of just and equitable compensation.⁶⁷⁹

3.2 Trade marks

Generally speaking, intellectual property may be divided into three broad categories, namely patents, trade marks and copyrights.⁶⁸⁰ For the purposes of this research, trade marks are of importance. A trade mark may take on a number of forms, whether it be a picture or any visual symbol – including a singular letter or a number, a word, name, slogan, an aspect of packaging, a colour, a sound or even a smell. It may also be any combination of these.⁶⁸¹ The South African Trade Marks Act 194 of 1993 (“Trade Marks Act”) defines a trade mark in the following terms:

“‘trade mark’, other than a certification trade mark or a collective trade mark, means a mark used or proposed to be used by a person in relation to goods or services for the purpose of distinguishing the goods or services in relation to which the mark is used or proposed to be used from the same kind of goods or services connected in the course of trade with any other person.”⁶⁸²

A “mark” is in turn defined as:

“any sign capable of being represented graphically, including a device, name, signature, word, letter, numeral, shape, configuration, pattern, ornamentation, colour or container for goods or any combination of the aforementioned”.⁶⁸³

⁶⁷⁸ [58] – [59].

⁶⁷⁹ 2002 4 SA 768 (CC) [57] – [59].

⁶⁸⁰ It may also be grouped in various other ways: see for example Kanagavel’s categorisation in Kanagavel’s (2003) *J Pat Trademark Off Soc* 665.

⁶⁸¹ 672. See also World Intellectual Property Organisation (WIPO) “Chapter 2 - Fields of Intellectual Property Protection” in *WIPO Intellectual Property Handbook: Policy, Law and Use* 2 ed (2004) 70.

⁶⁸² S 2(1) of the Trade Marks Act.

⁶⁸³ S 2(1).

Two interdependent characteristics of a trade mark which are essential for the purposes of registering it in terms of the South African act, as well as in terms of trade mark law in general, is that it must be distinguishable and that it cannot be deceptive.⁶⁸⁴ In being distinguishable, a trade mark protects consumers since a trusted product will be easily identifiable. Manufacturers are encouraged to produce goods which are consistent in quality, having the effect that consumers will learn to either trust or avoid certain brands.⁶⁸⁵ Consequently, courts have described a trade mark as a “badge of origin”: a symbol that signifies that “this is the product of trader or manufacture X”.⁶⁸⁶ A trade mark may furthermore not deceive consumers as to the qualities of the particular product, claiming that it possesses certain characteristics which will persuade a consumer to buy and use it, while it does not have these qualities.⁶⁸⁷ Another important aspect that must be emphasised from the definition of the Trade Marks Act is that a trade mark must be used or proposed to be used.⁶⁸⁸

Trade marks are valuable commercial commodities. Dean describes them as the core of a brand, which comprises of the trade mark itself, as well as the commercial impact of the trade mark. A brand is established through advertising, packaging and other marketing communications. The more trust consumers place in a particular brand, the more valuable its brand equity will become. There are various accepted methods used to calculate the value of brand equity – something which is essential for

⁶⁸⁴ See for example Art 6 *quinquies* B of the Paris Convention on Industrial Property which provides as follows:

“Trademarks covered by this Article may be neither denied registration nor invalidated except in the following cases: (i) when they are of such a nature as to infringe rights acquired by third parties in the country where protection is claimed; (ii) when they are devoid of any distinctive character, or consist exclusively of signs or indications which may serve, in trade, to designate the kind, quality, quantity, intended purpose, value, place of origin, of the goods, or the time of production, or have become customary in the current language or in the bona fide and established practices of the trade of the country where protection is claimed; (iii) when they are contrary to morality or public order and, in particular, of such a nature as to deceive the public. It is understood that a mark may not be considered contrary to public order for the sole reason that it does not conform to a provision of the legislation on marks, except if such provision itself relates to public order.”

See further Kanagavel (2003) *J Pat Trademark Off Soc* 673 and World Intellectual Property Organisation (WIPO) “Chapter 2 - Fields of Intellectual Property Protection” in *WIPO Intellectual Property Handbook: Policy, Law and Use* 2 ed (2004) 68.

⁶⁸⁵ Global Intellectual Property Center “Intellectual Property 101” (2012) *Global Intellectual Property Centre* <http://www.ipdelivers.com/sites/default/files/IP_101.pdf> (accessed 14-01-2015).

⁶⁸⁶ *Scandecor Developments AB v Scandecor Marketing AV* [2001] UKHL 21 ([2002] FSR 122) [16] quoted with approval by Harms JA in *AM Moolla Group Ltd v The Gap Inc* 2005 6 SA 568 (SCA) [38]-[40] and cited by Dean in OH Dean “Deprivation of trade marks through state interference in their usage” (2013) 35 *EIPR* 576-589 582.

⁶⁸⁷ Kanagavel (2003) *J Pat Trademark Off Soc* 673.

⁶⁸⁸ See the wording included in ss 2(1); 2(2) and 2(3). See further O Dean & A Dyer (ed) *Introduction to Intellectual Property* (2014) 106.

many business transactions such as mergers, acquisitions and bankruptcy.⁶⁸⁹ Legal protection of trade marks are therefore essential if brands are to “serve their purpose and fulfil their economic function.”⁶⁹⁰

One of the ways in which a trade mark, registered in terms of the South African Trade Marks Act, may be removed from the register, is on the grounds of non-use. Section 27(1)(b) provides that, on application to the registrar or a court, a trade mark may be removed on the basis that up to the date three months before the date of the application, for a continuous period of five years or longer from the date of issue of the certificate of registration, there has been no *bona fide* use of the trade mark.⁶⁹¹ In terms of section 37, the duration period of a registration of a trade mark is ten years and a renewal of the registration is for the same time. If a trade mark is no longer being used, the brand equity will also diminish and will, in time, be completely obliterated.⁶⁹²

3.3 A case study: the deprivation of trade marks by prescribing plain packaging of tobacco products and infant formula

During the course of 2011 and 2012, the provisions of the Tobacco Plain Packaging Act of 2011 (“TPP Act”) came into force in Australia. In terms of this piece of legislation and its regulations, the packaging of tobacco products must include health warnings and may not display any trade mark. The brand name may appear on the packet but in plain letters and in a relatively small font size. Consequently, any distinguishing feature of the brand must be removed and all cigarette packets are to be rectangular in shape, drab dark brown in colour and only have a matt finish.⁶⁹³ The objectives of the TPP Act are explained to be the improvement of public health by discouraging people from taking up the use of tobacco products; as well as to discourage those who have stopped, from relapsing; and to encourage people to give up smoking or the use of tobacco products. It furthermore aims to reduce exposure to the smoke of tobacco to both non-smokers and smokers alike.⁶⁹⁴ The Australian Government has stated that

⁶⁸⁹ Dean (2013) *EIPR* 583.

⁶⁹⁰ OH Dean “The Value and Valuation of Trade Marks” in *Encyclopaedia of Brands and Branding* (1998) 19.

⁶⁹¹ An exception to this rule is available in terms of s 27(4) if it can be proven that the non-use has occurred due to special circumstances in the trade and not to any intention not to use or to abandon the trade mark.

⁶⁹² Dean (2013) *EIPR* 583.

⁶⁹³ See ss 19 – 21 of the Act.

⁶⁹⁴ S 3(1)(a) of the Act.

it seeks to achieve these goals, whilst also pursuing compliance with some of the provisions of the World Health Organisation Framework Convention on Tobacco Control (“FCTC”).⁶⁹⁵

International tobacco companies soon applied for a declaration of invalidity of the TPP Act, contending that it was contrary to the Australian Constitution.⁶⁹⁶ However, in *JT International SA v Commonwealth of Australia* the High Court of Australia found that the effect of these provisions did not amount to an “acquisition of property” by the state which, in terms of section 51(xxxi) of the Constitution, had to be just.⁶⁹⁷ The application was accordingly denied and the TPP Act is currently in force in Australia.

Some Member States of the World Trade Organisation (“WTO”), including the Ukraine,⁶⁹⁸ Honduras, the Dominican Republic, Cuba and Indonesia, lodged complaints against Australia on the basis that the TPP Act is in violation of the obligations imposed by, *inter alia*, the TRIPS agreement.⁶⁹⁹ In May 2014, the WTO appointed panellists to investigate these complaints.⁷⁰⁰ At the time of writing this thesis, this dispute had not yet been resolved.⁷⁰¹

⁶⁹⁵ See also s 3(1)(b) of the TPP Act. The FCTC, proclaimed in Geneva in 2003 and entering into force in 2005 was developed as an international response to the globalisation of the tobacco epidemic. See WHO Framework Convention on Tobacco Control “Overview” (2003) *World Health Organization* <http://www.who.int/fctc/text_download/en/> (accessed 28-01-2015); Dean (2013) *EIPR* 576.

The FCTC itself does not mention plain packaging but the Guidelines to the FCTC provide that Parties should “consider adopting measures to restrict or prohibit the use of logos, colours, brand images or promotional information on packaging other than brand names and product names displayed in a standard colour and font style (plain packaging).” Frankel and Gervais point out that Member States to the FCTC does not have an obligation to comply with any of the Guidelines and the Guidelines do not amend or delete any of the TRIPS agreement obligations. They state further that other members of the World Trade Organisation and the WHO have taken a different approach to the policy “balancing act” involved in determining how to implement plain packaging measures. S Frankel & D Gervais “Plain Packaging and the Interpretation of the TRIPS Agreement” (2013) 46 *Vand J Transnat'l L* 1149 1162-1164.

⁶⁹⁶ Dean (2013) *EIPR* 577.

⁶⁹⁷ *JT International SA v Commonwealth of Australia* [2012] HCA 43. For a detailed discussion of the case, see M du Bois “Trade Marks for Tobacco Products as Constitutional Property Australian Plain Packaging Legislation” (2013) 25 *SA Merc LJ* 197 – 222.

⁶⁹⁸ In June 2015 the Ukraine reportedly withdrew its challenge against the Australian legislation. World Trade Organisation “Dispute DS434 Australia — Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging” (30-05-2016) *World Trade Organization* <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds434_e.htm> (accessed 01-08-2016).

⁶⁹⁹ C Saez & W New “WTO to Consider Five Australia Plain Packaging Disputes Under One Panel”, *Intellectual Property Watch* available at <<http://www.ip-watch.org/2014/04/26/wto-to-consider-australia-plain-packaging-disputes-under-one-panel/>> (accessed 29-01-2015).

⁷⁰⁰ McCabe Centre for Law and Cancer “Dispute in the World Trade Organization: Latest Developments”, available at <<http://www.mccabecentre.org/focus-areas/tobacco/dispute-in-the-world-trade-organization>> (accessed 29-01-2015).

⁷⁰¹ World Trade Organisation “Dispute 467 Australia — Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging” (05-05-2014)

There are indeed opposing views regarding the validity of plain packaging in terms of the various instruments of international intellectual property law. Some authors are of the opinion that this measure of regulation is in violation of some of the obligations which Australia has in terms of WTO agreements, and in particular of TRIPS and the General Agreement on Tariffs and Trade 1994 (“GATT 1994”). These authors, and also the tobacco companies, argue that the method of plain packaging is in contravention of Article 20 of TRIPS in that it is an unjustifiable encumbrance upon the use of a trade mark. Furthermore, the use of plain packaging of tobacco products cannot be justified in terms of Article 8(1) of TRIPS since it cannot be proven that plain packaging is a necessary measure to protect public health.⁷⁰² There are, however, also authors who hold the opposite view and in terms of their interpretation, plain packaging does not contravene any WTO agreement.⁷⁰³

Several other countries,⁷⁰⁴ including South Africa, have indicated that they also intend to introduce similar plain packaging legislation of tobacco products within their jurisdiction. Health Minister, Mr Aron Motaalehi, has stated on several occasions that he plans to force manufacturers of tobacco products to sell their goods in plain packets in South Africa.⁷⁰⁵ The Minister was apparently encouraged by the judgment in the *JT*

World Trade Organisation <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds467_e.htm> (accessed 01-08-2016).

⁷⁰² See for example Frankel & Gervais (2013) *Vand J Transnat'l L* 1149; and Memorandum from Lalive to Philip Morris International Management SA “Why Plain Packaging is in Violation of WTO Members’ International Obligations under TRIPS and the Paris Convention” (23 July 2009); and Report by Daniel Gervais for Japan Tobacco International, *Analysis of the Compatibility of certain Tobacco Product Packaging Rules with the TRIPS Agreement and the Paris Convention* (30 November 2010) as cited by Voon & Mitchell in Mitchell *et al* (eds) *Public Health and Plain Packaging of Cigarettes: Legal Issues* (2012) 4.

⁷⁰³ See, in this regard, T Voon and A Mitchell, as well as M Davison in A Mitchell *et al* (eds) *Public Health and Plain Packaging of Cigarettes: Legal Issues* and T Voon, A Mitchell, M Davison & E Bonadio in T Voon, AD Mitchell & J Liberman (eds) *Regulating Tobacco, Alcohol and Unhealthy Foods: The Legal Issues* (2015).

⁷⁰⁴ In the UK, Phillip Morris has filed papers in the English High Court contesting the UK’s approval of legislation which will enforce plain packaging of tobacco products. World Trademark Review “Plain packaging battle escalates as WTO prepares for hearings on challenges to Australian regime” (26-05-2016) *World Trademark Review* <<http://www.worldtrademarkreview.com/blog/detail.aspx?g=ae2b117-e8b5-4144-91e2-444949613101>> (accessed 12-08-2016). Despite arguments by Lord Hoffman, an honorary professor of intellectual property law at the University of London and chair of the Institute of Intellectual Property Research Council that that the general prohibition of a marks use “is a simple destruction of the value previously enjoyed by the trademark owner” and that the UK’s regulations unlawfully deprive tobacco companies of their intellectual property in violation of the European Charter of Fundamental Rights and the European Convention on Human Rights, the case was dismissed in May 2016. BBC News “Tobacco laws: Bid to overturn packaging rules dismissed” (19-05-2016) *BBC News* <<http://www.bbc.com/news/uk-36333450>> (accessed 13-08-2016).

⁷⁰⁵ W Roelf “South Africa plans plain cigarette packaging by 2015: minister” *Reuters* 24 July 2014 <http://www.reuters.com/article/2014/07/24/us-safrica-tobacco-idUSKBN0FT1QI20140724> (accessed

International decision, declaring that if the Australian Health Minister, Ms Tanya Plibersek, won this case, she “will win for all of us”.⁷⁰⁶

Minister Motsaledi in fact already introduced and implemented another set of regulations with far-reaching consequences for trade mark usage, although not aimed at tobacco products. In an apparent response to a global call to action in promoting breastfeeding, the South African Department of Health promulgated the Regulations Relating to Foodstuffs for Infants and Young Children.⁷⁰⁷ In terms of these regulations a number of restrictions are placed on the labelling, advertisement and promotion of infant and follow-up formula, liquid or powdered milk marketed as being suitable for infants or young children, complementary foods, feeding bottles, teats and feeding cups with spouts, straws or teats.⁷⁰⁸ Of particular importance in the context of trade marks are the strict requirements regarding the labelling and packaging of designated products found in regulations 2 to 6.⁷⁰⁹ These include the prohibition of any graphic representation, apart from those necessary to show the correct method of preparing and using the product.⁷¹⁰ The company logo and brand name is permitted, provided that they do not contain a picture of an infant, young child or other humanised figure.⁷¹¹ Regulation 4(3)(b) prohibits the use of expressions or names that may be understood to identify the product as suitable to feed infants. Such phrases include the terms “first growth”, “first food”, “from the start” and “best start in life”.

There has been some reaction from South African experts in intellectual property to these proposals and legislative changes. One such commentator, Dean, makes a compelling argument that the proposed ban of the use of brand logos on cigarette packaging, thus only allowing brand names or product names to be depicted in a plain manner, constitutes the deprivation of property.⁷¹² In instances where a proprietor is

29-01-2015). This intention was confirmed in 2016: Matthew le Cordeur *Fin 24* “No branding, no logos, no colours - SA gets tough on cigarettes” 31 May 2016 <<http://www.fin24.com/Companies/Health/sa-to-hit-smokers-with-tougher-laws-20160531>> (accessed 01-06-2016).

⁷⁰⁶ K Child “Joy greets Aussie ruling” *Times Live* 16 August 2012, available at <<http://m.timeslive.co.za/thetimes/?articleId=6170155>> (accessed on 29/01/2015).

⁷⁰⁷ As discussed above in the text to ch 4 at 2 4.

⁷⁰⁸ As discussed above in the text to ch 4 at 2 4.

⁷⁰⁹ These regulations came into operation on 6 December 2014.

⁷¹⁰ Reg 2(2)(a).

⁷¹¹ Reg 2(3). In its Draft Guidance for Industry, (n 36) the Department of Health describes a “humanised figure” as “any inanimate object that is portrayed or endowed with human characteristics or attributes. Examples include: fruits, vegetables, flowers, etc. with arms and legs, an image of the sun with eyes, giving animals human characteristics such as walking on only two legs.”

⁷¹² Dean (2013) *EIPR* 576-589. See also “Deprivation of Trade Marks through State Interference in their Usage” Inaugural lecture presented at the Faculty of Law, Stellenbosch University 21 May 2013. See

prevented from using his trade mark, the trade mark will be extinguished. Since deprivation involves an interference with the use, enjoyment or exploitation of private property, restricting the use of intellectual property by means of plain packaging consequently falls within the scope of deprivation in this context.⁷¹³ He is furthermore of the opinion that the deprivation would be arbitrary since there would be no rational connection between the government's legitimate purpose of promoting public health and the deprivation of property. Dean argues that by removing the consumer's ability to distinguish between competing products, it will not follow that people will smoke less, quit smoking or be discouraged to take up smoking.⁷¹⁴ By means of the doctrine of constructive expropriation, Dean argues that the implementation of plain packaging legislation will also constitute expropriation of trade marks.⁷¹⁵ Other commentators, including Van Der Walt and Shay,⁷¹⁶ and Du Bois,⁷¹⁷ have agreed with the point that plain packaging may lead to the arbitrary deprivation of intellectual property. Harms, however, has a different view and is of the opinion that "plain packaging law does not deprive the trade mark owner of any trade mark right but only regulates or limits the exercise of that right."⁷¹⁸

The argument of the deprivation of intellectual property can also be made in respect of Regulations R991:⁷¹⁹ these provisions also deprive the owners of registered trade marks of their property. One such registered owner is that of Parmalat, who from 2016 is no longer able to use their brand name "First Growth" in South Africa. Since these legislative measures have never been challenged, the Department of Health has never had to prove that the use of pictures of children or other humanised figures, and the use of phrases such as "first food" or "good start" directly contribute to the use of infant and follow-up formula, complementary food and liquid or powdered milks marketed as suitable for infants or young children, instead of breastfeeding.⁷²⁰

also OH Dean "Curtailling the use of Tobacco Marks" *Intellectual Property Forum* Issue 91 (Dec 2012) 107-108; Mills (2014) *PELJ*, specifically 281-282.

⁷¹³ Dean (2013) *EIPR* 586.

⁷¹⁴ 587.

⁷¹⁵ 587. The contrary view, in light of the *Agri SA* decision, is supported by Du Bois in (2013) *SA Merc LJ* 220-222.

⁷¹⁶ AJ van der Walt & RM Shay "Constitutional Analysis of Intellectual Property" (2014) 17 *PELJ* 66/612.

⁷¹⁷ Du Bois in (2013) *SA Merc LJ* 197 – 222, although the author is more cautious in her approach, stating that it would depend on the formulation of the particular legislative provision.

⁷¹⁸ L Harms "Plain packaging and its impact on trademark Law" (2013) *De Jure* 387 397.

⁷¹⁹ The Regulations Relating to Foodstuffs for Infants and Young Children R991 in GG35941 of 06-12-2012, and discussed above in section 2 4 and Mills (2014) *PELJ*.

⁷²⁰ Mills (2014) *PELJ* 281-282.

From the above discussion, it is evident that the restricted use of trade marks, should it be offered as a possible method of regulation in seeking to combat childhood obesity, will have implications for the field of intellectual property and trade mark law.⁷²¹ Such possible implications will be discussed in chapter 8 below. It will be argued that, in the same way in which it was explained at chapter 4 at 2 4 of this thesis, any restriction placed upon intellectual property must also be reasonable and proportionate, and efficient in serving the intended purpose of the limitation.

4 Parental responsibilities and rights

4 1 The parent-child relationship

The parent-child relationship is a complex, yet simple relationship; one, which has sometimes been surprisingly and persistently constant, yet fluid enough to adapt to varying circumstances. In much the same way, the concepts of “childhood” and “parenthood”— which are intimately linked — are mutable and subject to social, political and economic contexts.⁷²² The answers to the questions as to what is considered a family, and in particular, who and what is a parent, have changed quite considerably in recent years, and are complicated by the advances in reproductive technology.⁷²³ A number of people may have to assume parental duties and responsibilities in various sets of circumstances and, as a result, may have to care for

⁷²¹ Such measures have not yet been introduced but the suggestion has recently often been featured by the media. See for example L Jolivet “As bad as cigarettes? Australia looks to plain packaging for junk food” (15-07-2015) *Yahoo News* <<https://ca.news.yahoo.com/blogs/daily-buzz/bad-cigarettes-australia-looks-plain-packaging-junk-food-170450028.html>> (accessed 01-04-2015); G Smith “Would Plain Packaging Help Fight the Childhood Obesity Crisis in Australia?” (2015) *Food Safety* <<https://www.foodsafety.com.au/2015/01/would-plain-packaging-help-the-childhood-obesity-crisis-in-australia/>> (accessed 01-04-2015); Kiwiblog “The push starts for plain packaging of fast food” (2015) *Kiwiblog* <http://www.kiwiblog.co.nz/2015/03/the_push_starts_for_plain_packaging_of_fast_food.html> (accessed 01-04-2015).

⁷²² A Bainham, SD Sclater & M Richards *What is a parent? A Socio-Legal Analysis* (1999) 1.

⁷²³ This distinction between “social” and “biological” parenthood is quite evident in the dictionary definition of “parent”, being described as “a person who is a father or mother: a person who has a child; ... a) one that begets or brings forth offspring; [and] b) a person who brings up and cares for another” Merriam Webster Online Dictionary, available at <<http://www.merriam-webster.com/dictionary/parent>> (accessed 20-01-2015). It is interesting to note that, although both the CRC and the ACRWC consider the family as a natural and fundamental unit of society, crucial to the growth and well-being of children, neither of the documents of international law defines the terms “family” or “parents”. See also AE Boniface “Revolutionary changes to the parent-child relationship in South Africa” in J Sloth-Nielsen & Z Du Toit (eds) *Trials and Tribulations, Trends and Triumphs* (2008) 156-159 describing how the definition of the term “family” has been developed by the South African courts and legislation.

a child.⁷²⁴ The extent and scope of these parental duties may also vary in different contexts but in all instances remain subject to the promotion of the best interests of the child. In chapter 3 it was established that, in terms of Articles 3, 5 and 18 of the CRC, parents have to perform their responsibilities, duties and rights in such a manner that their children's best interests always remain their basic concern.

Whereas parents are entitled to certain fundamental rights and freedoms, State Parties to the CRC must implement appropriate measures to balance parental authority with that of the rights of the child. Therefore, even though the CRC does not seek to regulate private family decisions, Article 3(2) of the Convention provides that State Parties will "ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures." Chapter 3 provided the conclusion that in the context of this research, it is in children's best interests to be provided with nutritious food and clean drinking water in order to fulfil, *inter alia*, their rights to life, health, survival and development. As a result, it can be said that parents, with assistance from the state, have the responsibility to realise these rights.

In chapter 3 of this thesis it was also explained how notions regarding parental power, authority and rights have changed significantly throughout history.⁷²⁵ Today much more emphasis is placed on parental duties and responsibilities and a deliberate manifestation of this paradigm shift is found, for example, in the terminology used in legislation.⁷²⁶ In South Africa, the courts have been instrumental in the paradigm shift, as is evident from the following remarks by Foxcroft J in *V v V*:

⁷²⁴ See for example the definition of parental responsibilities and rights included in s 18(2) of the South African Children's Act 38 of 2005, explaining that persons who have parental responsibilities and rights in respect of a child have to care for that child. The content and meaning of the term "care" will be explored below.

⁷²⁵ Schäfer *Child Law in South Africa* 213 is of the opinion that the basis on which parental power, known as "*ouerlijke macht*" to the Dutch legal scholars, was assigned, has not changed much since the seventeenth century.

⁷²⁶ The South African Law Reform Commission, in its Discussion Paper on the *Review of the Child Care Act* (Project 110, 2002) 8 3 4 reached the conclusion that the "common law concept of 'parental power' [was] outmoded and unsatisfactory." See also Boniface "Revolutionary changes to the parent-child relationship in South Africa" in *Trials and Tribulations, Trends and Triumphs*, in particular 151-153. See also A Skelton "Parental Responsibilities and Rights" in T Boezaart (ed) *Child Law in South Africa* (2009) 63 explaining that the Children's Act specifically refers to "parental responsibilities and rights" instead of "parental rights and responsibilities" in order to stress the importance of parents' responsibilities towards their children, whilst recognising the validity of parental rights. See also the brief discussion at 4 2 below.

“There is no doubt that over the last number of years the emphasis in thinking in regard to questions of relationships between parents and their children has shifted from a concept of parental power of the parents to one of parental responsibility and children's rights. Children's rights are no longer confined to the common law, but also find expression in s 28 of the Constitution of the Republic of South Africa Act 108 of 1996, not to mention a wide range of international conventions.”⁷²⁷

Despite the fact that the emphasis has moved away from the power and authority of parents over their children, the relationship between parents and children is still often formulated in terms of the rights that parents have over their children. The notion of parental authority, which has been described as the sum of all of the rights and responsibilities a parent has over a child,⁷²⁸ is one which will not easily disappear. Ownership is embedded in the concept of parental authority, accompanied by a sense of entitlement that a parent has over a child. Human explains that, in terms of this approach, parents feel that they are entitled to a type of benefit deriving from the fact that they are parents.⁷²⁹ Since parents “own” their children, and parents are expected to develop their children into particular types of persons, parents have the right to take decisions for and on behalf of their children. In terms of this model parents first and foremost have fundamental rights merely because of their status as parents and their responsibilities play a secondary role.⁷³⁰

This type of reasoning was especially evident in the arguments raised by the applicant mother in *Gillick v West Norfolk and Wisbech Area Health Authority* (“*Gillick*”).⁷³¹ However, the now well-known statement of Lord Scarman, writing for the majority, declared that “parental rights are derived from parental duty and exist only so long as they are needed for the protection of the person and property of the child.”⁷³²

⁷²⁷ V v V 1998 4 SA 169 (C) 176C-D.

⁷²⁸ E Spiro *The Law of Parent and Child* (1985) 42; CS Human “Kinderregte en ouerlike gesag: ‘n Teoretiese perspektief” (2000) 11 *Stell LR* 71 79; Skelton “Parental Responsibilities and Rights” in *Child Law in South Africa* 63.

⁷²⁹ Human (2000) *Stell LR* 79.

⁷³⁰ 79.

⁷³¹ 1986 1 AC (HL) 112. In this matter a mother sought an order declaring a circular from the Department of Health and Social Security permitting a doctor to provide contraceptives to children without their parents' consent, to be unlawful. Mrs Gillick's argument was that the provision of such items to any of her children under the age of 16 without her consent would be inconsistent with her parental rights. The majority of the House of Lords rejected the argument that a parent has absolute control over a child and found that a girl's capacity to make decisions regarding contraception would depend on her maturity and level of intelligence to comprehend the implications of her decision.

⁷³² 184B.

Lord Fraser agreed with him in explaining the second and more contemporary approach to parenthood in the following terms:

“[P]arental rights to control a child do not exist for the benefit of the parent. They exist for the benefit of the child and they are justified only in so far as they enable the parent to perform his duties towards the child, and towards other children in the family.”⁷³³

In terms of this approach, parents have responsibilities and rights over their children so as to fulfil their duties towards children. Parents are to take decisions for their children insofar as their children cannot do so themselves.⁷³⁴ Bainham has explained this ideology as one in terms of which parental powers only survive unless the best interests of the child “demand that they are overridden.”⁷³⁵ In line with the exposition of the concept of the best interests of the child provided in chapter 3, Bainham explains as follows:

“This could be interpreted as a reiteration of the familiar welfare principle but with the significant modification that the assessment of the child’s best interests (upon which depends the lawfulness of the parents’ proposals) would be made by third parties dealing with the child and/or the parents and not by the courts.”⁷³⁶

It can therefore be said that parents, as the primary care-givers, are predominantly responsible for the welfare of and meeting the basic needs of their children. This responsibility is often couched in terms of available means,⁷³⁷ while acknowledging the parental right to freedom of choice in making the decisions as to the daily methods of care of their children. Whilst as adult consumers, parents have the right to choose which products will be consumed within their households, parents first and foremost have some crucial responsibilities and duties to fulfil. The most important and general of these duties of parents and other care-givers of children is that of promoting the best interests of the child.⁷³⁸ In fact, a Committee of Ministers of the European Union

⁷³³ 170D. Woolf J from the Queen’s Bench Division of the High Court even questioned the existence of parental rights, asking whether it was accurate to state that parents have rights at all, and thought it more appropriate to only refer to parental responsibilities and duties. A Bainham “The balance of power in family decisions” (1986) 45 *CLJ* 262 267.

⁷³⁴ Human (2000) *Stell LR* 79.

⁷³⁵ A Bainham *Children, Parents and State* (1988) 51.

⁷³⁶ 52.

⁷³⁷ See for example s 1 of the Children’s Act, discussed below, which explains that “‘care’, in relation to a child, includes, where appropriate — (a) within available means” providing the child with a suitable place to live; living conditions that are conducive to the child’s health, well-being and development; and the necessary financial support.

⁷³⁸ See ch 3, section 3 3 2.

explained in an Explanatory Memorandum, “parental responsibility” in the following terms:

“[a] modern concept according to which parents are, on a ... basis of equality ... and in consultation with their children, given the task to educate, legally represent, maintain, etc their children. In order to do so they exercise powers to carry out duties in the interests of the child and not because of an authority which is conferred on them in their own interests.”⁷³⁹

4.2 The meaning of parental responsibilities and rights

The statement by the English Law Commission in their *Review of Child Law: Guardianship and Custody*, confirmed this contemporary approach to parenthood and the reasoning by the House of Lords in *Gillick*, in that the Law Commission stated that references to parents’ rights in legislation is likely to confuse. As a result, sections 2 and 3 of the UK Children Act, 1989 refer to only parental responsibilities, although this includes “all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property”.⁷⁴⁰ Similarly, legislation in British Columbia in Canada and the Australian Capital Territory state that parents have parental responsibilities only and place much emphasis on the care of a child or young person.⁷⁴¹ The terminology has been firmly entrenched in international law due to the use thereof in the CRC, the ACRWC, the Hague Conventions on the Protection of Children and Co-operation in respect of Intercountry Adoption (1993) and on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures of the Protection of Children (1996), and the Brussels II Regulation of the European Union (2003).

⁷³⁹ Council of Europe, Committee of Ministers, Recommendation No R (84) 4 (adopted by the Committee of Ministers on 28 February 1984 at the 367th meeting of the Ministers’ Deputies).

⁷⁴⁰ S 3(1).

⁷⁴¹ See especially s 41 of the Family Law Act [SBC 2011] Ch 25 of British Columbia and Division 1.3.2 of the Children and Young People Act 2008 of the Australian Capital Territory (ss 15 – 21). Schäfer *Child Law in South Africa* 216 lists a number of jurisdictions which has adopted the “parental responsibility” terminology but notes the exceptions of France and Spain which still use the concepts of parental authority and *patria potestas*. From a comparative perspective it is further interesting to note that in terms of the Parental Responsibility legislation in Canada (in the provinces of Manitoba, Ontario and British-Columbia) and in certain states in the USA parents are held financially responsible for any property loss, damage or destruction intentionally caused by their children. In these circumstances parental responsibilities refer to the liability which parents have in terms of tort law or criminal law for the actions of their children. See for example the British Columbian Parental Liability Act [SBC 2001] Ch 45. In South Africa too the parental liability as to damage caused by their children is found in the law of delict and a guardian will be held personally liable if a child is used as an agent or instrument to cause damage. See in this regard J Heaton *The South African Law of Persons* (4th ed) (2012) 89 and the cases cited in fn 64.

The Children's Act refers to "parental responsibilities and rights" but explains the meaning of this phrase to relate more to the duties which parents have towards their children. In terms of section 1, read with section 18 of this act, a person with parental responsibilities and rights in respect of a child has to care for the child; maintain contact with the child; act as guardian of the child; and contribute to the maintenance of the child. Section 1(2) of the act explains that the common law meanings of "custody" and "access" must be construed to also include the definitions of "care" and "contact".⁷⁴² Upon closer inspection of the descriptors of these terms, it appears that only "contact" assigns a parental right in the sense that the parent has a right, as well as the corresponding duty, to maintain a personal relationship with the child, also in circumstances where the parent does not live with the child, by "being visited by the child".⁷⁴³ The challenge, of course, is to translate the above legal provisions into the lived reality of the intimate parent-child relationship. In what follows, the parental responsibilities and rights specifically pertaining to a child's daily food intake, in juxtaposition with state obligations, will be discussed.

Although the perception is often that parental responsibilities consist mainly of financial responsibilities, maintenance is merely one aspect of a parent's duties. A parent's role is far more complex, as Mothle J of the North Gauteng High Court explained these obligations in the following way:

"In my view ... the content of the right to parental care goes further than just the need for financial support. From the time of the birth of a child there are numerous duties which parents have to perform and where money is not a factor. These would include teaching the child to eat, to put on clothes, to tie shoes, to use ablution facilities, to walk, to talk, to respect, to express appreciation, to do homework and perform house chores, and to be present and supportive of the child during his/her participation in sport and art activities. The list is endless and no attempt is made here to create a *numerus clausus*. These parental care duties are performed to assist the child in preparing for life's challenges. They

⁷⁴² For commentary on the rather peculiar prescriptive language used in the act and the confusion it causes as to the terminology to be used in court proceedings, see N Zaal & M Couzens "Articulating Common Law and Statutory Parental Responsibilities: *Wheeler v Wheeler and other cases*" (2012) *TSAR* 188.

⁷⁴³ "Contact", in relation to a child, is defined as "(a) maintaining a personal relationship with the child; and
(b) if the child lives with someone else – (i) communication on a regular basis with the child in person, including – (aa) visiting the child; or (bb) being visited by the child; or (ii) communication on a regular basis with the child in any other manner, including – (aa) through the post; or (bb) by telephone or any other form of electronic communication".

could be referred to as parental guidance, advice, assistance, responsibility, or simply parenting or child nurturing.⁷⁴⁴

Being nurtured and being dependant on other people form a substantial part of a child's life. Parents need to take care of their children. Parents also need to care for their children. In this respect, Tronto has observed that while care is intrinsic to human life, we do not think about what it actually means to care about someone, to care for or take care of someone, and receiving care.⁷⁴⁵ It also has to be borne in mind that taking care of a child is different from caring for an ill spouse or elderly parent.⁷⁴⁶ So too is taking care of a baby different from caring for an adolescent child. Nevertheless, in general terms, caring for a child relates to taking care of the child's everyday basic needs – albeit physical, spiritual or mental. In more precise terms, “care” refers to the vital tasks of feeding and clothing; providing a home and safe environment; nursing during sickness – including the provision of medical treatment; ensuring an education; protecting from harm whilst promoting physical and mental well-being; nurturing social and intellectual development; and providing appropriate moral guidance and discipline.⁷⁴⁷ The South African Children's Act accordingly defines “care” in relation to a child in the following terms:

- “(a) within available means, providing the child with –
 - (i) a suitable place to live;
 - (ii) living conditions that are conducive to the child's health, well-being and development; and
 - (iii) the necessary financial support;
- (a) safeguarding and promoting the well-being of the child;
- (b) protecting the child from maltreatment, abuse, neglect, degradation, discrimination, exploitation and any other physical, emotional or moral harm or hazards;
- (c) respecting, protecting, promoting and securing the fulfilment of, and guarding against any infringement of, the child's rights set out in the Bill of Rights and the principles set out in Chapter 2 of this Act;

⁷⁴⁴ *M v Minister of Police* 2013 5 SA 622 (GNP) [22]. In the UK Hale LJ appropriately explained in *Parkinson v St James and Seacroft University Hospital NHS Trust* [2001] EWCA 530 paras 70-71 that “[p]arental responsibility is not simply or even primarily a financial responsibility... The primary responsibility is to care for the child. The labour does not stop when the child is born. Bringing up children is hard work ... The obligation to provide or make acceptable and safe arrangements for the child's care and supervision lasts for 24 hours a day, 7 days a week, all year round, until the child becomes old enough to take care of himself.”

⁷⁴⁵ J Tronto *Moral Boundaries: the Political Argument for an Ethic of Care* (1993) 105-107 and 125 as cited by J Bridgeman “Accountability, support or relationship? Conceptions of parental responsibility” (2007) 58 *NILQ* 307 309.

⁷⁴⁶ Bridgeman (2007) *NILQ* 309.

⁷⁴⁷ 309.

- (d) guiding, directing and securing the child's education and upbringing, including religious and cultural education and upbringing, in a manner appropriate to the child's age, maturity and stage of development;
- (e) guiding, advising and assisting the child in decisions to be taken by the child in a manner appropriate to the child's age, maturity and stage of development;
- (f) guiding the behaviour of the child in a humane manner;
- (g) maintaining a sound relationship with the child;
- (h) accommodating any special needs that the child may have; and
 - (i) generally, ensuring that the best interests of the child is the paramount concern in all matters affecting the child".⁷⁴⁸

This legislative attempt of explaining what it means to care for a child is of course just that. It is submitted that these legislative descriptions of what it means to be a parent cannot fully convey the reality of this special human bond which exist between a parent and child. Sachs J captured some of the essence of what it means to be a parent, and especially a parent's supervisory role, as follows:

"[P]arents serve as the most immediate moral exemplars for their offspring. Their responsibility is not just to be with their children and look after their daily needs. It is certainly not simply to secure money to buy the accoutrements of the consumer society, such as cell phones and expensive shoes. It is to show their children how to look problems in the eye. It is to provide them with guidance on how to deal with setbacks and make difficult decisions. Children have a need and a right to learn from their primary caregivers that individuals make moral choices for which they can be held accountable."⁷⁴⁹

Nevertheless, in attempting to describe the concept of care in relation to a child, many pieces of legislation share a number of common descriptors. It is interesting to note that the definition of "parental responsibilities" found in section 41 of the recently enacted Family Law Act of British Columbia in Canada compares to the definition of "care" found in the South African Children's Act.⁷⁵⁰ Also in Australia, section 19 of the

⁷⁴⁸ S 1 of the Children's Act. A "care-giver" is defined as being "any person other than a parent or guardian, who factually cares for a child and includes- (a) a foster parent; (b) a person who cares for a child with the implied or express consent of a parent or guardian of the child; (c) a person who cares for a child whilst the child is in temporary safe care; (d) the person at the head of a child and youth care centre where a child has been placed; (e) the person at the head of a shelter; (f) a child and youth care worker who cares for a child who is without appropriate family care in the community; and (g) the child at the head of a child-headed household".

⁷⁴⁹ *S v M (Centre for Child Law as Amicus Curiae)* 2008 3 SA 232 (CC) at [34].

⁷⁵⁰ Section 41 of the act, which came into effect in March 2013, provides:

"For the purposes of this Part, parental responsibilities with respect to a child are as follows: (a) making day-to-day decisions affecting the child and having day-to-day care, control and supervision of the child; (b) making decisions respecting where the child will reside; (c) making decisions respecting with whom the child will live and associate; (d) making decisions respecting the child's education and participation in extracurricular activities, including the nature, extent and location; (e) making decisions respecting

Children and Young People Act 2008 of the Australian Capital Territory describes “daily care responsibility” as including making decisions about a child or young person’s daily activities and care.⁷⁵¹ In line with the second approach to parenthood, described in section 4.1 above, it would appear that the legislative trend is to define activities of parental care in terms of responsibilities, connoting a sense of duty rather than that of rights.

In response to the above definitions, it needs to be stressed that, in terms of care, parents do not have the responsibility to provide their children with the best, or for that matter even the best possible, foods, clothes or education. The duty upon parents and care-givers, in fact, is to safeguard the best interests of their children. They must ensure that none of the rights which their children have, are violated; that, as far as is within their control, their children remain both physical and mentally healthy; and that they guide their children in making responsible decisions when they reach a level of maturity and understanding to do so. To this end, the basic necessities, as long as it meets certain nutritional requirements, for example, will suffice. It is the obligation of parents to look out for their children’s welfare and to protect them from harm. This is their parental responsibility. This, essentially, is what it means to be a good parent.

Although the rigid common law model of parental authority, based in an outdated moral view of “good” and “bad” parents, has been abolished,⁷⁵² most parents still strive to be “good parents”. However, what it means to be a “good” parent may not always be all that simple and seemingly clear to everyone. Marketers know this and often exploit this natural inclination of trying to be a “good” parent by portraying their concepts of “good parenting” in food advertisements. Food marketing messages often portray parents who are fun, adventurous and agreeing to their children’s wishes, as parents who get the “best results” from their children, depicting a happy and smiling family as being the ultimate goal. Parents who do not let their children have fun by

the child's cultural, linguistic, religious and spiritual upbringing and heritage, including, if the child is an aboriginal child, the child's aboriginal identity; (f) subject to section 17 of the Infants Act, giving, refusing or withdrawing consent to medical, dental and other health-related treatments for the child; (g) applying for a passport, licence, permit, benefit, privilege or other thing for the child; (h) giving, refusing or withdrawing consent for the child, if consent is required; (i) receiving and responding to any notice that a parent or guardian is entitled or required by law to receive; (j) requesting and receiving from third parties health, education or other information respecting the child; (k) subject to any applicable provincial legislation, (i) starting, defending, compromising or settling any proceeding relating to the child, and (ii) identifying, advancing and protecting the child's legal and financial interests; (l) exercising any other responsibilities reasonably necessary to nurture the child's development.”

⁷⁵¹ The Children and Young People Act 2008 of the Australian Capital Territory (ss 15 – 21)..

⁷⁵² Schäfer *Child Law in South Africa* 214.

letting them enjoy sweets, biscuits, fast foods and all sorts of other “fun” foods, are shown to be embarrassing and examples of “bad parents”.⁷⁵³

The manner in which to be a parent is often described as being an individual choice. However, it is also clear that “good” parents are driven by wanting to do what is best for their children, requiring “ethical self-management within the moral parameters of normative definitions of “successful parenting”.”⁷⁵⁴ Accordingly, it can be said that individual autonomy in deciding how to raise a child will be limited by community norms and social values. Parents must raise their children, guide and control them and assist them in becoming healthy and well-balanced members of the community.⁷⁵⁵ To be a “good” and responsible parent is therefore to take responsibility for and care of a child’s welfare in the public interest.⁷⁵⁶ Being a good parent is indeed not an easy task and one that cannot be reduced to a list of responsibilities and rights. Moreover, when parents have to promote their children’s best interests, a simplistic and one-dimensional approach will also not suffice.

4 3 The evolving capacities of the child

One such an important aspect, which need to be considered in a comprehensive approach, is that of the evolving capacities of the child.⁷⁵⁷ Despite the fact that the children’s vulnerabilities provide a justification for the special rights accorded to them in terms of international law, there is a risk that children can become defined by their vulnerabilities.⁷⁵⁸ As was described above, children look to their parents for advice and guidance, which will ultimately provide them with the tools to make responsible decisions for themselves. As a result, the fact that a child is constantly developing more capabilities and skills needs to be considered. In chapter 3 it was explained that the best interests of the child cannot be fully implemented if the views of the child, capable of expressing them, are not respected. The degree to which effect will be

⁷⁵³ Wilcox *et al* “Report of the APA Task Force on Advertising and Children” (20-02-2004) *American Psychological Association* 23 – 24. The important association which marketers have created between fun and food was also described in chap 2 above.

⁷⁵⁴ V Gillies “Meeting Parents’ Needs? Discourses of ‘Support’ and ‘Inclusion’ in Family Policy” (2005) 25 *Critical Social Policy* 70 77 as quoted by Bridgeman (2007) *NILQ* 318.

⁷⁵⁵ Bridgeman (2007) *NILQ* 318.

⁷⁵⁶ This argument is further canvassed by A Bainham “The Privatisation of the Public Interest in Children” (1990) 53 *Mod LR* 206 207.

⁷⁵⁷ As explicitly catered for in Art 5 of the CRC, discussed above.

⁷⁵⁸ Tobin “Understanding Children’s Rights: A Vision beyond Vulnerability” (2015) 84 *Nordic J Int’l L* 155-182.

given to such views of the child will depend on the age, level of development and maturity of the child: the evolving capacities of the child will have to be taken into account. In order to develop a child's capacities, parents and other care-givers must provide the appropriate guidance and direction.⁷⁵⁹

One staunch advocate of the child's right to autonomy, Freeman, has often explained how important it is for the child to be able to develop in such a manner that she will be able to partake in the decisions as to what are in her best interests. In terms of his "liberal paternalism" parents have the responsibility to continuously consider the development of their children's capabilities throughout their lives.⁷⁶⁰ Lord Denning powerfully explained that the scope of parental authority "starts with a right to control and ends with little more than advice."⁷⁶¹ This approach appealed to both Lord Fraser and Lord Scarman in the *Gillick* decision, quoting Lord Denning with approval and finding that parental rights will yield to the child's right to make her own decisions when she "reaches a sufficient understanding and intelligence to be capable of making up his own mind on the matter requiring decision."⁷⁶² This is also the view of the Committee on the Rights of the Child, who has commented as follows:

"These adjustments [to the levels of support and guidance parents offer their child] take account of a child's interests and wishes as well as the child's capacities for autonomous decision-making and comprehension of his or her best interests. While a young child generally requires more guidance than an older child, it is important to take account of individual variations in the capacities of children of the same age and of their ways of reacting to situations. Evolving capacities should be seen as a positive and enabling process, not an excuse for authoritarian practices that restrict children's autonomy and self-expression and which have traditionally been justified by pointing to children's relative immaturity and their need for socialization. Parents (and others) should be encouraged to offer "direction and guidance" in a child-centred way, through dialogue and example, in ways that enhance young children's capacities to exercise their rights, including their right to participation (art 12) and their right to freedom of thought, conscience and religion (art 14)."⁷⁶³

To this end, it is submitted that parents must be guided and equipped themselves so that their children will also make decisions that are in their own best interests. As

⁷⁵⁹ See also arts 3, 5 and 18 of the CRC, as discussed above at ch 3.

⁷⁶⁰ Freeman *The Rights and Wrongs of Children* 54–60.

⁷⁶¹ *Hewer v Bryant* 1970 1 QB 357 369.

⁷⁶² Lord Scarman in *Gillick v West Norfolk and Wisbech Area Health Authority* 1986 1 AC (HL) 112 186D.

⁷⁶³ General Comment No 7 (2005) 8, also referred to at section 4.4 of ch 3 of this thesis.

consumers, parents have the right to the relevant and correct information regarding the products they consume.⁷⁶⁴ This information will in turn enable them to guide their children to also make the most appropriate consumer choices.

As mentioned above, it is crucial that, in line with these evolving capacities of children, children themselves, as evolving consumers, are likewise equipped to make informed decisions. In chapter 3 it was explained how the state has the duty to ensure that children have access to information and that it must motivate and support the mass media industry in distributing information to children which will promote a healthy lifestyle.⁷⁶⁵ It was also explained that the right to receive communication is essential in the marketplace, also to the child consumer. This particular group of consumers too need to have the appropriate knowledge and the correct information in order to make informed decisions regarding the products which they consume, or in this case, eat and drink. One group of child consumers, who specifically needs to have accurate information and messages promoting a healthy lifestyle, is that of adolescents. In chapter 3 at 4 2 of this thesis it was explained how this group is a particularly vulnerable group who are at risk since they are subject to many external influences and peer pressure. At an age where body image becomes a vital aspect of a child's feeling of self-worth and acceptance, the Committee on the Rights of the Child has emphasised that marketing practices have an especially powerful effect on children. Yet, as was explained in chapter 2, marketers bombard teenagers in particular with sales promotions and images of popular sport stars, entertainers and singers, and other celebrities promoting foods saturated in fat, sugar and salt.

4 4 The state's role as *parens patriae*

The presumption that parents will act in their children's best interests, is one which has existed for many years. Many family law systems have been developed around the expectation that parents will love and protect their children and that they will therefor automatically make the correct choices for their children.⁷⁶⁶ As was the case

⁷⁶⁴ See for example ss 22–28 of the CPA providing that consumers have the right to disclosure and information, including the right to correct product labelling.

⁷⁶⁵ See the text to section 4 5 of ch 3 of this thesis.

⁷⁶⁶ MP Thomas "Child abuse and neglect, part 1: Historical overview, legal matrix and social perspectives" (1972) 50 *NCL Rev* 293-294 as quoted by Richett & Hudson (1979) *J Soc and Soc Welfare* 852. See also R Farrugia "Parental Responsibility and State Intervention" (2000-2001) 31 *Cal W Int'l LJ* 127.

in Roman law, the state was also not allowed to interfere in this private relationship in terms of English common law and in 1259 an English statute was promulgated to formally recognise this aspect.⁷⁶⁷ The rationale for this piece of legislation was explained as follows:

“The relationship between the parent and the child was a trust. The right was endowed by the crown as a trust because it was assumed that the parent would discharge faithfully on behalf of his child. If the trust were not faithfully discharged, it would be incumbend [sic] upon the crown to intervene and to protect the child's interest... The state would act as a guarantor of the trust.”⁷⁶⁸

The law in the USA, based on the English common law system, similarly viewed the state as the “guarantor of this trust”.⁷⁶⁹ As *parens patriae*, the state could only act as a parent of the last instance in instances where parents have failed to provide the required level of care.⁷⁷⁰

Today the right to privacy of the family is entrenched in international law. Article 12 of the Universal Declaration of Human Rights states that “[n]o one shall be subjected to arbitrary interference with his privacy, family, home or correspondence”.⁷⁷¹ Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms extends the protection of this right, by providing that “[t]here shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society ... for the protection of health or morals, or for the protection of the rights and freedoms of others”.⁷⁷² It must be emphasised that children too have this right and it is notably also protected in Article 16 of the CRC which provides as follows:

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

⁷⁶⁷ The Provisions of Westminster, 1259, available at <http://historyofengland.typepad.com/documents_in_english_hist/2012/10/the-provisions-of-westminster-1259.html> (accessed 23-01-2015).

⁷⁶⁸ BG Fraser “The Child and his parents: a delicate balance of rights” in RE Helfer & CH Kempe (eds) *Child abuse and neglect: the family and the community* (1976) 332 as quoted by Richett & Hudson (1979) *J Soc and Soc Welfare* 854.

⁷⁶⁹ R Bremner *Children and youth in America. A documentary history, 1600-1865* (1970) 364 as quoted by Richett & Hudson (1979) *J Soc and Soc Welfare* 858.

⁷⁷⁰ See ch 3 at 2.2.

⁷⁷¹ Text of the Declaration available at <<http://www.un.org/en/documents/udhr/>> (accessed 23-01-2015).

⁷⁷² Text of the Convention available at <<http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm>> (accessed 23-01-2015).

2. The child has the right to the protection of the law against such interference or attacks.”

The state is therefore unable to interfere in the everyday decisions which parents make in taking care of their children and the government cannot dictate to parents how to raise their children.⁷⁷³ Nonetheless, as was explained above, the state has the obligation to provide parents with the guidance and assistance to be able to know what their parental responsibilities are and how to perform them to the best of their abilities. The South African Constitutional Court, in *Government of the Republic of South Africa v Grootboom*⁷⁷⁴ explained this obligation as follows:

“The extent of the State obligation must also be interpreted in the light of the international obligations binding upon South Africa. The United Nations Convention on the Rights of the Child, ratified by South Africa in 1995, seeks to impose obligations upon State parties to ensure that the rights of children in their countries are properly protected. Section 28 is one of the mechanisms to meet these obligations. It requires the State to take steps to ensure that children's rights are observed. In the first instance, the State does so by ensuring that there are legal obligations to compel parents to fulfil their responsibilities in relation to their children. Hence, legislation and the common law impose obligations upon parents to care for their children. The State reinforces the observance of these obligations by the use of civil and criminal law as well as social welfare programs.”

The state consequently has the authority to interfere with family life. If it refrains from doing so, it may be interpreted to be an endorsement of the existing state of affairs.⁷⁷⁵ However, as was explained above, if parental care does not meet a normative standard, the state has the international legal obligation to interfere. Particularly in instances of abuse and neglect,⁷⁷⁶ where the rights, health or morals of a child need

⁷⁷³ Bridgeman (2007) *NILQ* 319 citing the Home Office *No more excuses: A new approach to tackling youth crime in England and Wales* (1997) para 3.2. Lord Templeman in *Re KD (A Minor: Ward: Termination of Access)* [1988] 1 AC 806 812 explained the position rather well:

“The best person to bring up a child is the natural parent. It matters not whether the parent is wise or foolish, rich or poor, educated or illiterate, provided the child's moral and physical health are not in danger. Public authorities cannot improve on nature.”

⁷⁷⁴ 2001 1 SA 46 (CC).

⁷⁷⁵ Bainham (1990) *Mod LR* 207.

⁷⁷⁶ In terms of the South African Children's Act, “abuse” is defined as “any form of harm or ill-treatment deliberately inflicted on a child, and includes ... (e) exposing or subjecting a child to behaviour that may harm the child psychologically or emotionally.” “Neglect” is in turn defined as “a failure in the exercise of parental responsibilities to provide for the child's basic physical, intellectual, emotional or social needs.” In terms of s 305(3)(a) a parent, guardian, other person who has parental responsibilities and rights in respect of a child, care-giver or person who has no parental responsibilities and rights in respect

to be protected, the state has the obligation to act in the best interests of the child – even if that would require the child to be removed from her parents.⁷⁷⁷ It would certainly be more desirable for the state to not let the situation reach this unfortunate level of abuse by rather implementing, in accordance with Article 3(2) of the CRC, “appropriate legislative and administrative measures” which will guide and support parents as to how to perform their duties and responsibilities in such a manner which will be conducive to the child’s well-being. Once again, the Constitutional Court has provided confirmation of this state obligation in the following words:⁷⁷⁸

“This does not mean, however, that the State incurs no obligation in relation to children who are being cared for by their parents or families. In the first place, the State must provide the legal and administrative infrastructure necessary to ensure that children are accorded the protection contemplated by s 28. This obligation would normally be fulfilled by passing laws and creating enforcement mechanisms for the maintenance of children, their protection from maltreatment, abuse, neglect or degradation, and the prevention of other forms of abuse of children mentioned in s 28. In addition, the State is required to fulfil its obligations to provide families with ... access to health care, food, water and social security in terms of s 27.”

To ensure that parents perform their duties, cannot be said to be an undue intrusion upon parental responsibilities and rights since parents are, in a sense, performing a public service by advancing the public interest.⁷⁷⁹ In fact, there are also many instances where parents will not necessarily be best equipped to make decisions about their children’s interests and where they would need expert advice as to which route to follow. One such instance may exist in circumstances where medical

of a child but who voluntarily cares for the child either indefinitely, temporarily or partially, is guilty of an offence if that parent or care-giver or other person ... abuses or deliberately neglects the child”. In the context of this research, it is interesting to note that s 305(4) provides that a person who is legally liable to maintain a child is guilty of an offence if that person, while able to do so, fails to provide the child with, *inter alia*, adequate food. The term “adequate food” is not defined in the Act.

⁷⁷⁷ Art 9(1) of the CRC provides that “States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child’s place of residence.” See also the wording of Art 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms as referred to above.

⁷⁷⁸ In the *Grootboom* decision at [78], as well as in *Minister of Health v Treatment Action Campaign* (No 2) 2002 5 SA 721 (CC).

⁷⁷⁹ Bainham (1990) *Mod LR* 207.

professionals need to advise as to the best option in respect of medical treatment of a child. In other instances, for example in choosing a baby's name or their religious affiliation, it may be difficult to establish objective criteria on which to base decisions regarding a child. In these circumstances, parents will probably be in the best position to make these decisions on their children's behalf, or at least for the time being.⁷⁸⁰ The challenge for the state, and indeed for the law, is to encourage parents to make all of their decisions in the interests of their children, rather than in the interests of themselves.⁷⁸¹

5 Conclusion

The protection of human rights is essential to the survival of a free and democratic society. In this chapter it was shown that the right to freedom of commercial speech, the right to intellectual property and parental responsibilities and rights are all fundamental in a constitutional dispensation such as that of South Africa. Nevertheless, it is globally acknowledged that, as important as these rights may be, these freedoms may be curtailed in certain circumstances. Many jurisdictions have devised a method of assessment which establishes whether the restriction placed upon the right can be justified in the particular circumstances. In each instance, the limitation must be found to serve the purpose for which it was introduced and may also not be unjustifiably overbroad. Put differently, the restriction of a fundamental right must be rational and proportional to its end.

In the case of the limitation of commercial speech so as to serve the purpose of enhancing public health, there have been a number of court decisions, each adjudicating the regulatory efforts on their own merit. The restrictions discussed in this chapter have mainly related to the prohibition of tobacco and alcohol advertising, purporting to reduce the consumption of such products. Whereas the courts in Canada, the EU and the USA have been very vigilant in protecting commercial speech in these instances, the South African decision in *British American Tobacco v Minister*

⁷⁸⁰ B Walsh "The United Nations Convention on the Rights of the Child: A British View" (1991) *Int J Law & Fam* 170 181-182.

⁷⁸¹ ES Scott "Parental Autonomy and Children's Welfare" (2002 -2003) *Wm & Mary B Rts J*1071 1072-1073. See also the Explanatory Memorandum of the EU Committee of Members, quoted above:

"In order to do so [parents] exercise powers to carry out duties in the interests of the child and not because of an authority which is conferred on them in their own interests."
Council of Europe, Committee of Ministers, Recommendation No R (84) 4 (adopted by the Committee of Ministers on 28 February 1984 at the 367th meeting of the Ministers' Deputies).

of Health has held that a blanket ban on the advertising of tobacco products would be the only way in which the governmental purpose would be achieved. The Constitutional Court has not yet had the opportunity to pronounce its judgement on such a matter.

There has also not yet been a South African test case pertaining to the curtailment of trade marks in an attempt to reduce the consumption of harmful substances. The one example of regulatory measures which prohibit the use of certain trade marks, found in the domain of infant formula, has not been challenged in court and Regulations R991 are currently in force. In relation to the use of tobacco products, the Australian High Court relied on the Framework Convention on Tobacco Control and in essence found that this instrument can be used as justification for a ban on the use of trade marks.

The restriction that may always be placed upon so-called parental rights is that it must in actual fact be exercised as a responsibility to act in children's best interests. Parents have an obligation to care for their children and to meet their basic needs. In order to do so, they must have the support and guidance from the state, assisting parents by informing them of what is best for their children's well-being, and by providing the relevant measures to promote their children's health and development. In line with the evolving capacities of the child, a child need to be taught how to make decisions which are beneficial to her own well-being. The ultimate goal is to raise children who will become adults who themselves will be able to do this again for the next generation of children. In order to justify an intrusion upon private family life, it must be proven that the governmental purpose of also promoting the best interests of children is not being met by the care provided by the parents or care-givers. The state's role in this relationship is rather one of prevention, guidance and empowerment, than the limitation of fundamental rights. Once again, the measures must be proportional and rational in relation to the aim which the state seeks to achieve.

Both chapters 3 and 4 have shown that the state has a central role to play in pursuing the objective of upholding the best interests of the child. Whereas international law provides a generic standard in the form of treaties such as the CRC and the ACRWC, the practical implications of promoting the best interests of children are extensive. Achieving this goal while balancing it with conflicting interests may be easier said than done in the context of the regulation of food-marketing practices to children. The next chapter will consequently explore whether international standards,

specifically drafted within this context and for the purpose of promoting responsible and appropriate food consumption amongst children, provide any assistance in this respect. The chapter will focus on guidelines and codes set by international consumer groups, the marketing industry itself and in particular on the World Health Organisation's Set of Recommendations on the Marketing of Foods and Non-alcoholic Beverages to Children.

CHAPTER 5: MARKETING PRINCIPLES AND GUIDELINES

1 Introduction

From the discussion in the previous chapters it is clear that the recognition, protection and promotion of children's rights in general, and the best interests of the child in particular, have been decisively confirmed by various international declarations, treaties and other instruments of international human rights law. Such instruments furthermore protect human beings' right to adequate food. Despite the fact that many of these treaties were entered into before the threat of obesity rose to the levels it has today, international law recognises that children and their parents are entitled to realise children's full growth and potential, to be free from disease and to have access to a diet that enables physical and mental growth.⁷⁸² Although these declarations, conventions and protocols discussed in chapter 3 do not directly address the issue of marketing of food to children, they provide the fundamental framework from which other international instruments can set specific standards.⁷⁸³

Such international standards have been found in the work of both non-governmental and inter-governmental organisations such as the United Nations, and in particular its Children's Fund ("UNICEF"), the Food and Agriculture Organisation ("FAO"), the WHO, the ICC and the International Association for the Study of Obesity ("IASO"). The research and recommendations from organisations such as these have increasingly provided invaluable guidance in the drafting of regulatory measures implemented worldwide. Many of these bodies have suggested various measures aimed to reduce the exposure and impact of nutritionally poor food-marketing practices. Although it is never explicitly stated that the sole purpose of these recommendations is to promote the best interests of the child, it becomes evident that many of these documents do in fact take cognisance of some of the rights of the child. It is to these guidelines and recommendations that the focus must now turn.

⁷⁸² J Stettner "International Obesity: Legal Issues" (2010) 24 *Emory Int'l L Rev* 209 217.

⁷⁸³ 217.

2 Recommendations by inter-governmental and non-governmental organisations seeking to improve global health

2.1 The World Health Organisation

The WHO in particular has been very vocal in its call for the restrictions of food marketing campaigns to children. Established as a global health organisation by the United Nations in 1948, the WHO's main objective is to direct and coordinate international health within the United Nations system.⁷⁸⁴ One of the six main areas to which the WHO pays particular attention is that of non-communicable diseases.⁷⁸⁵ Since heart disease, stroke, cancer, diabetes and chronic lung disease, and mental health conditions, together with violence and injuries, are collectively responsible for more than 70 percent of all deaths worldwide, and eight out of ten of these deaths occur in low- and middle-income countries,⁷⁸⁶ the WHO has done extensive research on the contributing role which obesity plays in this regard.⁷⁸⁷

One of the most recent developments was the announcement by the WHO Director-General in May 2014 that a high-level Commission on Ending Childhood Obesity had been established.⁷⁸⁸ This commission has been tasked with producing a report specifying which approaches and combinations of interventions are likely to be most effective in tackling childhood and adolescent obesity in different contexts around the world.⁷⁸⁹ In its interim report, published in 2015, the Commission emphasised the fact that childhood obesity is a complex issue that is influenced by a number of factors. As a result, in order to prevent obesity, a multi-sectoral approach across different sectors and levels of society, including government, the private sector and civil society, is required.⁷⁹⁰ Citing some of the “unequivocal evidence” that the marketing of unhealthy

⁷⁸⁴ World Health Organisation “About WHO” (2016) *World Health Organization* <<http://www.who.int/about/en/>> (accessed 24-09-2015).

⁷⁸⁵ The other five areas are health systems; promoting health through the life-course; communicable diseases; corporate services; and preparedness, surveillance and response. World Health Organisation “About WHO” (2016) *World Health Organization*.

⁷⁸⁶ World Health Organisation “What we do” (2016) *World Health Organization*.

⁷⁸⁷ For a list of some of the reports published by the WHO in this regard, see World Health Organisation “Obesity and other diet-related chronic diseases list of publications” (2016) *World Health Organization* <<http://www.who.int/nutrition/publications/obesity/en/>> (accessed 24-09-2015).

⁷⁸⁸ World Health Organisation “Director-General announces new initiative to end childhood obesity” (2014) *World Health Organization* <<http://www.who.int/mediacentre/news/releases/2014/world-health-assembly67/en/>> (accessed 24-09-2015).

⁷⁸⁹ World Health Organisation “About the work of the Commission” (2016) *World Health Organization* <<http://www.who.int/end-childhood-obesity/about/en/>> (accessed 24-09-2015).

⁷⁹⁰ Commission on Ending Childhood Obesity *Interim Report of the Commission on Ending Childhood Obesity* (2015) 10.

food and beverages is related to childhood obesity, the Commission in its interim report stressed that any attempt to tackle childhood obesity should include a reduction in the exposure of children to, and the power of, marketing, as also endorsed by the World Health Assembly.⁷⁹¹ Some of the other initiatives driven by the WHO and the reports published from numerous studies regarding the impact of nutrition, physical activity and food marketing, particularly to children, on the increasing obesity rates will be discussed below.

2 1 1 The Global Strategy on Diet, Physical Activity and Health

Member States at the 2002 WHA requested the Director-General of the WHO to develop a global strategy which would address two of the main risk factors for non-communicable diseases, namely, diet and the lack of physical activity. The Director-General responded by initiating a thorough consultative process, including six regional consultations held with Member States, organisations of the United Nations system, other intergovernmental bodies, and representatives of civil society and the private sector. A reference group of independent international experts on diet and physical activity from the WHO's six regions were also consulted during the process to provide their expertise.⁷⁹² The result of this process was the endorsement of the WHO Global Strategy on Diet, Physical Activity and Health at the eighth plenary meeting of the WHA in May 2004.⁷⁹³

As part of the resolution that was adopted, Member States are urged to develop, implement and evaluate the actions recommended in the Strategy. The Strategy seeks to

- “(1) reduce the risk factors for non-communicable diseases that stem from unhealthy diets and physical inactivity by means of essential public health action and health-promoting and disease preventing measures;
- (2) to increase the overall awareness and understanding of the influences of diet and physical activity on health and of the positive impact of preventive interventions;

⁷⁹¹ 4.

⁷⁹² World Health Organization “Global Strategy on Diet, Physical Activity and Health” (2004) *World Health Organization* <http://www.who.int/dietphysicalactivity/strategy/eb11344/strategy_english_web.pdf>(accessed 11-10-2011).

⁷⁹³ The text of the Global Strategy is available at <http://www.who.int/dietphysicalactivity/strategy/eb11344/strategy_english_web.pdf>(accessed 11-10-2011).

- (3) to encourage the development, strengthening and implementation of global, regional, national and community policies and action plans to improve diets and increase physical activity that are sustainable, comprehensive, and actively engage all sectors, including civil society, the private sector and the media;
- (4) to monitor scientific data and key influences on diet and physical activity; to support research in a broad spectrum of relevant areas, including evaluation of interventions; and to strengthen the human resources needed in this domain to enhance and sustain health.”⁷⁹⁴

The Strategy therefore aims to improve the levels of information regarding nutrition which consumers should have access to, and to encourage physical activity in practical ways. The Strategy furthermore acknowledges that bringing about a change in people’s diet and physical activity will not occur easily or overnight and it therefore stresses that it would require a combined effort by many stakeholders, both public and private, and over several decades. This effort would have to comprise of a combination of sound and effective actions at global, regional, national and local levels, while the impact of these activities have to be closely monitored.⁷⁹⁵

In line with the role of the state as *parens patriae*, the Strategy emphasises the important role that the state has to play in ensuring public health. To this end, it is crucial that Member States, through their governments, understand that they have a “steering and stewardship role” in achieving this change in the public’s perspective of the importance of nutrition supporting a healthy lifestyle.⁷⁹⁶ They must therefore commit themselves to developing and supporting their own policies, strategies and action plans. Support should be provided by means of effective legislation, appropriate infrastructure, implementation programmes, adequate funding, monitoring and evaluation, and continuing research.⁷⁹⁷ Governments should also ensure that accurate and balanced information are provided to consumers to enable them easily to make healthy choices, and ensure the availability of appropriate health promotion and education programmes. When providing this information, Member States must take literacy levels, communication barriers and local culture into account.⁷⁹⁸ The Strategy consequently highlights the importance of educational programmes, including adult literacy programmes, which provide sound knowledge and understanding of the

⁷⁹⁴ The four main objectives are included in para 18.

⁷⁹⁵ Para 34.

⁷⁹⁶ Para 36.

⁷⁹⁷ Para 39.

⁷⁹⁸ Para 40.

relationship between diet, physical activity and health, of energy intake and output, and healthy choices of food items.⁷⁹⁹

More importantly, the Strategy recognises the impact of marketing on food choices and dietary habits and therefore appeal to governments to ensure that food and beverage advertisements do not exploit children's inexperience or credulity. The WHO Global Strategy on Diet, Physical Activity and Health states that messages that encourage unhealthy dietary practices or physical inactivity must be discouraged, and positive, healthy messages must be encouraged. Governments should work with consumer groups and the private sector (including advertising companies) to develop appropriate multi-sectorial approaches "to deal with the marketing of food to children, and to deal with such issues as sponsorship, promotion and advertising."⁸⁰⁰ With regard to labelling of food items, the Strategy provides that consumers require accurate, standardised and comprehensible information on the content thereof in order to make healthy choices. In this regard, governments may require information to be provided on key nutritional aspects, as proposed in the Codex Alimentarius Guidelines.⁸⁰¹ Health claims should also not mislead the public about nutritional benefits or risks.⁸⁰²

Crucial to the purposes of this research, the Strategy furthermore recognises that, since schools influence the lives of most children in all countries, these institutions have a vital role to play in promoting healthy diets, physical activity, and other healthy behaviour. Schools should provide children with the necessary health information, improve health literacy and should consider, together with parents and responsible authorities, issuing contracts for school lunches to local food producers in order to

⁷⁹⁹ Para 40.

⁸⁰⁰ Para 40.

⁸⁰¹ The Codex Alimentarius (the Book of Food) is a global reference point to which consumers, food producers and processors, national food control agencies and the international food trade refer as it provides for hygienic and safety standards, fair trade practices, and guidelines and recommendations for food security. World Health Organisation and Food and Agriculture Organisation of the United Nations *Understanding the Codex Alimentarius* (2006) Preface. The standards, codes of practice, guidelines and recommendations that constitute the Codex Alimentarius, and compiled by the Codex Alimentarius Commission, is available at <<http://www.codexalimentarius.org/standards/list-of-standards/>> (accessed 09-07-2016). One of these guidelines, which is relevant to this thesis, is the Guidelines on Nutrition Labelling (CAC/GL 2-1985). These guidelines which were adopted in 1985, revised in 1993 and 2011 and since been amended on numerous occasions, seek to, *inter alia*, ensure that consumers be provided with information such as a suitable profile of nutrients contained in the food and considered to be of nutritional importance, enabling consumers to make informed choices. (Text available at <http://www.codexalimentarius.org/download/standards/34/CXG_002e_2015.pdf> (accessed 09-07-2016)).

⁸⁰² Para 40. The Strategy advocates the promotion of healthy foods in general: see for example also paras 41 and 43.

ensure a local market for healthy foods. Governments are furthermore encouraged to adopt policies that support healthy diets at school and limit the availability of products high in salt, sugar and fats.⁸⁰³

The Strategy finally also stresses the important role that the WHO, in close collaboration with organizations of the United Nations system and other inter-governmental bodies (such as the FAO, UNESCO, UNICEF, and the UN) play, especially in setting international standards and norms.⁸⁰⁴ Civil society and non-governmental organisations (“NGO”) are furthermore key in influencing individual behaviour and the organisations and institutions that should be involved in encouraging healthy diets and physical activity.⁸⁰⁵

Consequently, it is crucial that the private sector is also involved in implementing this Strategy: the food industry, retailers, catering companies, sporting goods manufacturers, advertising and recreation businesses, insurance and banking groups, pharmaceutical companies and the media all have important parts to play as responsible employers and as advocates for healthy lifestyles. It needs to be emphasised that the WHO Global Strategy on Diet, Physical Activity and Health proposes initiatives by the food industry and manufacturers in particular to reduce the fat, sugar and salt content of processed foods and their portion sizes; to increase introduction of innovative, healthy, and nutritious choices; and to review their current marketing practices consistently.⁸⁰⁶ Further specific recommendations to the food industry and sporting-goods manufacturers include a) the continuous development and provision of affordable, healthy and nutritious choices to consumers; b) the introduction of new products with better nutritional value; c) providing consumers with adequate and understandable product and nutrition information; d) practicing responsible marketing that supports the Strategy, particularly with regard to the promotion and marketing of foods high in saturated fats, *trans*-fatty acids, free sugars, or salt, especially to children; and e) issuing simple, clear and consistent food labels and evidence-based health claims that will help consumers to make informed and healthy choices with respect to the nutritional value of foods.⁸⁰⁷

⁸⁰³ Para 43.

⁸⁰⁴ Paras 49–59.

⁸⁰⁵ Para 60.

⁸⁰⁶ Para 61.

⁸⁰⁷ Para 61.

It is therefore clear that the WHO Global Strategy on Diet, Physical Activity and Health, by proposing these measures, recognises and seeks to promote the rights which children have to health, life, survival and development, information, the freedom of expression and choice as consumers and the right to not be exploited.

2 1 2 The Set of Recommendations on the Marketing of Foods and Non-alcoholic Beverages to Children

As part of the WHO's Global Strategy for the Prevention and Control of Non-Communicable Diseases, a set of recommendations was developed in order to guide Member States in designing new efforts and/or to strengthen existing policies regarding food marketing to children.⁸⁰⁸ The list of 12 recommendations have, as its rationale, the aim of reducing the impact on children of marketing foods which are nutritionally poor as well as reducing the exposure and power which these marketing messages have on children.

In support of the WHO Global Strategy on Diet, Physical Activity and Health, the set of 12 recommendations also stresses the important role which the state has to play in accomplishing this aim. Governments are to be the key stakeholders in developing the policies that the recommendations propose, but all relevant stakeholders from industry and other platforms should be responsible for the implementation, monitoring and evaluation of such policies. The Set of Recommendations furthermore propose that, in order to develop policies in this regard, Member States should consider different approaches, consider their country's available resources, the benefits and burdens of the different approaches upon all stakeholders involved and then develop a comprehensive and effective policy – one with clear definitions to facilitate uniform implementation but to also address specific national challenges. As part of their policy framework, Member States must consequently also establish specific monitoring and enforcement mechanisms which includes definitions of sanctions and which could include a complaints reporting system. The policy framework should, in addition, include a system to evaluate the impact and effectiveness of the policy and its overall aim, while it always encourages and continues with further research on the extent, nature and effects of food marketing to children in their country. On a regional level, it

⁸⁰⁸ Some more background information, as well as the text of the recommendations are available at <http://whqlibdoc.who.int/publications/2010/9789241500210_eng.pdf> (accessed 28-04-2011).

is important that Member States co-operate with one another in order to reduce the impact of cross-border marketing. Finally, but rather importantly, it is also specifically recommended that settings where children gather (including, but not restricted to, places such as schools) should be free of any type of marketing.⁸⁰⁹

2 1 3 A Framework for Implementing the Set of Recommendations on the Marketing of Foods and Non-Alcoholic Beverages to Children

In January 2012 the WHO published a framework document aimed at assisting policy-makers in the practical implementation of the Set of Recommendations in their individual territories.⁸¹⁰ The Framework provides practical guidance to governments as to how develop and implement policies and to effectively monitor and evaluate such policies. It furthermore also suggests key areas and principles of further research.

The Framework proposes that Member States recognise “marketing” as a wide range of activities, including the promotion of not only products and services but also of brands. Efforts to restrict marketing must be sufficiently comprehensive to deal with a broad scope of marketing techniques and commercial communications.⁸¹¹ Such efforts may also be targeted at a whole range of marketing actors, including food manufacturers and food retailers (and their respective trade associations and representative bodies). The restrictions may furthermore target a range of producers: from large global food and non-alcoholic beverage producers, to small local vendors and kiosks, including supermarkets and quick service restaurant chains, broadcasters, publishers, schools, public authorities, newsagents, and Internet search engines, or only be focussed on some.⁸¹²

The Framework recommends that the Ministry of Health, or other designated body in various Member States, establish a government-led working group on food marketing to children to include representatives from multiple government departments, agencies and bodies. Such a government-led working group should dialogue with a broader stakeholder group, which could include members of civil

⁸⁰⁹ The World Health Organisation “Set of Recommendations on the Marketing of Foods and Non-alcoholic Beverages to Children” (2010) *World Health Organization*.

⁸¹⁰ World Health Organization *A framework for implementing the set of recommendations on the marketing of foods and non-alcoholic beverages to children* (2012) 6.

⁸¹¹ 9-10.

⁸¹² 9-10.

society, academia, legislators, the private sector and the advertising and media industry, while protecting the public interest and avoiding conflict of interest. As a result, other relevant government sectors that should be represented in this working group should include child protection, education, consumer affairs, food supply, media and communications, agriculture, trade, finance and economic development, and foreign direct investment.⁸¹³

Prior to the development of a policy, the Framework suggests that a situation analysis of the current marketing activities and their impact may be undertaken with the assistance of stakeholder organisations, while regulatory agencies and legal analysts may assist in conducting a survey of the current regulatory environment. The Framework is, however, mindful of the fact that a lack of resources for such an analysis may exist and therefore does not require such an analysis as a prerequisite to any policy that restricts the impact on children of the marketing of foods high in saturated fats, trans-fatty acids, free sugars, or salt.⁸¹⁴

A rather useful explanation offered by the Framework is one in which the two possible types of approaches for policy development, proffered by recommendation 3 of the Set of Recommendations, is assessed. The recommendation is that Member States may choose to follow either a comprehensive approach, or a stepwise approach. The Framework explains how the most comprehensive of all interventions in this context will be to restrict the marketing of all products to children, and not only that of food.⁸¹⁵ According to the Framework, this approach is based in the premise that children have the right to a commercial free childhood and is concordant with the CRC. Although the approach provides a degree of equity between different industrial sectors, more role-players will be affected by it and consideration should be given to issues such as “positive” marketing that encourages healthy behaviour.⁸¹⁶ An approach in terms of which no food products may be marketed to children, is based on the view that children are best informed about healthy eating by parents, schools and health professionals, rather than commercial entities. As a result, no food profiling system will be required to distinguish food types but, the promotion of more healthy

⁸¹³ 13.

⁸¹⁴ 14.

⁸¹⁵ The Framework refers to the examples of such prohibitions existing in Quebec, as well as Norway and Sweden, albeit being restricted in the last-mentioned jurisdictions broadcasts originating in their own countries. World Health Organization *A framework for implementing the set of recommendations on the marketing of foods and non-alcoholic beverages to children* 16 and 18.

⁸¹⁶ 18.

foods to children will also be restricted.⁸¹⁷ In terms of an approach in which promotion of the specific foods and beverages that are considered detrimental to children's diets are prohibited, marketing is removed from all exclusively child-centred environments and media, including schools and children's television programmes, as well as from environments shared with adults, such as shopping malls and prime-time television.⁸¹⁸ This approach requires a reliable method of identification of products that cannot be promoted, and could act as an incentive for the food industry to develop healthier products.⁸¹⁹

A more stepwise policy approach may start one or more actions and progressively add actions to build stronger protection, and may prioritise places where children gather, take action against specific types of products, protect certain groups of children, control specific forms of marketing or specific media.⁸²⁰ The Framework explains that when addressing the exposure of children to marketing, consideration should be given to when, where, to whom, and for what products, marketing a) will be permitted, and b) will not be permitted.⁸²¹ Restrictions may also be placed to reduce the power of marketing, by prohibiting techniques, such as the use of licensed characters, brand mascots and celebrities, or premium offers and collector promotions, that have a particularly powerful effect. Such an approach will require specifying which marketing techniques will not be permitted.⁸²² Member States may also choose to adopt a combined approach, which will target those media that are particularly extensive sources of exposure, while eliminating the most powerful marketing techniques or those to which children are particularly vulnerable.⁸²³

The Framework furthermore addresses the issue regarding which age categories of children should be protected against marketing practices. It emphasises that the evidence is not conclusive regarding a definite "cut-off" age at which children understand the persuasive intent of marketing. In addition, since available research studies have focused predominately on marketing to children younger than 12 than that of adolescents, the evidence of the impact on children is greater for this younger age group than for older age groups. The Framework therefore cautions Member

⁸¹⁷ 17.

⁸¹⁸ 17.

⁸¹⁹ 17.

⁸²⁰ 16.

⁸²¹ 19.

⁸²² 20.

⁸²³ 20.

States to consider several factors when considering onto which age groups their policies must focus. This includes the fact that the absence of evidence of effects on older children does not mean no effect exists; only that evidence may not have been adequately measured. In this regard, it must be borne in mind that the policy aim is to reduce the impact of marketing on children's diet, not to address whether or not children understand the persuasive intent of marketing. Since children may not yet have the maturity for responsible decision making, they remain vulnerable and continue to need protection in many domains. Furthermore, more often than not, marketing targeted at teenagers and young adults, reaches younger children as well and a narrowly-defined age range may therefore not fully protect children from the impact of marketing.⁸²⁴

The Framework also refers to a number of measures implemented in several other jurisdictions, including the different regulatory and policy implementation models and mechanisms of enforcement. Since many of these measures will be discussed in chapter 6 of this thesis, this section of the framework document will not be referred to here. However, it must be pointed out that it is clear that the Framework provides a considered view of the regulatory options which are available but approaches the matter also from the perspective that the best interests of the child are here a matter of first concern. It furthermore calls for sustained and effective monitoring and evaluation of policies, continued research and for governments to continuously act in the public interest. It is submitted that this Framework for Implementation provides pragmatic and comprehensive guidance to Member States, whilst at the same time providing them with enough scope and choice as to which particular model would be most suitable to their circumstances.

2 1 4 WHO Regional Office for Europe: Nutrient Profile Model

Nutrient profiling is defined by the WHO as the “science of classifying or ranking foods according to their nutritional composition for reasons related to preventing disease and promoting health”.⁸²⁵ It has been identified as a useful tool for the implementation of

⁸²⁴ 21.

⁸²⁵ WHO Guiding principles and framework manual for the development or adaptation of nutrient profile models (in press) as cited by World Health Organisation Europe “Regional Office for Europe nutrient profile model” (2015) *World Health Organisation Europe 2* <<http://www.euro.who.int/en/health->

restrictions upon food marketing methods aimed at children since it provides a means to distinguish between food that are considered to be healthier than those containing high levels of sugar, salt and fat.⁸²⁶ However, a 2013 report by the WHO Regional Office for Europe found that only four of the 53 countries in Europe had used a nutrient profile model in restricting marketing communications.⁸²⁷ In response to the commitment made by the ministers of health of the WHO European Member States in Vienna in July 2013, and following a consultation process which involved a number of European countries,⁸²⁸ the WHO Regional Office for Europe in 2015 published a nutrient profile model, with the purpose of aiding governments in respect of marketing restrictions.⁸²⁹ These models, as well as those used in Australia, New Zealand and the United States were considered but ultimately the European model was based on the ones adopted in Norway and Denmark. It is explained that these models were chosen since they are based on food categories rather than using a scoring system. Category-specific models are considered more adaptable than models based on scoring, and this aspect is an important consideration for a regional model that countries will be looking to use nationally.⁸³⁰

The European model divides foods into 17 categories.⁸³¹ Once a food has been identified as belonging to a particular category, such as savoury snacks or milk drinks for example, a food may only be marketed if it does not exceed on a per 100 grams per millilitre basis any of the relevant thresholds for that food product category.⁸³² Thus, for example, if a milk drink contains more than 2,5 grams of fat per 100 millilitres, it may not be marketed. It may also not contain any added sugar or sweeteners.

topics/disease-prevention/nutrition/publications/2015/who-regional-office-for-europe-nutrient-profile-model> (accessed 13-11-2015).

⁸²⁶ World Health Organisation Europe “Regional Office for Europe nutrient profile model” (2015) *World Health Organisation Europe 2*,.

⁸²⁷ The 4 countries being Denmark, Norway, Ireland and the UK. World Health Organisation Europe “Regional Office for Europe nutrient profile model” (2015) *World Health Organisation Europe 1*. See also ch 6, section 2 1 2 of this thesis for an explanation of the UK model in particular.

⁸²⁸ Albania, Austria, Bulgaria, Czech Republic, Denmark, Estonia, Finland, Hungary, Israel, Norway, Poland, Portugal, Serbia, Slovenia, Switzerland and the former Yugoslav Republic of Macedonia. World Health Organisation Europe “Regional Office for Europe nutrient profile model” (2015) *World Health Organisation Europe 1*.

⁸²⁹ World Health Organisation Europe “Regional Office for Europe nutrient profile model” (2015) *World Health Organisation Europe 1-2*. This model is attached to the thesis as Addendum A.

⁸³⁰ World Health Organisation Europe “Regional Office for Europe nutrient profile model” (2015) *World Health Organisation Europe 2-3*.

⁸³¹ World Health Organisation Europe “Regional Office for Europe nutrient profile model” (2015) *World Health Organisation Europe 3*.

⁸³² World Health Organisation Europe “Regional Office for Europe nutrient profile model” (2015) *World Health Organisation Europe 4*.

Savoury snacks may not contain more than 0,1 grams of salt per 100 grams.⁸³³ Certain categories of foods may not be marketed at all, including chocolate and sugar confectionery, energy bars, and sweet toppings and desserts, fruit juices and edible ices. Other categories of foods, such as fresh and frozen meat, poultry, and fish, as well as fruit, vegetables and legumes may be marketed regardless of its nutritional content.⁸³⁴

2.2 The International Association for the Study of Obesity

It is interesting to note that the first discussions expressing the need for an international organization with the sole purpose of addressing obesity, took place as early as 1961.⁸³⁵ Nevertheless, the first organisational committee meeting of IASO only took place in England in 1985.⁸³⁶ As a global association, the original IASO General Council membership included two representatives from each national obesity association, concerned individuals from countries without obesity associations, and past presidents/chairs of the International Congress on Obesity. Currently IASO has 52 national association members representing 56 countries and territories.⁸³⁷

IASO is a registered NGO within the WHO and is responsible for a number of international publications, as well as the establishment of several regional and international educational, research and action programmes preventing and managing obesity. Such programmes include those by the European Association for the Study of Obesity (“EASO”), the Specialist Certification of Obesity Professionals in Education (“SCOPE”)⁸³⁸ and the Global Alliance, made up of five principal medical non-governmental organizations formally linked to the WHO: the World Heart Federation (“WHF”), International Diabetes Federation (“IDF”), International Pediatric Association (“IPA”), International Union of Nutritional Sciences (“IUNS”) and IASO itself. The

⁸³³ Annex to World Health Organisation Europe “Regional Office for Europe nutrient profile model” (2015) *World Health Organisation Europe* 7-10 <<http://www.euro.who.int/en/health-topics/disease-prevention/nutrition/publications/2015/who-regional-office-for-europe-nutrient-profile-model>> (accessed 13-11-2015).

⁸³⁴ Annex to World Health Organisation Europe “Regional Office for Europe nutrient profile model” (2015) *World Health Organisation Europe* 7-10.

⁸³⁵ IASO “IASO History” (2015) IASO <<http://www.iaso.org/about-iaso/history/>> (accessed 05-11-2015).

⁸³⁶ IASO “IASO History” (2015) IASO.

⁸³⁷ IASO “IASO History” (2015) IASO.

⁸³⁸ This programme is aimed to recognise obesity specialists and enhance the quality of obesity education for medical professionals in Europe, The ‘E’ in SCOPE initially stood for Europe, but it was soon realised that the need for education extended far beyond that region alone. IASO “IASO History” (2015) IASO.

Alliance initiated the development of the first ever global action programme to address the issues surrounding the prevention of obesity and related chronic disease, with a particular focus on childhood obesity.⁸³⁹

Another significant development in IASO's history was the formation in 1995 of the International Obesity Task Force ("IOTF"). Comprised of leaders in the academic obesity community worldwide, the IOTF prepared the first scientific research report on the global epidemic of obesity, which served as the basis for the first WHO expert consultation on obesity held in Geneva in 1997.⁸⁴⁰ The protection of children against commercial exploitation in the form of promotion of foods and beverages was identified as one of the high priority strategies for addressing childhood obesity.⁸⁴¹ Following a WHO Forum and Technical Meeting on the issue of marketing to children in May 2006, an IOTF Working Group drafted a set of rights-based principles which, if applied, should ensure a "substantial level of protection for children against exposure to commercial promotions of obesogenic foods and beverages, and make a significant contribution to a multi-strategy approach to reduce childhood obesity across society".⁸⁴² These principles soon became known as "The Sydney Principles".

2 2 1 *The Sydney Principles*

The Sydney Principles declare that its basic rationale is founded in the fact that children are particularly vulnerable to commercial exploitation, and regulations need to be sufficiently powerful to provide them with a high level of protection. The Principles echo much of the basic principles of the theory of children's rights and the approach adopted by the CRC: The Sydney Principles confirm that the protection of children is the responsibility of every section of society - parents, governments, civil society, as well as the private sector. In fact, the Principles specifically refers to the CRC in that it provides that any regulatory efforts need to be aligned with and support the United Nations CRC and the Rome Declaration on World Food Security.⁸⁴³

⁸³⁹ IASO "IASO History" (2015) IASO.

⁸⁴⁰ IASO "IASO History" (2015) IASO.

⁸⁴¹ IOTF "The Sydney Principles" (2013) IOTF <<http://www.iaso.org/iotf/obesity/childhoodobesity/sydneyprinciples/>> (accessed 14-11-2011).

⁸⁴² IOTF "The Sydney Principles" (2013) IOTF.

⁸⁴³ IOTF "The Sydney Principles" (2013) IOTF. See also B Swinburn, T Lobstein, N Rigby, LA Baur, KD Brownell, T Gill, J Seidell, S Kumanyika and the International Obesity Taskforce Working Group on Marketing to Children "The 'Sydney Principles' for reducing the commercial promotion of foods and beverages to children" (2008) 9 *Public Health Nutrition* 881.

The Sydney Principles furthermore proposes that all types of commercial targeting of children (including all of the techniques discussed above in this chapter) should be regulated and the regulations should be sufficiently flexible to include new marketing methods as they develop. The principles advise that childhood settings such as schools, child care, and early childhood education facilities should be free from commercial promotions that specifically target children. In short, the Sydney Principles state that the actions to reduce marketing to children should:

- a) support the rights of children;
- b) afford substantial protection to children;
- c) be statutory in nature;⁸⁴⁴
- d) take a wide definition of commercial promotions;
- e) guarantee commercial-free childhood settings;
- f) include cross-border media;⁸⁴⁵ and
- g) be evaluated, monitored and enforced.⁸⁴⁶

During the discussions, there was consensus that targeting only unhealthy foods and beverages would be a valuable start because of the close association with obesity. The restriction of all marketing of all other products to children was a much bigger step and broader than the obesity agenda.⁸⁴⁷ There was furthermore agreement that the division of foods into “healthy” and “unhealthy” foods would need to be made on scientific grounds, whilst some were of the opinion that to restrict the commercial marketing of all foods and beverages unless they had been shown to have health benefits, was an option.⁸⁴⁸

Once again, it can be said that the recommendations included in these principles are another example of an attempt at promoting the best interest of the child. The Sydney principles in particular endorse a rights based approach in that it recognises the impact which marketing practices may have on the interests of the child. It calls for Government intervention in particular by recommending statutory measures which

⁸⁴⁴ It is explained that “[o]nly legally-enforceable regulations have sufficient authority to ensure a high level of protection for children from targeted marketing and the negative impact that this has on their diets. Industry self-regulation is not designed to achieve this goal.”

⁸⁴⁵ “International agreements need to regulate cross-border media such as Internet, satellite and cable television, and free-to-air television broadcast from neighbouring countries.”

⁸⁴⁶ IOTF “The Sydney Principles” (2013) *IOTF*. See also Swinburn *et al* (2008) *Public Health Nutrition* 881.

⁸⁴⁷ 884.

⁸⁴⁸ 884.

recognise a broad spectrum of marketing activities and which will be enforced. It is submitted that these principles, in particular, recognises the basis for regulating food-marketing practices to be found in the imperative to promote the best interests of the child.

3 Recommendations for increased consumer protection

3.1 The United Nations Guidelines for Consumer Protection

The UN General Assembly adopted the UN Guidelines for Consumer Protection (UNGCP) on 16 April 1985.⁸⁴⁹ Although these guidelines are not legally binding, they provide an internationally recognized set of basic objectives.⁸⁵⁰ This set of guidelines aim, *inter alia*, to protect consumers from hazards to their health and safety. It furthermore seeks the “promotion and protection of the economic interests of consumers; ... [a]ccess of consumers to adequate information to enable them to make informed choices according to individual wishes and needs;” and to “[c]onsumer education, including education on the environmental, social and economic impacts of consumer choice”.⁸⁵¹

The underlying principle of the UNGCP is that consumers’ right to information must be ensured. In order to protect consumers’ economic interests, governments must guarantee that promotional marketing and sales practices are guided by the principle of fair treatment of consumers and legal requirements should be met. In order to achieve this, consumers need to be provided with the information that will enable them to take informed and independent decisions. In addition, the guidelines require that measures should be put in place so as to ensure that the information provided is accurate.⁸⁵² To this end, governments should further encourage all of the relevant stakeholders to participate in the free flow of accurate information on all aspects of

⁸⁴⁹ A/RES/39/248. The text of the UNGCP is available at <<http://www.un.org/documents/ga/res/39/a39r248.htm>> (accessed 05-10-2011). The guidelines were formally expanded in 1999 with Section G on sustainable consumption, and were re-adopted in the UN General Assembly decision 54/449. Consumers International “UN Guidelines on Consumer Protection” (2003) *Consumer International* <http://www.consumersinternational.org/media/33866/consumption_en.pdf> (accessed 05-10-2011).

⁸⁵⁰ UN Department of Economic and Social Affairs: Division for Sustainable Development “Consumer Protection and Sustainable Consumption: New Guidelines for the Global Consumer” (2015) *United Nations* <<http://www.un.org/esa/sustdev/sdissues/consumption/cppgoph4.htm>> (accessed 05-10-2011).

⁸⁵¹ Guideline 3, included in the *General Principles* of the Guidelines.

⁸⁵² Guideline 22.

consumer products.⁸⁵³ General consumer education and information programmes should be developed, including the distribution of information on the environmental impacts of consumer choices and behaviour and the possible implications thereof.⁸⁵⁴

It is very important to note that the UNGCP prescribes that “[c]onsumer education should, where appropriate, become an integral part of the basic curriculum of the educational system, preferably as a component of existing subjects.”⁸⁵⁵ Children must therefore, as part of their basic education, receive information and training on topics ranging from health, nutrition, prevention of food-borne diseases and food adulteration; product hazards; product labelling; relevant legislation, information on weights and measures, prices, quality, credit conditions and availability of basic necessities; environmental protection; and efficient use of materials, energy and water.⁸⁵⁶ Governments should also encourage the formulation and implementation of marketing codes and other business practices which will safeguard consumer rights. The guidelines furthermore encourage voluntary agreements between business, consumer organisations and other interested parties.⁸⁵⁷

3.2 The Guidelines for Consumer Organisations to Promote National Food Safety Systems

Although primarily concerned with food safety standards and the prevention of foodborne diseases, the Guidelines for Consumer Organisations to Promote National Food Safety Systems, developed by Safe Food International, in conjunction with the WHO and the FAO, also provide a number of important instructions pertaining to the regulation of food marketing to children. In this regard, it calls upon consumer groups to “be vigilant in identifying ways in which their national laws should be implemented, strengthened and modernized.”⁸⁵⁸ Such legislation should, *inter alia*, provide a framework for the removal of hazardous food from the market “in a timely fashion” and ensure that both the food authorities, food producers and processors give consumers accurate information about food products. As a result, the Guidelines specifically refers

⁸⁵³ Guideline 23.

⁸⁵⁴ Guideline 35.

⁸⁵⁵ Guideline 36.

⁸⁵⁶ Guideline 37. The Guidelines further states that business should be actively involved in these educational programmes.

⁸⁵⁷ Guideline 26. These codes should receive adequate publicity.

⁸⁵⁸ The text of the guidelines is available at <http://safefoodinternational.org/guidelines_for_consumer_organizations.pdf> (accessed 10-10-2011).

to the role which appropriate and correct labelling may play in ensuring consumers' health and safety. Legislation must furthermore establish pre-market approval procedures for food additives, artificial food components and ingredients, foods derived from modern biotechnology, food processing technologies and residues of food animal drugs and pesticides to ensure a safe and nutritional food supply. The guidelines moreover emphasise the importance of the provision of information, education, communication, and training programmes to assist consumers in making informed decisions regarding risks and their food consumption.

In this way the UNGCP and the Guidelines for Consumer Organizations to Promote National Food Safety Systems clearly support the idea of self-regulation of marketing practices but emphasises the important role of oversight which the state has in this relationship. The state must implement the measures to ensure compliance to these codes and provide the practical support to realise consumer rights. This should occur in the form of legislative measures of enforcement. Both sets of Guidelines furthermore unquestionably promote the child consumer's right to access to relevant and correct information regarding the products which they consume, seek to protect them from marketing practices which may jeopardise their health and endorse the nutritional education of children.

4 Principles of ethics proposed by the marketing industry

4.1 The ICC Consolidated Code of Advertising and Marketing Communications Practice

It is evident that, despite the emphasis which is placed on statutory regulation, the importance of industry self-regulatory measures cannot be underestimated. One such industry body, the ICC, established in 1919 and representing businesses in approximately 120 countries around the world, is a world business organisation which seeks to "serve world business by promoting trade and investment, open markets for goods and services, and the free flow of capital".⁸⁵⁹ It also aims to promote high standards of business ethics through the development and distribution of rules,

⁸⁵⁹ International Chamber of Commerce "What is ICC" (2016) ICC <<http://www.iccwbo.org/id93/index.html>> (accessed on 17-10-2011).

including codes and guidelines on how business should direct its efforts to assure responsible marketing communications.⁸⁶⁰

The ICC first issued a Code on Advertising Practice in 1937 and in 2006 many of the marketing codes were consolidated into one document: the Consolidated ICC Code of Advertising and Marketing Communication Practice. The ICC claims that these codes have been used as ethical guidelines creating a level playing field that minimizes the need for legislative or regulatory control. Through the Consolidated Code the ICC seeks to build trust with consumers and acceptance of the role which self-regulation has to play.⁸⁶¹ However, it should be noted that the ICC does not hold advertisers accountable to their codes but merely provide guidance to help countries develop their own guidelines and enforcement systems.⁸⁶²

In an attempt to keep up to date with changes in practice such as interactive marketing communications, the ICC published its ninth revision of the ICC Consolidated Code of Advertising and Marketing Communications Practice in September 2011 (the Consolidated ICC Code). The Consolidated ICC Code applies to all advertising and other marketing communications for the promotion of any kind of goods and services, corporate and institutional promotion included. Its standards of ethical conduct are to be observed by everyone concerned with marketing communications, whether as advertisers, marketers, advertising practitioners or agencies, in the media, or in related functions.⁸⁶³ Article 18 of the Consolidated ICC Code is devoted to children and young people and provides that special care should be taken in marketing communications directed to or featuring children or young people.⁸⁶⁴

⁸⁶⁰ International Chamber of Commerce "ICC framework for responsible food and beverage marketing communication" (2016) *International Chamber of Commerce* <http://www.iccwbo.org/uploadedFiles/ICC/Policy_pages/332%20FINAL_Framework_Food_and_Beverage.pdf> (accessed 17-10-2011).

⁸⁶¹ Preface to the Consolidated Code of Advertising and Marketing Communications Practice, text available at <http://www.codescentre.com/images/downloads/660%20consolidated%20icc%20code_2011_final%20with%20covers.pdf> (accessed 17-10-2011).

⁸⁶² Hawkes (2005) *Nutrition Bulletin* 376.

⁸⁶³ Code Centre "Scope of the Code and definitions" (2011) *Code Centre* <http://www.codescentre.com/images/downloads/660%20consolidated%20icc%20code_2011_final%20with%20covers.pdf> (accessed 17-10-2011).

⁸⁶⁴ From the section in the Consolidated ICC Code devoted to definitions, it appears that, since the definition of the term "child" or "young person" varies widely, the use of local definitions of a "child" is recommended. An exception is in the field of privacy where there is general consensus on the age at which rules relating to "children" apply. Hence, for the purpose of all privacy related sections, including sections on online behavioural advertising, and in the absence of relevant local regulatory or self-regulatory definitions, the Consolidated ICC Code refers to "children" as 12 and under.

The ICC Consolidated Code provides, in general, that communications should not undermine positive social behaviour, lifestyles or attitudes.⁸⁶⁵ The Code specifically provides that products, which are unsuitable for children, should not be advertised or promoted to them. The Code does not provide an explanation as to what such unsuitable products may be but suggests that these products should be clearly identified as such.⁸⁶⁶ Marketing communications should neither exploit the inexperience or credulity of children and young people, nor contain any statement or visual treatment that could have the effect of harming children or young people mentally, morally or physically.⁸⁶⁷ Marketing communications should therefore, *inter alia*:

- a) not include any direct appeal to children and young people to persuade their parents or other adults to buy products for them;
- b) not suggest that possession or use of the promoted product will give a child or young person physical, psychological or social advantages over other children or young people, or that not possessing the product will have the opposite effect;
- c) not undermine the authority, responsibility, judgment or tastes of parents, having regard to relevant social and cultural values;
- d) not imply that the product being promoted is immediately within the reach of every family budget and the price of the product should be advertised in such a way as to not lead children and young people to an unrealistic perception of the cost or value of the product.

Article D5 of the Consolidated ICC Code furthermore provides certain guidelines pertaining to digital marketing communications to children and, among others, encourage parents' and guardians' participation and supervision of their children's online activities. These guidelines are currently used as the only form of regulation of "new" media marketing practices in many jurisdictions and will again be referred to in chapter 6.

<http://www.codescentre.com/images/downloads/660%20consolidated%20icc%20code_2011_final%20with%20covers.pdf> (accessed 17-10-2011).

⁸⁶⁵ The Consolidated ICC Code does not provide a definition of "positive social behaviour, lifestyles and attitudes".

⁸⁶⁶ Art 18 of the Consolidated ICC Code.

⁸⁶⁷ The term "marketing communications" is defined as including "advertising as well as other techniques, such as promotions, sponsorships and direct marketing, and should be interpreted broadly to mean any communications produced directly by or on behalf of marketers intended primarily to promote products or to influence consumer behaviour".

4.2 The ICC Framework for Responsible Food and Beverage Marketing Communication

In an apparent attempt to join in the increasing worldwide attention paid to diet, physical activity and health, and because it recognised that these aspects are of great significance to the international food and beverage community and to the broader business community of which it is a part,⁸⁶⁸ the Commission on Marketing and Advertising of the ICC developed a framework for the responsible marketing of food and beverages. This framework focusses on three key aspects, namely the role of commercial communication in an information-focused society, guidelines for communicating to children, and freedom of commercial speech.

The framework consequently confirms that responsible marketing can assist consumers in making appropriate choices about food and beverages, while it may promote an understanding of the role of nutrition, diet and physical activity in healthy lifestyles. By conveying marketing communication consistent with principles of good nutrition, diet, physical activity and personal choice, business must play an important role. Good communication and good business practice requires that honest and truthful information be consistently provided. Secondly, since children are a special group of consumers with a lack of experience and a more limited capacity to assess information, care must be taken to market and sell products to children in a responsible manner. In this Framework the ICC has furthermore declared that it remains mindful that parents and other adults responsible for a child's welfare play a primary role in a wide variety of decisions affecting children, including choices about diet, physical activity and health. Finally, the importance of freedom of commercial speech is underlined and regarded as a fundamental principle of free markets. This freedom has nourished competition among companies and provided more benefits to consumers. As companies compete, consumers are presented with a wider range of choices, more information on which to base those choices and better prices. The ICC nonetheless acknowledges that this exercise of freedom of speech, as with all rights, carries with it

⁸⁶⁸ International Chamber of Commerce "Framework for responsible food and beverage marketing communication" (2016) *International Chamber of Commerce* <http://www.iccwbo.org/uploadedFiles/ICC/Policy_pages/332%20FINAL_Framework_Food_and_Beverage.pdf> (accessed 17-10-2011).

attendant obligations. The ICC hence regards responsibility to be an essential element in freedom of commercial speech.⁸⁶⁹

The ICC Framework for Responsible Food and Beverage Marketing Communication provides instructions to the advertising industry in much more practical language than that of the general terms found in its Consolidated Code of Advertising and Marketing Communications Practice. For the purposes of this research, and in order to draw a comparison to the proposed Regulations R429, introduced by the South African Department of Health and which will be discussed in chapters 7 and 8, the guidelines will be quoted *verbatim* below:

“[N]utrition information and claims about nutrition and health benefits should have a sound scientific basis. Claims should be conveyed consistent with the nature and scope of the evidence, providing the consumer with supportable information. Nutrition information and claims should also be judged by the likely perception of the reasonable consumer, especially where children and young people are concerned.

Food and beverage marketing communication should not encourage or condone excess consumption and portion sizes should be appropriate to the setting portrayed. Marketing communication should not undermine the importance of healthy lifestyles.

Marketing communication should respect the spirit of ICC, local and sectoral self-regulatory codes, in order to maintain confidence both in marketing communication and in the self-regulation system.

Where claims or terminology used in marketing communication might reasonably be interpreted by a consumer as health or nutrition claims, they should be supportable with appropriate scientific evidence.

Copy, sound and visual presentations in marketing communication for food and beverage products should accurately represent the material characteristics of the product featured, such as taste, size, content nutrition or health benefits, and should not mislead consumers concerning any of those characteristics.

Food products not intended to be substitutes for meals should not be represented as such. All nutritional and health-benefit information and claims for food and beverage products should have a sound scientific basis. Consumer taste or preference tests should not be used in a way that might imply statistical validity if there is none. Testimonials should be based on well accepted and recognized opinion from experts.

Food and beverage marketing communication should not undermine the promotion of healthy balanced diets, nor the importance of a healthy active lifestyle.

Marketing communication directed towards children for food and beverage products should not create a sense of urgency, or inappropriate price minimisation. While fantasy, including animation is appropriate in communication with younger as well as older children, care

⁸⁶⁹ International Chamber of Commerce “Framework for responsible food and beverage marketing communication” (2016) *International Chamber of Commerce*.

should be taken not to exploit a child's imagination in a way that could mislead him/her about the nutritional benefits of the product involved.

Food and beverage marketing communication should not mislead consumers about potential health or other benefits from the consumption of the advertised product. In marketing communication to children or young people, this includes such things as status or popularity with peers, success in school or sports, or intelligence.

Food product marketing communication should not undermine the role of parents and other adults responsible for a child's welfare in guiding diet and lifestyle choices.

Advertisements should not include any direct appeal to children to persuade their parents or other adults to buy advertised products for them. Sales promotion offers addressed to children should provide the conditions of the premium offer, sweepstake or contest being advertised in terms that children can understand.

Marketers should strive to be sure that young children have an understanding of the products to be purchased, if any, to receive the premium; and for sweepstakes and contests, the conditions of entry, types of prizes and the likelihood of winning."

4.3 The Responsible Advertising and Children Programme

Another initiative fuelled by the Consolidated ICC Code is that of the Responsible Advertising and Children Programme (RAC) and is driven by marketing bodies such as the World Federation of Advertisers. The Programme represents advertisers, agencies and media worldwide who believe that "marketing communications in the context of children needs to be both responsible and sensitive to children and families."⁸⁷⁰ Marketing communications to children should be seen in the context of parental guidance and must not undermine the authority of parents or other appropriate adult role models. However, taking into account that children are much more exposed to much more media and the fact that the current generation is more technologically savvy than any of its predecessors, the RAC supports the development of a global programme of media literacy which will help children gain the skills necessary to interact with the media. In this regard, the RAC helped drive the successful launch of media literacy programmes such as *Media Smart* in the UK and similar such initiatives in Belgium, Germany, the Netherlands, Finland, Sweden, Portugal and Hungary.⁸⁷¹

⁸⁷⁰ RAC "Advertising and Children" (2011) RAC <<http://www.responsible-advertising.org/advertisingandchildren.asp>> (accessed 18-10-2011).

⁸⁷¹ RAC "Advertising and Children" (2016) RAC.

The Programme also supports a system of self-regulation to be implemented in conjunction with effective legislation as a “double of protection”. This will ensure that companies can be taken to court if they are in continued breach of a self-regulatory code.⁸⁷² For this reason the RAC claims to have developed an “industry blueprint” for framing responsible food and beverage marketing communications, based on what can be effectively implemented at international, regional, national, industry and company level.⁸⁷³ This blueprint includes national and regional regulatory frameworks, national self-regulatory frameworks, industry-wide self-regulatory codes on food marketing communications (such as the ICC’s Code of Advertising and Marketing Communications Practice and Framework for Responsible Food and Beverage Marketing Communication), individual corporate food marketing communications policies (which addresses the “balance” and types of products advertised), and the promotion of best practices through “pledge programmes”.⁸⁷⁴

It is important to stress that the RAC admits that advertising has an effect on food choices, since, if this was not so, companies would not advertise. Nevertheless, since there is only evidence of a “modest direct effect” on children’s food preferences and consumption, and, in the context of the multitude of factors that determine individual behaviour, advertising is regarded as only a minor factor. The RAC also emphasises and relies upon studies which have reported that the lack of physical activity may be regarded as the single most important cause of obesity.⁸⁷⁵ The Programme furthermore cites other studies which have found that the prohibition of advertisements is ineffective in combating excessive or unbalanced consumption and unhealthy lifestyles. These studies are used as evidence that advertising bans do not affect obesity rates and that “there is absolutely no correlation between food and beverage advertising spend or the number of food advertisements viewed by children and obesity rates.”⁸⁷⁶ Furthermore the argument by the food marketing industry, in the form

⁸⁷² RAC “Responsible Advertising means effective Self-Regulation” (2011) RAC <http://www.responsible-advertising.org/effective_selfregulation.asp> (accessed 18-10-2011).

⁸⁷³ RAC “Food Advertising: Our vision for responsible food marketing communications” (2011) RAC <http://www.responsible-advertising.org/fo_our_vision.asp> (accessed 18-10-2011).

⁸⁷⁴ RAC “Food Advertising: Our vision for responsible food marketing communications” (2011) RAC.

⁸⁷⁵ RAC “Food Advertising: A holistic response to a multi-factorial problem” (2011) RAC <http://www.responsible-advertising.org/fo_holistic_response.asp> (accessed 18-10-2011).

⁸⁷⁶ RAC “Food Advertising: Advertising bans miss the mark” (2011) RAC <http://www.responsible-advertising.org/fo_advertising_bans.asp> (accessed 18-10-2011). Interestingly enough, the Hastings *et al* “Review of research on the effects of food promotion to children” (2003) *UK Government Archive*, discussed above in chapter 2, and the Ofcom study, “Childhood Obesity – Food Advertising in Context” of 2004 are used as examples of such studies. Examples of the fact that marketing bans are ineffective,

of the RAC on this occasion, is that, since most of the money generated by TV advertising to children are reinvested in children's programmes, advertising bans would, in addition to the impact on the broadcasting industry, have significant negative consequences for the food industry and the economy in general.⁸⁷⁷

As a result, it would appear that even the marketing industry recognises that they have a role to play in trying to address the problem of rising figures of obesity. This fact is underlined by the way in which the industry codes refer to certain advertising practices which are unscrupulous and exploitative. However, at the same time there seems to be an element of denial by some role-players in the marketing industry of how much some of these practices contribute to the obesity crisis. It is exactly for this reason that governmental oversight and governance should be used in conjunction with industry measures, and in this way provide for a comprehensive framework of protection. The fears of an adverse effect on the future development of children's programmes due to a lack of funding from the food industry can be addressed if other sponsors are given the opportunity to support children's television. It must furthermore be borne in mind that a restriction upon advertising would only apply to nutritionally poor foods and that food manufacturers would still be able to promote healthy products. As a result, the reformulation of food products to meet health standards must be encouraged amongst food manufacturers.

5 Conclusion

It is clear that there is strong global concern regarding the increase in obesity rates and its associated health issues and that many appreciate the role which food marketing to children play in this matter. The information provided in the discussion in chapter 2 and in this chapter above clearly demonstrates that there is a need to regulate the marketing practices that are employed in order to market food products to children. Marketers make use of techniques which exploit children, are detrimental to their health, and infringe upon their rights to life, survival and development. The fact that this aspect is also recognised and addressed by some members of the marketing industry itself, is further testimony to the need for clear parameters. This chapter

are those of Sweden, Norway and Quebec, where advertising to children under the age of twelve is prohibited but childhood obesity rates are apparently not lower than in other, similar countries/regions where such advertising restrictions exist.

⁸⁷⁷ RAC "Food Advertising: Advertising bans miss the mark" (2016) RAC.

discussed these parameters in the context of guidelines seeking to promote global health, to increase consumer protection, and to instil ethical and responsible marketing values and behaviour. In its current format, the system of self-regulation by the marketing industry appears to be failing in its task to curb these unethical and harmful practices, yet it is still the only system currently used in many jurisdictions. The possible reasons for this apparent failure will be discussed in chapter 8.

This chapter has also highlighted many of the recommendations made by inter-governmental organisations that primarily seek to reduce the exposure to and impact of food marketing techniques upon the rights of the child. Some of the recurring themes of these guidelines are that consumers, including child consumers, have the right to be protected against unethical and exploitative marketing practices. They also have the right to truthful and honest product information. Children, in particular, have the right to receive education and training with respect to health, nutrition, product labelling and food product qualities. As a result, these international guidelines propose a number of ways in which the best interests of the child should be promoted as a primary consideration whilst also still paying heed to the rights of freedom of speech and intellectual property. Some jurisdictions have responded to these calls and have introduced a variety of measures in an effort to implement these standards. In many instances, these methods consist of governmental regulation used in conjunction with self-regulatory codes from the advertising industry. Some of these measures from selected jurisdictions will accordingly be discussed in the next chapter.

CHAPTER 6: REGULATORY MEASURES: A COMPARITIVE PERSPECTIVE

1 Introduction

Chapter 5 explains the measures which internationally recognised and established organisations such as the WHO have proposed that Member States implement in an attempt to reduce childhood obesity. Although many of these proposals do not enjoy the status of international law, some jurisdictions have heeded the call for a reduction in the exposure and impact of food marketing to children. Bearing in mind the obligations that Member States to the CRC have, while also taking other fundamental freedoms into account, these measures have imposed various levels of restrictions upon marketing practices. At this stage, there is limited research as to the success of some of these measures.

The purpose of chapter 6 is to explain what some of these measures are and to provide a comparative perspective to the South African regulatory framework, which will be described and analysed in chapters 7 and 8. The focus will fall on food-marketing practices and not marketing of other products which are directed at children. The chapter will, however, also briefly refer to other legislative efforts, outside of the realm of marketing techniques that some jurisdictions have employed in an effort to combat obesity. Some general observations as to the different types of regulatory measures will introduce the comparative perspective.

1 1 Regulation: general remarks

It is often claimed that we live in a regulatory state.⁸⁷⁸ Concerns about the “evils” of regulation, intrusion upon the private domain and excessive bureaucratisation of economics and social life have been fuelled by recent debates over increasing regulatory measures.⁸⁷⁹ The failures of existing regulatory measures have furthermore also necessitated calls for improvements to regulatory policies or methods of “better regulation”.⁸⁸⁰ Regulation is in fact a unique and distinct field of study and the discussions pertaining to the theory and implementation of regulatory measures are

⁸⁷⁸ M Moran *The British Regulatory State* (2003) 8; see also R Baldwin, M Cave & M Lodge *Understanding Regulation: Theory, Strategy, and Practice* 2 ed (2012) 2. The colloquial term often used is that of a “nanny state”.

⁸⁷⁹ Baldwin *et al* *Understanding Regulation* 9.

⁸⁸⁰ 69-72.

active in a vast number of disciplines, including law, economics, political science and public policy, sociology, history, psychology and anthropology.⁸⁸¹ Most of the research and debates centre on the question of whether regulation is socially desirable.⁸⁸²

As a result of the continued debate, regulation has been defined in various contexts. One such definition offered is that regulation is the sustained and focused control over community activities, enforced by a public agency.⁸⁸³ Moran considers regulation to be an activity in which the discretion of individuals or institutions is restricted by the imposition of rules.⁸⁸⁴ Baldwin *et al* suggest that, rather than viewing regulation as a “red light”, in terms of which it is seen as a method of restricting undesirable behaviour, the broader view should be taken. As an enabling or facilitative device, regulation provides a “green light” in order for activities to be conducted in an ordered fashion, preventing chaos from ensuing and thus protecting the public order.⁸⁸⁵ As a result, the motive for regulation is often couched in terms of societal interest, and justified as being a set of objective standards seeking to promote harmonisation.⁸⁸⁶

1 2 Different types of regulatory measures

Whereas the original notion attached to regulation was one of governmental dominance over societal activities, regulatory measures in the modern era may be formulated and enforced by a number of individuals and organisations – both in the private, industry, governmental and international spheres. However, the distinction between so-called “private” regulation or self-regulation, and that of “public” regulation or state regulation, is often difficult to maintain, since in many instances the two systems are inter-dependant: operational state regulation depends on private co-operation, whereas self-regulation will often only be effective if it is underwritten by state power.⁸⁸⁷ In many jurisdictions a system of co-regulation exists: the state or government sets the basic objectives through policy initiatives and leaves it to the

⁸⁸¹ 2. I wish to emphasise that this section will only provide a very brief introduction to some of the types of regulation and this outline cannot provide any true reflection of the debate and discussion with respect to different models of regulation.

⁸⁸² PL Joskow & RC Noll "Regulation in Theory and Practice: An Overview" in G Fromm (ed) *Studies in Public Regulation* (1981) 2.

⁸⁸³ P Selznick's definition as cited by Baldwin *et al* *Understanding Regulation* 3.

⁸⁸⁴ M Moran "Theories of Regulation and Changes in Regulation: The Case of Financial Markets" (1986) 34 *Political Studies* 185 185.

⁸⁸⁵ Baldwin *et al* *Understanding Regulation* 3.

⁸⁸⁶ 15 and 41. At n 1 of page 15 the authors provide a list of sources which review public interest reasons for regulation.

⁸⁸⁷ Moran (1986) 186.

relevant industry role-players to translate these goals into specific guidelines, to report back to the authorities on the progress achieved and to do so on a voluntary basis.⁸⁸⁸ As a result, industry self-regulation and state regulation have been described as part of a continuum which are not mutually exclusive.⁸⁸⁹

Regulatory measures, which set health, safety and performance standards, including rules which prescribe occupational, environmental and product safety requirements, in essence seek to protect consumers from making decisions which they may later regret.⁸⁹⁰ Such regulatory measures will be required when market practices fail to properly advise and protect users. Joskow and Noll examined the different regulatory models pertaining to product and food regulation. They found that, in terms of Spence's model, for example, the ignorant workers with risky occupations or the consumers of hazardous products might not know which perils are involved in their potential behaviour. The better informed – who may be either the employers or manufacturers of the goods, or the government which has the information through conducting research – will be in a position to know which information should be provided as to the possible risks and therefore should set regulatory standards.⁸⁹¹ Hinich's model of food regulation, instead, incorporates an insurance system or a similar risk-spreading mechanism to pay for health care. As long as sellers of insurance cannot tell the difference between ignorant and informed individuals, excessive risk taking by ignorant consumers will impose a pecuniary external diseconomy on the informed population. Therefore, the informed group may prefer to ban risky workplaces and products in order to save the cost of funding the medical care of the ignorant.⁸⁹²

Marketing and advertising, in an ideal world, actually offers one method of providing the prospective consumer with information needed to make an informed decision. As

⁸⁸⁸ JJ Boddewyn "Foreword" in MA Shaver & S An (eds) *The Global Advertising Regulation Handbook* (2015) viii.

⁸⁸⁹ I Bartle & P Vass (2005) *Self Regulation and The Regulatory State: A Survey of Policy and Practice, Research Report 17* (2005) 24.

⁸⁹⁰ Joskow & Noll "Regulation in Theory and Practice: An Overview" in *Studies in Public Regulation* 24.
⁸⁹¹ 25.

⁸⁹² Joskow and Noll are of the view that this model does not explain why regulation, rather than a change in the institutions for financing medical care, is imposed. Oi's approach, however, is making use of the question as to the liability of the employer or manufacturer. Since producers cannot know what exactly the damage costs of all individual consumers may be, they must provide a heterogeneous group of consumers with as much information as possible. The informed consumer will be able to purchase the optimal quality of product and the optimal insurance policy separately. Joskow & Noll "Regulation in Theory and Practice: An Overview" in *Studies in Public Regulation* 25-26.

to the field of regulation of marketing and advertising itself, there are several types of regulatory methods. Governmental regulation can take various forms, including legislation and governmental watchdogs, while self-regulation, consumerism or organized market forces, media forces, and natural market forces may all also perform regulatory duties.⁸⁹³ As was mentioned above, a hybrid system in terms of which all of the above stakeholders may have a role to play, is often used in a number of jurisdictions worldwide. The various manifestations of these hybrid systems in the food-marketing context will be described in this chapter.

The role of self-regulation, however, requires particular emphasis. As was also mentioned above, industry self-regulation can be defined as the process whereby an industry-level organisation provides the rules and standards that all members in the particular industry are requested to follow.⁸⁹⁴ Incorporated into these rules, the industry organisation also creates and imposes sanctions against non-compliant members of the industry. Self-regulation is often proffered to be the optimum regulatory solution since it is developed, implemented and “owned” by the industry. The benefits of self-regulation are said to be that it is a less adversarial, more flexible and timelier process than that of governmental regulation, and that it conserves government resources. The disadvantages are, however, that promises are often not fulfilled because of weak standards or ineffective enforcement, which allows enterprises to continue to serve their own interests at the expense of consumers and in effect renders self-regulation as worthless.⁸⁹⁵

As a staunch supporter of self-regulation, Boddewyn explains that self-regulation can be divided into the following five categories, which often may overlap, creating hybrid categories. The most informal type of self-regulation occurs in instances where participants to an enterprise have goals and standards and the participants provide in-house oversight of their own business. Norms and values are developed internally, and members must comply with them.⁸⁹⁶ Secondly, the entire industry, such as the advertising trade, may also develop and degree upon norms and values. Members of

⁸⁹³ MA Shaver & S An “Introduction” in MA Shaver & S An (eds) *The Global Advertising Regulation Handbook* (2015) 1.

⁸⁹⁴ LL Sharma, SP Teret & KD Brownell “The Food Industry and Self-Regulation: Standards to Promote Success and to Avoid Public Health Failures” (2010) 100 *Am JPublic Health* 242.

⁸⁹⁵ 242.

⁸⁹⁶ MA Shaver & S An (eds) *The Global Advertising Regulation Handbook* (2015) 2 citing JJ Boddewyn *Global Perspectives on Advertising Self-regulation: Principles and Practices in Thirty-eight Countries* (1992).

the industry enforce these standards by monitoring each other. In terms of a third category an examining board is often established and can consist of members from the trade as well as outside members from the general public. Complaints against a competitor about its advertising practices may be brought to the attention of such a board that may also impose certain prescribed sanctions.⁸⁹⁷

Another type of self-regulation makes use of an association which monitors the advertising industry. In this case, however, both members of the industry itself as well as individual members of the public may complain about advertisements. At the same time the association will monitor advertising practices and initiate cases when an agency fails to comply with laws or industry codes.⁸⁹⁸ In addition, certain associations may monitor specific types of cases. Examples of these would be associations mandated to examine drugs and food products. Finally, governmental regulation makes use of its own investigating teams and methods of oversight. Offending industry members are taken to task by the imposition of fines or other statutory penalties.⁸⁹⁹

2 Regulation of marketing techniques

It has been recorded that advertisers in France introduced the first national system of self-regulation in 1935⁹⁰⁰ whilst in 1937 the International Chamber of Commerce introduced its first advertising guidelines.⁹⁰¹ These guidelines called for advertising to be “decent, honest and truthful”.⁹⁰² Since then, there have been numerous attempts at regulating commercial speech, often limiting marketing practices in the interests of promoting and protecting public health.⁹⁰³ Such laws, rules and regulations have predominantly followed in reaction to new types of techniques or forms of media which have been used as marketing tools but also have been amended and often relaxed as

⁸⁹⁷ Shaver & An (eds) *The Global Advertising Regulation Handbook* 2-3 citing Boddewyn *Global Perspectives on Advertising Self-regulation*.

⁸⁹⁸ Shaver & An (eds) *The Global Advertising Regulation Handbook* 3 citing Boddewyn *Global Perspectives on Advertising Self-regulation*.

⁸⁹⁹ Shaver & An (eds) *The Global Advertising Regulation Handbook* 3 citing Boddewyn *Global Perspectives on Advertising Self-regulation*.

⁹⁰⁰ With the founding of the Office for the Control of Advertisements (Office de Contrôle des Annonces, or OCA). JP Teyssier “France” in MA Shaver and S An (ed) *The Global Advertising Regulation Handbook* 155.

⁹⁰¹ J Boddewyn “Foreword” in MA Shaver and S An (ed) *The Global Advertising Regulation Handbook* 10. See also ADB Nielsen & Nordic Council of at 103; ICC “The Merchants of Peace” available at <http://www.iccwbo.org/about-icc/history/> (accessed on 06/10/2015). See also ch 5 at 4 1.

⁹⁰² Boddewyn “Foreword” in *The Global Advertising Regulation Handbook* 10.

⁹⁰³ See also the discussion in ch 4 of this thesis at 2.

morals and values change.⁹⁰⁴ In recent years, an increasing need for consumer protection as well as a global call to encourage healthier consumer behaviour have necessitated a number of regulatory changes. Although the international community places great faith in the power of the law to change individual consumer behaviour through regulatory intervention, achieving such change is far from simple and easy.⁹⁰⁵ Nevertheless, research seems to suggest that some types of intervention may have an effect on consumer behaviour and it is certainly true that it is more difficult to make healthy choices in certain environments than in others.⁹⁰⁶ This appears especially true in light of the research, which proves that advertising leads to an increase in consumption, also of foods containing high levels of salt, sugars and fat and which are marketed to children.⁹⁰⁷

In what follows, the different types of regulatory efforts – whether it be self-imposed by the marketing or food manufacturing industries or imposed by government legislation – will be discussed. As a result, the different approaches to promoting children’s rights with regard to food marketing will be analysed in terms of intervention methods. These include company promises or pledges, codes of conduct, industry performance indicators, individual or class action litigation, as well as local and national regulations. Whereas chapter 5 provides an overview of international recommendations and guidelines that are applicable in these instances, chapter 6 will provide some insight as to what methods have been employed in a number of jurisdictions, while chapters 7 and 8 will examine the South African efforts in this regard.

2 1 Television advertising

In chapter 2 of this thesis it was explained how television marketing remains the most popular form of marketing, despite the increase in amounts which are spent on online marketing and other forms of “new” marketing. As a result, television advertising also still currently remains the most regulated form of marketing and has been the subject of concern and debate in the USA since the 1970s.⁹⁰⁸

⁹⁰⁴ See also Boddewyn “Foreword” in *The Global Advertising Regulation Handbook* 11.

⁹⁰⁵ Alemanno & Garde (eds) *Regulating Lifestyle Risks* 2.

⁹⁰⁶ 3.

⁹⁰⁷ Cairns *et al* *The Extent, Nature and Effects of Food Promotion to Children: A Review of the Evidence to December 2008* Systematic literature reviews are further supported by experimental studies such as those by E Boyland & J Halford “Television Advertising and Branding: Effects on Eating Behaviour and Food Preferences in Children” (2013) 62 *Appetite* 236. See also ch 2 at 2 3.

⁹⁰⁸ Hawkes *Marketing Food to Children* 10.

2 1 1 Governmental prohibition of advertising to children

There are currently four jurisdictions that prohibit all forms of television advertising of any type of product to children through means of statutory provisions. These are Norway, Sweden, Quebec,⁹⁰⁹ and since 2014, Brazil.⁹¹⁰ These injunctions, however, are qualified by the fact that a child, for the purposes of the various pieces of legislation, is defined as a person under the age of 12 (in Norway, Sweden and Brazil) or 13 (in Quebec).⁹¹¹ Brazil, however, not only prohibits television commercials but all

⁹⁰⁹ 16, and as was mentioned above in ch 4.

⁹¹⁰ E Soares "Brazil: New Resolution Bans Advertising to Children Under Age 12" (22-04-2014) *Library of Congress* <http://www.loc.gov/lawweb/servlet/lloc_news?disp3_l205403936_text> (accessed 20-04-2015).

⁹¹¹ The original ch 7, s 4 of the Swedish Radio and Television Act (1996:844) has been amended and incorporated into ch 8 ss 7 and 8 of the 2010 Act (2010:696) and provides as follows:

"Commercial advertising and children: 7. Commercial advertising in television broadcasts, Teletext and on-demand TV may not be designed to attract the attention of children less than 12 years of age. Commercial advertising in television broadcasts and on-demand TV may not appear immediately before or after a programme or part of a programme that is primarily directed to children below 12 years of age. 8. Individuals or characters who play a prominent role in programmes that are primarily aimed at children below the age of 12 years may not appear in commercial advertising on television broadcasts, Teletext and on-demand TV."

The Radio and Television Act (1996:844). In Sweden, however, a special children's ombudsman called the *Barnombudsmannen*, has the specific task of protecting the rights and interests of children as set out in the Convention on the Rights of the Child. This ombudsman accordingly protects the rights of all people under the age of 18 and has a special website where complaints by children may be lodged. Shaver & An (ed) *The Global Advertising Regulation Handbook* 142-144.

Ss 248 and 249 of the 1980 Consumer Protection Act of Quebec provides:

"248. Subject to what is provided in the regulations, no person may make use of commercial advertising directed at persons under thirteen years of age. 249. To determine whether or not an advertisement is directed at persons under thirteen years of age, account must be taken of the context of its presentation, and in particular of (a) the nature and intended purpose of the goods advertised; (b) the manner of presenting such advertisement; (c) the time and place it is shown. The fact that such advertisement may be contained in printed matter intended for persons thirteen years of age and over or intended both for persons under thirteen years of age and for persons thirteen years of age and over, or that it may be broadcast during air time intended for persons thirteen years of age and over or intended both for persons under thirteen years of age and for persons thirteen years of age and over does not create a presumption that it is not directed at persons under thirteen years of age."

CanLII "Consumer Protection Act CQLR c P-40.1" (19-10-2015) *CanLII* <<http://www.canlii.org/en/qc/laws/stat/cqlr-c-p-40.1/latest/cqlr-c-p-40.1.html>> (accessed 11-03-2015).

See also Norwegian Ministry of Health and Care Services: Sissel L Beckmann (Deputy Director General) "Regulation on food marketing and advertising to children: Regulations in Norway" (17-06-2010) *Norwegian Ministry of Health and Care Services* 18 <http://www.naos.aesan.msssi.gob.es/naos/ficheros/estrategia/IV_Convencion/Sissel_Beckmann.pdf> (accessed 11-03-2015).

Brazil's National Council of the Rights of the Child and the Adolescent (*Conselho Nacional dos Direitos da Criança e do Adolescente*, or CONANDA) issued Resolution No 163 on 13 March 2014, banning all advertisements targeting children. The Resolution, which entered into force on this date of publication in the country's Official Gazette, considers all types of advertising and marketing communications (*comunicação mercadológica*) to be abusive. See Soares "Brazil: New Resolution Bans Advertising to Children Under Age 12" (22-04-2014) *Library of Congress*.

marketing communications, including print advertisements, radio spots, banners, websites, packaging, promotions, merchandising, promotional activities during concerts and performances, and arrangements of products at points of sale, but only if aimed at children younger than 12.⁹¹² In March 2016, the Brazilian Supreme Court of Justice found that a marketing campaign in terms of which children had to buy 5 cookies and pay a further €5 to be able to receive a Shrek branded watch, breached the provisions of the Brazilian Consumer Protection Code which prohibit such practices.⁹¹³

In Sweden the ban is furthermore limited to advertisements broadcasted on Swedish television and does not apply to commercials which are broadcasted by means of satellite channels. In 1997, the ECJ ruled that the ban is applicable to television programming originating in Sweden but not to broadcasts which are transmitted from elsewhere in the EU.⁹¹⁴ Furthermore, in 2003 the European Commission dismissed a claim that the Swedish ban restricted the free movement of advertising services across the EU.⁹¹⁵

Similarly, the ban in Quebec has withstood a Supreme Court challenge in which it was contended that the ban unduly limits freedom of speech. In *Irwin Toy Ltd v Quebec (Attorney General)*⁹¹⁶ the majority of the court held that sections 248 and 249 of the Consumer Protection Act infringe section 2(b) of the Canadian Charter of Rights and Freedoms and section 3 of the Quebec Charter of Human Rights and Freedoms but that this infringement can be justified in terms of section 1 of the Canadian Charter and section 9.1 of the Quebec Charter. The reasons for the court's decision are explained in chapter 4 in this thesis.⁹¹⁷

The advertising industry has reacted to these prohibitions by changing their approach to television commercials. In both Sweden and Quebec, it appears that, since the bans came into effect, advertisements have been targeting parents,

⁹¹² Consumers International "Advertising to children now illegal in Brazil" (2014) *Consumers International* <<http://www.consumersinternational.org/news-and-media/news/2014/04/advertising-to-children-now-technically-illegal-in-brazil/>> (accessed 20-04-2015); Soares "Brazil: New Resolution Bans Advertising to Children Under Age 12" (22-04-2014) *Library of Congress*.

⁹¹³ Migalhas "Judgment history: STJ prohibits advertising to children" (10-03-2016) *Migalhas*. See also ch 3 at 4 7.

⁹¹⁴ JH Kang "Barbie Banished from the Small Screen: The Proposed European Ban on Children's Television Advertising" (2001) 21 *Nw J Int'l L & Bus* 543 548-549.

⁹¹⁵ J Tylee "EC permits Sweden to continue child ad ban" (11-07-2003) *Campaign Live* <<http://www.campaignlive.co.uk/news/185210/>> (accessed 11-03-2015).

⁹¹⁶ *Irwin Toy Ltd v Quebec (Attorney General)* [1989] 1 SCR 927, 1989 CanLII 87 (SCC).

⁹¹⁷ See section 2 3 of ch 4 above.

encouraging them to buy products for their children. Fast food restaurants in particular promote their establishments as being family orientated while media channels obtain broadcasting licences from other jurisdictions where regulatory measures are not in place.⁹¹⁸ This practice would appear directly to oppose the sixteenth General Comment by the Committee on the Rights of the Child in which it discussed the impact of the business sector on children's rights.⁹¹⁹ The Committee expressly called on the business sector to respect the best interests of the child on a global scale and not to use the lack of stringent compliance in one jurisdiction as an opportunity to disregard the best interests of the child. Whereas Sweden and Quebec are in this instance promoting the best interests of children by the regulatory system which it employs, marketers should rather try to implement this best practice in all of the jurisdictions in which they operate.⁹²⁰ In addition, it appears that marketers in the Nordic region and in Quebec continuously expand their methods of non-traditional marketing that are not covered by the ban on television advertising.⁹²¹

2 1 2 Governmental restrictions on advertising

In the UK, both the Department of Health and the Food Standards Agency ("FSA") identified the advertising of foods containing high amounts of fat, sugar and salt ("HFSS foods") to be an area which need to be regulated in an attempt to restrict children's exposure to these types of food.⁹²² These two departments, in conjunction with the independent regulator and competition authority for the UK communications industries, Ofcom, commissioned a full investigation as to possible regulatory solutions.⁹²³

After extensive research, reports and consultation processes, Ofcom was tasked with the process to propose regulatory measures. This regulatory body concluded that it should act in a proportionate and targeted manner and accordingly in November 2006, it published a set of regulations that sought to incorporate a number of

⁹¹⁸ Hawkes *Marketing Food to Children* 20; Kang (2001) *Nw J Int'l L & Bus* 548-549.

⁹¹⁹ General Comment No 16 (2013) .

⁹²⁰ See also the discussion in ch 3, section 3 3 2.

⁹²¹ Hawkes *Marketing Food to Children* 20 – 21.

⁹²² Ofcom "Television Advertising of Food and Drink Products to Children: Final Statement" (22-02-2007) *Ofcom*

<http://stakeholders.ofcom.org.uk/binaries/consultations/foodads_new/summary/foodads3.pdf> (accessed 12-12-2011).

⁹²³ Ofcom "Television Advertising of Food and Drink Products to Children" (22-02-2007) *Ofcom*.

objectives. These objectives included a significant reduction in the exposure of children under the age of 16 to HFSS food advertising. At the same time the aim was to avoid disproportionate consequences on the revenue of broadcasters while also avoiding intrusive regulation of advertising during adult airtime, given that adults are able to make informed decisions about advertising messages.⁹²⁴ Ofcom therefore proposed a set of content rules which are now included in the Broadcast Committee on Advertising Practice (“BCAP”) Television Advertising Standards Code. All television broadcasters must comply with these standards in relation to any advertising they transmit. In 2004, the responsibility for the Television Advertising Standards Code was transferred from Ofcom to the Advertising Standards Authority (ASA). However, in terms of this co-regulatory scheme Ofcom still retains ultimate responsibility for all television advertising standards as the regulator in terms of the Communications Act 2003.⁹²⁵

The regulations provide that broadcasters are not allowed to advertise, *inter alia*, HFSS foods and drinks during or adjacent to children’s programmes. For these purposes “children’s programmes” refer to programmes produced for children below the age of 16 years. To determine whether a product qualifies as a HFSS product, the nutrient profiling system of the FSA is used. In terms of this nutrient profiling system, points are awarded to food and drink products based on their nutritional content. A final overall score is then calculated and the products categorised accordingly. A food product, for example, will be classified as “less healthy” if it has a score of four or more, whereas a drink with one or more points will be subject to the advertising restrictions.⁹²⁶

The content rules of the regulations provide that advertisements are not to encourage poor nutritional habits or an unhealthy lifestyle. Television commercials may also not encourage children to make purchase requests, or condone or encourage excessive consumption. Advertisements may furthermore not imply that children will be inferior to others, disloyal or will have let someone down, if they or their

⁹²⁴ Ofcom “Television Advertising of Food and Drink Products to Children” (22-02-2007) *Ofcom*.

⁹²⁵ Ofcom “Television Advertising of Food and Drink Products to Children” (22-02-2007) *Ofcom*.

⁹²⁶ Food Standards Agency “Guide to using the nutrient profiling model” (27-09-2010) *Food Standards Agency* <<http://collections.europarchive.org/tna/20100927130941/http://food.gov.uk/healthiereating/advertisin gtochildren/nutlab/nutprofmod>> (accessed 11-03-2015). See also Food Standards Agency “Nutrient Profiling Technical Guidance April 2009” (27-09-2010) *Food Standards Agency* <<http://collections.europarchive.org/tna/20100927130941/http://food.gov.uk/multimedia/pdfs/techguide nutprofiling.pdf>> (accessed 13-03-2015).

family do not buy, consume or use a product or service. It can furthermore not appeal to children's emotions, nor suggest that having the advertised product somehow confers superiority or special powers such as making a child more confident, clever, popular, or successful.⁹²⁷ If an advertisement for a children's product contains a price, the price must not be minimised by the use of words such as "only" or "just".⁹²⁸

It is furthermore important to note that the content rules prohibit the use of licenced characters or celebrities, referring to characters which are borrowed from other contexts such as the film or television industry and which have no historical association with the product, in any advertisement of a HFSS product and targeted directly at pre-school or primary school children.⁹²⁹ This prohibition, however, does not apply to advertiser-created equity brand characters. These are characters that have been created by the advertiser and which does not have a separate identity outside their associated product or brand. As a result, these may be used to sell food.⁹³⁰ The Ofcom regulations furthermore provide some guidelines as to the use of promotional offers in general: the advertisements promoting these offers should not promote excess consumption, should avoid creating a sense of urgency and should not encourage children to eat or drink a product only to take advantage of a promotional offer.⁹³¹

Similar types of restrictions also exist in Ireland,⁹³² South Korea⁹³³ and Mexico.⁹³⁴ In Chile the Law of Nutritional Composition of Food and Advertising (*ley de comida*

⁹²⁷ Ofcom "Television Advertising of Food and Drink Products to Children" (22-02-2007) *Ofcom*.

⁹²⁸ Ofcom "Television Advertising of Food and Drink Products to Children" (22-02-2007) *Ofcom*.

⁹²⁹ Ofcom "Television Advertising of Food and Drink Products to Children" (22-02-2007) *Ofcom*.

⁹³⁰ Ofcom "Television Advertising of Food and Drink Products to Children" (22-02-2007) *Ofcom*.

⁹³¹ Ofcom "Television Advertising of Food and Drink Products to Children" (22-02-2007) *Ofcom*.

⁹³² WCRF International Nourishing Framework "Restrict food advertising and other forms of commercial promotion" (2015) *WCRF International Nourishing Framework* <http://www.wcrf.org/sites/default/files/4_Restrict%20advertising_Final.pdf> (accessed 10-03-2015) explains that in terms of the Children's Commercial Communications Code, 2013 revision, advertising, sponsorship, teleshopping and product placement of HFSS foods as defined by a nutrient profiling model, are prohibited during children's TV and radio programmes where over 50% of the audience are under eighteen years old. There is an overall limit on advertising of HFSS food adverts at any time of day to no more than 25% of sold advertising time and to only one in four advertisements. Remaining advertising targeted at children under the age of 13 must not include nutrient or health claims or include licensed characters.

⁹³³ WCRF International Nourishing Framework "Restrict food advertising and other forms of commercial promotion" (2015) *WCRF International Nourishing Framework* describes s 10 of the Special Act on the Safety Management of Children's Dietary Life, as amended in 2010, as prohibiting TV advertising to children under 18 years for specific categories of food before, during and after programmes shown between 5-7pm and during other children's programmes.

⁹³⁴ WCRF International Nourishing Framework "Restrict food advertising and other forms of commercial promotion" (2015) *WCRF International Nourishing Framework*. In February 2014, the Mexican Ministry of Health issued an order restricting the advertising of foods and sweetened beverages, also defined according to a nutrient profiling model. The restrictions apply to TV programmes classified as suitable to all ages within the times of 2.30-7.30pm on weekdays and 7:00am-7.30pm on weekends, where over

chatarra) has been approved in 2012 and is due to come into operation during 2015.⁹³⁵ In terms of this act, the advertisement of foods regarded as “excess” foods will be prohibited to children younger than 14. Foods found to be containing high amounts of calories, saturated fats, sugar and sodium will be defined as “in excess” and may furthermore also not be advertised during, before or after TV programmes where the 20 percent or more of the audience consists of children.⁹³⁶ In Peru, the Promoting Healthy Food for Children Act was signed by the President in May of 2013, and provides for a list of measures to reduce children’s exposure to and consumption of unhealthy foods.⁹³⁷ One of these measures is the limitation of advertising aimed at children and adolescents younger than 16 years. The act prohibits advertising that encourages “immoderate consumption” of food and non-alcoholic beverages that contain trans fats or high levels of sugar, salt, and saturated fat; encourages “inappropriate portions”; appeals to children’s emotions or credulity; or uses testimony from real people or fictitious characters whom the children might admire. It also forbids adverts that suggest that a parent is “more intelligent or more generous” if he or she purchases a particular product.⁹³⁸ It is particularly interesting to note that Peruvian legislation will also introduce a mandatory warning system for the advertising and

35% of the audience are under age 13. Advertising for these foods is also restricted in films classified as “A”. Implementation commenced on 15 July 2014 for sweetened drinks, potato chips, chocolates and confectionary and have been extended to other foods covered by the nutrient profiling model in January 2015.

⁹³⁵ M Zepeda “Senator Girardi Issues Complaint Under New ‘Fast Food Law’” (2007-2015) *I Love Chile News* <<http://www.ilovechile.cl/senator-girardi-issues-complaint-under-new-fast-food-law/>> (accessed 17-03-2015).

⁹³⁶ WCRF International Nourishing Framework “Restrict food advertising and other forms of commercial promotion” (2015) *WCRF International Nourishing Framework*; H Blaikie “Canada: Strict New Chilean Law For Foods High In Calories, Fat, Salt Or Sugar” (13-12-2012) *Mondaq* <<http://www.mondaq.com/canada/x/211394/advertising+marketing+branding/Strict+New+Chilean+Law+For+Foods+High+In+Calories+Fat+Salt+Or+Sugar>> (accessed 16-03-2015). The act will also prohibit promotional incentives, such as toys included in meals, as well as advertising of foods in schools. Chile is also planning to introduce further legislative measures relating to other marketing techniques in its effort to combat obesity and these are discussed below in this chapter. E Woo “Bill seeks to increase taxes on junk food and get a healthy food” (15-02-2015) *Bio Chile* <<http://www.biobiochile.cl/2015/02/15/proyecto-de-ley-busca-aumentar-impuestos-a-comida-chatarray-bajar-a-alimentos-saludables.shtml>> (accessed 17-03-2015) (page translated by Google Translate).

⁹³⁷ B Fraser “Latin American countries crack down on junk food” (2013) 382 *The Lancet* 385 385; WCRF International Nourishing Framework “Restrict food advertising and other forms of commercial promotion” (2015) *WCRF International Nourishing Framework*. Some of the other measures are discussed elsewhere in this chapter.

⁹³⁸ GB Newmann *Sugar is the New Tobacco: The Peruvian Junk Food Law in light of the WTO law after the Seals dispute Working Paper No. 2014-23* paper presented at the *Fourth Biennial Global Conference of the Society of International Economic Law (SIEL)*, 10 - 12 July 2014 <[available at http://ssrn.com/abstract=2463704](http://ssrn.com/abstract=2463704)>.

labelling of HFSS foods.⁹³⁹ Article 10 of the Promoting Healthy Food for Children Act provides that advertisements and the labels of food and non-alcoholic beverages with trans fats and high levels of sugar, sodium and saturated fats, should disclose in a clear, legible and prominent manner statements such as the following:

- “High in (sodium / sugar / saturated fat): Avoid excessive consumption”; or
- “Contains trans fats: Avoid consumption”.⁹⁴⁰

In April 2014, regulations were proposed which define the term “high” in the legislation. The regulations were published for public feedback and are currently waiting to be enacted.⁹⁴¹

2 1 3 Co-regulation: governmental and industry-imposed limitations upon advertising

As was explained above, the most prevalent form of regulation worldwide appears to be a system of co-regulation. The following section will place emphasis on the provisions of self-regulatory codes of conduct produced and enforced by the television advertising industry itself. Nevertheless, in many jurisdictions some form of governmental oversight or statutory provisions provide the contextual basis for these codes and, as a result, these pieces of legislation will also be referred to.

Consumer bodies, labour unions and other non-profit organisations play an active role in France where advertising is forbidden on public radio stations and after 20:00 on public television channels.⁹⁴² The French system of co-regulation is said to be one of the oldest systems where private regulatory codes co-exist with laws enacted by the Legislature, decrees and orders of the executive branch, or rules made by independent administrative authorities.⁹⁴³ Both article 7 of Decree No 92-280 of 27

⁹³⁹ The Law of Nutritional Composition of Food and Advertising of Chile requires warnings and a graphic design to be included on the labels of such products. WCRF International Nourishing Framework “Restrict food advertising and other forms of commercial promotion” (2015) *WCRF International Nourishing Framework*.

⁹⁴⁰ Newmann *Short Sugar is the New Tobacco: The Peruvian Junk Food Law in light of the WTO law after the Seals dispute*.

⁹⁴¹ WCRF International Nourishing Framework “Restrict food advertising and other forms of commercial promotion” (2015) *WCRF International Nourishing Framework*.

⁹⁴² Shaver & An (eds) *The Global Advertising Regulation Handbook* 156. Until 2003 big retail groups were not allowed to advertise on television and the cinema sector and publishing firms are only allowed to advertise on certain stations.

⁹⁴³ 154.

March 1992⁹⁴⁴ and the *Bureau de Vérification de la Publicité* (BVP) — the French advertising self-regulatory body — provide in general that television advertisements are not allowed to take advantage of children's inexperience and immaturity and should accordingly not urge minors to purchase products or services by exploiting their naiveté. Children should also not be urged to persuade their parents or any third party to buy the product advertised and advertisements should not undermine the confidence that children have in their parents, teachers or other adult role models.⁹⁴⁵ The BVP advises in considerable detail that television commercials should not depict and promote snacking, compulsive eating, excessive eating and an inactive way of life.⁹⁴⁶ Advertisements should furthermore not give the impression that food products enable children to have better school or sports results.⁹⁴⁷

The use of warnings, either in the form of banners or legal notices, is also compulsory for a number of products in France.⁹⁴⁸ In 2007 the Legislature decreed that all advertisements of food products containing added sugar, salt, fat or artificial sweeteners, and processed food and drinks, used in broadcast and print media, must carry a health warning, such as “for your health, avoid eating too much fat, sugar and salt” or “avoid snacking between meals”.⁹⁴⁹ These messages must cover at least 7 percent of the screen or page used in an advertisement. Failure to comply with this requirement may carry a government levy of 1,5 percent of a company's advertising budget.⁹⁵⁰

⁹⁴⁴ As amended by Decree 2001-1331 2001-12-28 art 2 and 4 JORF December 29, 2001.

⁹⁴⁵ M Béjot & B Doittau “Advertising to children in France” (2004) *Legal briefing* 65-68 <<http://www.galamarketlaw.com/pdf/Legalfinal.pdf>> (accessed 18-03-2015) 66.

⁹⁴⁶ See for example Hawkes *Marketing Food to Children* 28-29.

⁹⁴⁷ Béjot & Doittau “Advertising to children in France” (2004) *Legal briefing* 68.

⁹⁴⁸ Shaver & An (ed) *The Global Advertising Regulation Handbook* 160.

⁹⁴⁹ Decree No 2007-263 of 27 February 2007 laying down the conditions governing the information to sanitary character to accompany advertising or promotional messages for certain food and drink and on advertising and promotional messages for certain foods and drinks and amending the Public Health Code (Second Part: regulations). Shaver & An (ed) *The Global Advertising Regulation Handbook* 160; C Mercer “France tightens food and drink advert rules” (01-03-2007) *Beverage Daily* <<http://www.beveragedaily.com/Markets/France-tightens-food-and-drink-advert-rules>> (accessed 18-03-2015); WCRF International Nourishing Framework “Restrict food advertising and other forms of commercial promotion” (2015) *WCRF International Nourishing Framework*.

⁹⁵⁰ Mercer “France tightens food and drink advert rules” (01-03-2007) *Beverage Daily*; Obesity Policy Coalition “International Food Advertising Regulations” *Obesity Policy Coalition* <<http://www.opc.org.au/downloads/positionpapers/policy-brief-international-laws-food-advertising.pdf>> (accessed 18-03-2015); SM Simon “Junk food: Evolution of the legislation in European countries” <<http://www.eph.org/a/2554>> (accessed 18-03-2015).

Another fairly established industry regulatory body is that of the Canadian Advertising Advisory Board (CAAB) which was founded in 1957.⁹⁵¹ As a result, a system of co-regulation also exists in Canada but the lines between governmental and self-regulatory measures are reportedly less distinct.⁹⁵² The Broadcast Code for Advertising to Children, for example, is statutory in nature since compliance with the Code is a requirement for Canadian Radio-television and Telecommunications Commission (CRTC) licensure.⁹⁵³ The Code is promoted and administered by the industry body, Advertising Standards Canada (ASC), which is also the body who has the authority over pre-clearance of advertisements.⁹⁵⁴

In terms of the Code, as well as according to a series of standards by the Canadian Broadcasting Association, when advertising to people under the age of 12, care must be taken to not place any undue pressure upon these children, with the effect that they pester their parents into buying a particular advertised product. Advertisements, which promote premiums or contests, must place equal amounts of emphasis on the product as well as on the premium or contest and the exposure of the product must account for at least 50 percent of the commercial time.⁹⁵⁵ Furthermore, similar to the provisions of the Ofcom content rules in the UK, persons and characters (including cartoon characters) well-known to children and/or featured on children's programs may not be used to endorse or personally promote products, premiums or services. The Canadian Code, however, accepts that the mere presence of such well-known puppets, persons or characters in a commercial message does not necessarily constitute endorsement or personal promotion. The example, which is used to explain this, is the instance where a film clip or animation is used as a mood or theme-setting introduction to commercial messages before presenting the subject of the commercial message itself.⁹⁵⁶ Nevertheless, these puppets, persons and characters may not handle,

⁹⁵¹ Shaver & An (ed) *The Global Advertising Regulation Handbook* 22.

⁹⁵² Hawkes *Marketing Food to Children* 21.

⁹⁵³ Advertising Standards Canada "Broadcast Code for Advertising to Children - Background" (2016) ASC *Clearance Service* <<http://www.adstandards.com/en/clearance/childrens/broadcastCodeForAdvertisingToChildren-Background.aspx>> (accessed 19-03-2015); Hawkes *Marketing Food to Children* 21.

⁹⁵⁴ Advertising Standards Canada "Broadcast Code for Advertising to Children - The Code" (2016) ASC *Clearance Service*; MA Shaver and S An (ed) *The Global Advertising Regulation Handbook* 32; Hawkes *Marketing Food to Children* 21.

⁹⁵⁵ CI 5 of the Broadcast Code for Advertising to Children. Advertising Standards Canada "Broadcast Code for Advertising to Children - The Code" (2016) ASC *Clearance Service*.

⁹⁵⁶ CI 7(a) of the Broadcast Code for Advertising to Children. Advertising Standards Canada "Broadcast Code for Advertising to Children - The Code" (2016) ASC *Clearance Service*.

consume, mention or endorse in any other way the product being advertised.⁹⁵⁷ Once again none of these rules apply to puppets, persons and characters created by an advertiser specifically for the purpose of promoting the particular products.⁹⁵⁸

As mentioned above, in Canada children's broadcast advertisements have to be pre-approved by the marketing industry's ASC. This means that it is compulsory to submit any paid commercial message that is carried in or immediately adjacent to a children's program or any message determined by the broadcaster as being directed to persons younger than 12 and is carried in or immediately adjacent to any other program.⁹⁵⁹ The ASC may not give approval for broadcast to any commercial that does not meet the recommended standards of the Code.⁹⁶⁰

There is no mention of food advertising in particular in the Canadian Code of Advertising Standards or in the Broadcast Code for Advertising to Children. However, in 2007 in terms of the Canadian Children's Food and Beverage Advertising Initiative ("CCFBAI"), eight companies announced that they would not engage in advertising directed primarily to children under the age of 12 years.⁹⁶¹ Another 11 companies⁹⁶² promised to direct 100 percent of their children's food advertising to healthier products.⁹⁶³ According to an Advertising Standards Canada compliance report published in 2009, participating companies "successfully met and even exceeded the original CAI requirements during the reporting period".⁹⁶⁴ However, upon closer inspection it appears that the nutritional criteria used by the ASC and the companies were not very strict, and as a result products such as FrootLoops, Frosted Flakes, Chocolate Lucky Charms, Trix and Reese's Puffs cereals, Nesquik Chocolate Syrup (sugar reduced version) and Frootloop Cereal Straws qualified as healthy dietary

⁹⁵⁷ CI 7 of the Broadcast Code for Advertising to Children. Advertising Standards Canada "Broadcast Code for Advertising to Children - The Code" (2016) *ASC Clearance Service*.

⁹⁵⁸ CI 7 of the Broadcast Code for Advertising to Children. Advertising Standards Canada "Broadcast Code for Advertising to Children - The Code" (2016) *ASC Clearance Service*.

⁹⁵⁹ CI 14 of the Broadcast Code for Advertising to Children. Advertising Standards Canada "Broadcast Code for Advertising to Children - The Code" (2016) *ASC Clearance Service*.

⁹⁶⁰ CI 14(b) of the Broadcast Code for Advertising to Children. Advertising Standards Canada "Broadcast Code for Advertising to Children - The Code" (2016) *ASC Clearance Service*.

⁹⁶¹ These companies are Cadbury Adams, Coca-Cola, Hershey, Janes Family Foods, Mars, McCain, PepsiCo and Unilever.

⁹⁶² Being the companies of Burger King, Campbell's, Ferrero, General Mills, Kellogg, Kraft, McDonald's, Nestlé, Parmalat, Post Foods and Weston Bakeries.

⁹⁶³ Toronto Medical Officer of Health "Food Advertising to Children: Update. Submitted to Board of Health" (01-02-2010) *Toronto Medical Officer of Health* 5-6 <<http://www.toronto.ca/legdocs/mmis/2010/hl/bgrd/backgroundfile-27182.pdf>> (accessed 19-03-2015).

⁹⁶⁴ Toronto Medical Officer of Health "Food Advertising to Children: Update" (01-02-2010) *Toronto Medical Officer of Health* 6.

choices.⁹⁶⁵ The Toronto Medical Officer of Health subjected these examples to the FSA nutrient profiling system used by the Ofcom content rules in the UK and found that Kellogg's Frosted Flakes and Frootloops cereals scored 10 points each, General Mills' Lucky Charms and Cinnamon Toast Crunch cereals each scored 12 points, and Frootloops cereal straws received 15 points.⁹⁶⁶

The FTC is the governmental body tasked with the general regulatory role over advertising in the USA and was established in 1914.⁹⁶⁷ It works closely with the Federal Communications Commission ("FCC") which, *inter alia*, monitors advertising content on broadcast media, as well as with the Food and Drug Administration ("FDA").⁹⁶⁸ In a country where children's advertising has been the subject of debate for nearly 50 years, advertising to children is currently restricted during programmes targeted at children under the age of 12 years to 10,5 minutes per hour on weekends, and 12 minutes per hour during the week.⁹⁶⁹ If the average duration of an advertisement is taken to be 30 seconds, this would mean that during the week children in the USA may be exposed to 24 advertisements per hour.

Once again, in terms of a system of co-regulation, there are numerous self-regulatory bodies that operate within the advertising industry in the USA. The National Advertising Review Council ("NARC") was created in 1971 as an alliance partner with some of the major trade organizations.⁹⁷⁰ NARC operates four self-regulatory bodies, one of which is the Children's Advertising Review Unit ("CARU").⁹⁷¹ CARU is administered by the Council of Better Business Bureaus ("CBBB") and funded by members of the children's advertising industry.⁹⁷² CARU seeks the voluntary

⁹⁶⁵ Toronto Medical Officer of Health "Food Advertising to Children: Update" (01-02-2010) *Toronto Medical Officer of Health* 6.

⁹⁶⁶ Toronto Medical Officer of Health "Food Advertising to Children: Update" (01-02-2010) *Toronto Medical Officer of Health* 6. As explained in this chapter above at 2 1 2, in terms of the FSA nutrient profiling system a food will be classified as "less healthy" if it scores more than 4 points.

⁹⁶⁷ Shaver & An (ed) *The Global Advertising Regulation Handbook* 48.

⁹⁶⁸ 48 – 49.

⁹⁶⁹ In terms of the Children's Television Act (1990). Hawkes *Marketing Food to Children* 21 – 22.

⁹⁷⁰ The American Association of Advertising Agencies ("AAAA"), the Association of National Advertisers ("ANA"), the American Advertising Federation ("AAF"), and the Council of Better Business Bureaus, Inc. ("CBBB"). In 2008, the Direct Marketing Association ("DMA"), Electronic Retailing Association ("ERA"), and Interactive Advertising Bureau ("IAB") joined the strategic alliance as partners of the self-regulatory system. Shaver & An (ed) *The Global Advertising Regulation Handbook* 49.

⁹⁷¹ The other bodies are the National Advertising Division ("NAD"); the National Advertising Review Board ("NARB"), which is the appellate body of NAD; and the Electronic Retailing Self-Regulation Program ("ERSP"). Shaver & An (ed) *The Global Advertising Regulation Handbook* 49.

⁹⁷² Children's Advertising Review Unit "Self-Regulatory Program for Children's Advertising" (2009) *Children's Advertising Review Unit* <<http://www.caru.org/guidelines/guidelines.pdf>> (accessed 20-03-2015).

cooperation of advertisers but in the event where an advertiser refuses to cooperate, the matter is referred to the legal authority, the FTC, who has the power to prohibit advertisers from engaging in further advertising activities. As a self-regulatory body, CARU has no sanctioning powers.⁹⁷³

CARU's guidelines are fairly broad in scope but not intended to be exhaustive.⁹⁷⁴ It provides, in general, for responsible advertising to children which is not false or misleading. The guidelines also provide, *inter alia*, that advertisements representing a mealtime should depict the food product within the framework of a nutritionally balanced meal. A nutritionally balanced meal is explained to contain at least three of the five major food groups, preferably including those food groups recommended for increased consumption by the current United States Department of Agriculture's Dietary Guidelines for Americans.⁹⁷⁵ The CARU guidelines describe such a depiction in the following vague terms:

"The food included in the meal should reflect reasonable portion sizes and types of foods appropriate for children in the meal setting depicted. ... If the meal includes a caloric beverage, the beverage should be one that is appropriate in a nutritionally balanced meal taking into account the beverage's nutritional attributes and its calories within the context of the meal depicted."⁹⁷⁶

The guidelines also disallow the use of programme personalities, live or animated, in commercials in or adjacent to a television programme primarily directed to children under 12 years of age in which the same personality or character appears.⁹⁷⁷

Another initiative, which appears to provide further guidance to marketers in the USA, is the CBBB's Children's Food and Beverage Advertising Initiative (CFBAI). Similar to the initiative by the same name in Canada, 17 companies in the USA have committed themselves to only advertising foods that meet the CFBAI's nutrition

⁹⁷³ SB Cassim & D Bexiga "The Regulation of Advertising to Children: A Comparative Assessment" (2007) 14 *Alternation* 137 155.

⁹⁷⁴ Children's Advertising Review Unit "Self-Regulatory Program for Children's Advertising" (2009) *Children's Advertising Review Unit*.

⁹⁷⁵ These foods consisting of fruits, vegetables, fat-free or low-fat milk and milk products and whole grains.

⁹⁷⁶ Children's Advertising Review Unit "Self-Regulatory Program for Children's Advertising" (2009) *Children's Advertising Review Unit* specifically Part I: General Guidelines - (b) Product Presentations and Claims.

⁹⁷⁷ Children's Advertising Review Unit "Self-Regulatory Program for Children's Advertising" (2009) *Children's Advertising Review Unit* specifically Part I: General Guidelines - (e) Blurring of Advertising and Editorial/Program Content.

criteria.⁹⁷⁸ In terms of a “stronger” set of criteria published in 2011, milk or milk substitute products which may be advertised, must contain less than 24g of sugar per 8 fluid ounces or cereals must have less than 10g of sugar per labelled serving size.⁹⁷⁹ As a result, products such as Chocolate Cheerios; Kellogg’s Frosted Flakes and Eggo Bites Pancakes Chocolatey Chip; a McDonald’s Hamburger Happy Meal (consisting of a hamburger, children’s size potato fries, apple slices, and fat-free chocolate milk); and Popsicle Jelly Belly are included on the list of products which may be advertised to children of all ages.⁹⁸⁰

2.2 Product placement

The regulation of embedded marketing in television programmes and movies has received far less attention than television advertising. In fact, product placement, along with many other forms of non-traditional forms of marketing, is fairly unregulated and restrictions thereupon have been described as patchy and vague.⁹⁸¹ It appears that in most instances where some form of regulation exists, this marketing technique will be incorporated in restrictions placed on television advertising, while the embedded use of products in movies, games and music videos remain unaffected.⁹⁸²

In Europe the Television Without Frontiers (“TVWF”) Directive, which previously prohibited “surreptitious marketing”,⁹⁸³ has been replaced with the Audiovisual Media

⁹⁷⁸ Council of Better Business Bureaus “Children’s Food & Beverage Advertising Initiative: Foods and Beverages that Meet the CFBAI Category-Specific Uniform Nutrition Criteria that May Be in Child-Directed Advertising” (01-2015) *Better Business Bureaus* <<http://www.bbb.org/globalassets/shared/media/cfbai/cfbai-product-list-jan-2015.pdf>> (accessed 23-03-2015). Thirteen companies have pledged to advertise only the products which meet the criteria (namely Burger King Corporation; McDonald’s USA, LLC; Campbell Soup Company; Mondelez Global LLC Inc; ConAgra Foods Inc; Nestlé USA; The Dannon Company; PepsiCo Inc; General Mills Inc; Post Foods, LLC; Kellogg Company; Unilever United States; Kraft Foods Global Inc) while four have pledged not to advertise to children younger than 12 (namely The Coca-Cola Company; The Hershey Company; Ferrero USA; and Mars Incorporated).

⁹⁷⁹ Council of Better Business Bureaus “Children’s Food and Beverage Advertising Initiative: Category-Specific Uniform Nutrition Criteria” (07-2011) *Better Business Bureaus* <<http://www.bbb.org/us/storage/16/documents/cfbai/CFBAI-Category-Specific-Uniform-Nutrition-Criteria.pdf>> (accessed 23-03-2015).

⁹⁸⁰ Council of Better Business Bureaus “Children’s Food & Beverage Advertising Initiative: Foods and Beverages that Meet the CFBAI Category-Specific Uniform Nutrition Criteria that May Be in Child-Directed Advertising” (01-2015) *Better Business Bureaus* .

⁹⁸¹ Hawkes *Marketing Food to Children* 45.

⁹⁸² 45.

⁹⁸³ The Ofcom Rules on Product Placement, discussed below, describes “surreptitious advertising” as a reference to a product, service or trade mark within a programme, where such a reference is intended by the broadcaster to serve as advertising and this is not made clear to the audience. Such advertising is likely to be considered intentional if it occurs in return for payment or other valuable consideration to the broadcaster or producer.” See also Hawkes *Marketing Food to Children* 45. Although there was

Services (“AVMS”) Directive in 2007. In terms of Article 11 of the AVMS Directive product placement is prohibited. Nevertheless, the provision at the same time provides for the exception that Member States have the discretion to allow product placement should certain requirements be met. An important aspect for the purposes of this research, however, is that there are exceptions to this exception: irrespective of the programme genres concerned, no product placement will be allowed to take place in European Member States either in children’s programmes or for tobacco products or medicines and medical treatments available only on prescription.⁹⁸⁴ The AVMS Directive unfortunately does not provide a definition of “children” or “children’s programming”.

The Danish government responded to this Directive by initially allowing product placement. Subsequently in 2013, Denmark enacted an act amending the Broadcasting Act and the Act on TV2 (*Lov om ændring af lov om radio- og fjernsynsvirksomhed og lov om TV 2*) which essentially prohibits the use of product placement.⁹⁸⁵ In Finland, Norway, Iceland and Israel product placement in public broadcasting is not allowed, while France has banned the embedded advertising of infant formula in all types of audio-visual media.⁹⁸⁶

In 2008 the UK the minister for Culture, Media and Sport at the time, Andrew Burnham, announced that the UK would maintain its prohibition on product placement. However, ten months later his successor, Ben Bradshaw, announced that the Department was reconsidering its position.⁹⁸⁷ Consequently, in 2010 the Audiovisual Media Services (Product Placement) Regulations came into force, as well as the Ofcom Guidance to these rules in February 2011.⁹⁸⁸ In terms of the Regulations, television programmes made for UK audiences can contain product placement as long as they comply with certain requirements, including the use of a P logo before, and

some debate as to whether the particular provision did in fact prohibit product placement, most commentators seemed to accept the fact that was banned. A Garde “Towards the liberalisation of product placement on UK television?” (2011) 16 *Communications Law* 92 92.

⁹⁸⁴ Garde (2011) *Communication Law* 93.

⁹⁸⁵ SS Jakobsen “Denmark: Reintroduction of Ban against Product Placement” (2013) IRIS Merlin Legal Observations of the European Audiovisual Observatory <<http://merlin.obs.coe.int/iris/2013/6/article15.en.html>> (accessed 25-05-2015).

⁹⁸⁶ Dreyfus “Focus on Product Placement” (02-01-2014) *Dreyfus* <<http://www.dreyfus.fr/en/trademarks/focus-on-product-placement/>> (accessed 26-03-2015); T Al-Kadi “Product Placement: A Booming Industry in Search of Appropriate Regulation” (2013) *JMRCS* 1 9.

⁹⁸⁷ Garde (2011) *Communication Law* 93.

⁹⁸⁸ 93.

after the pertinent programme, and after any commercial break.⁹⁸⁹ In addition to the rule that product placement may not be used in children's programmes, as imposed by the European AVMS Directive, and being applicable in the UK to programming directed to children younger than 16, the Ofcom content rules prohibit the use of product placement in religious, current affairs and consumer advice television programmes.⁹⁹⁰ In addition, product placement of infant formula and foods containing high levels of salt, sugar and fat is prohibited in terms of rule 9.13.⁹⁹¹

In contrast, no such rules exist in the USA or Canada. As is the case in most jurisdictions, somewhat vague self-regulatory guidance is found in advertising codes or marketing pledges in these countries.⁹⁹² Since exposure to television programming, videos and films produced in the USA is a common phenomenon worldwide, it is fair to say that the lack of regulation in this regard in the USA will have an effect on the global viewing public. In fact, the only rule relating to product placement in the USA is that in terms of the Communications Act of 1934 broadcasters are required to disclose to their viewers at the time of broadcast if any content of the broadcast has been made in exchange for money or services.⁹⁹³ This instruction, however, does not apply to feature films produced for theatrical exhibition and in 1963 the FCC waived the application of the Communications Act rule so that it is also not applicable when such films are subsequently broadcasted on television.⁹⁹⁴ It is furthermore reported that the sponsorship rule is easily circumvented since much of product placement on television occur without any exchange of money or services.⁹⁹⁵

⁹⁸⁹ Rule 9.14 Ofcom "Section Nine: Commercial References in Television Programming" <<http://stakeholders.ofcom.org.uk/broadcasting/broadcast-codes/broadcast-code/commercial-references-television/>> (accessed 26-03-2015).

⁹⁹⁰ Rule 9.12 Ofcom "Section Nine: Commercial References in Television Programming" <<http://stakeholders.ofcom.org.uk/broadcasting/broadcast-codes/broadcast-code/commercial-references-television/>> (accessed 26-03-2015).

⁹⁹¹ Ofcom "Section Nine: Commercial References in Television Programming" <<http://stakeholders.ofcom.org.uk/broadcasting/broadcast-codes/broadcast-code/commercial-references-television/>> (accessed 26-03-2015).

⁹⁹² See for example the Canadian Code of Advertising Standards advising that "[n]o advertisement shall be presented in a format or style that conceals its commercial intent".

⁹⁹³ Al-Kadi (2013) *JMRCS* 10.

⁹⁹⁴ 10.

⁹⁹⁵ 10.

2.3 Schools and places where children gather

Despite its lack of regulation pertaining to product placement, the USA has recently implemented progressive regulatory measures pertaining to foods served and marketed in schools. In December 2010, President Barack Obama signed the Healthy, Hunger-Free Kids Act into law.⁹⁹⁶ In terms of this piece of federal legislation, each local educational agency must establish a local school wellness policy, meeting certain minimum requirements, for all schools under its jurisdiction.⁹⁹⁷ As of 1 July 2014, public schools in the USA are not allowed to sell unhealthy food in their cafeterias, vending machines or at any fundraising event that occur during school hours.⁹⁹⁸ All foods which may be offered to children, have to comply with nutritional standards compiled in conjunction with the recommendations by the Dietary Guidelines of Americans.⁹⁹⁹ Wellness policies must also make provision for standards for all other foods that children may consume during school hours such as at classroom parties, or foods which may be used as incentives.¹⁰⁰⁰

In February of 2014, the United States Department of Agriculture also announced plans, *inter alia*, to prohibit the marketing of any unhealthy foods in American schools and invited public comment to its proposed rules.¹⁰⁰¹ In effect only the foods which may be offered to children in school, may be marketed to them. In terms of the proposed rule, only foods that comply with the nutritional standards may be featured, for example, on school sports scoreboards, vending machines, menu boards, on school buses, or in any other medium used on the school campus and during the

⁹⁹⁶ Healthy, Hunger-Free Kids Act 42 USC 1751.

⁹⁹⁷ S 204 of the Healthy, Hunger-Free Kids Act 42 USC 1751.

⁹⁹⁸ Richard B Russel National School Lunch Act 79 PL 396, 60 Stat 230

⁹⁹⁹ Also referred to as the "Smart Snack Nutritional Standards". United States Department of Agriculture "Local School Wellness Policy Implementation Under the Healthy, Hunger-Free Kids Act of 2010" submitted to United States Department of Agriculture, 2014, available at <http://www.fns.usda.gov/sites/default/files/Local_School_Wellness_Proposed_Rule_022614.pdf> (accessed 28-03-2015); New York Daily News "Michelle Obama announces new rules for advertising junk food at schools" (25-02-2014) *New York Daily News* <<http://www.nydailynews.com/news/politics/michelle-obama-announces-new-rules-advertising-junk-food-schools-article-1.1701140>> (accessed 28-03-2015). Eat Smart Move More "Unhealthy Food Marketing in schools: Reading, writing, and a candy ad?" (17-03-2014) *Eat Smart Move More*.

¹⁰⁰⁰ Eat Smart Move More "Unhealthy Food Marketing in schools: Reading, writing, and a candy ad?" (17-03-2014) *Eat Smart Move More*.

¹⁰⁰¹ The closing date for submissions of public comments was 28 April 2014. United States Department of Agriculture "Local School Wellness Policy Implementation Under the Healthy, Hunger-Free Kids Act of 2010" available at <http://www.fns.usda.gov/sites/default/files/Local_School_Wellness_Proposed_Rule_022614.pdf> (accessed 28-03-2015); New York Daily News "Michelle Obama announces new rules for advertising junk food at schools" (25-02-2014) *New York Daily News*. Eat Smart Move More "Unhealthy Food Marketing in schools: Reading, writing, and a candy ad?" (17-03-2014) *Eat Smart Move More*.

school day.¹⁰⁰² The marketing ban, however, would not apply to events that occur after school hours, such as sports events which are scheduled during the evening.¹⁰⁰³ It would also not apply to personal items of clothing, stationery, or any other products brought from home by students or staff members.¹⁰⁰⁴ In terms of the proposed rule it will also be required that schools inform and update the public about the content of their policies and the status of its implementation.¹⁰⁰⁵ As of the date of writing this thesis, the proposed rules have not yet come into force.

On 16 July 2014, the Joint Research Centre (“JRC”) of the European Commission published a report of its study of school food policies across Europe.¹⁰⁰⁶ It found that all of the 30 countries which it studied, had some form of guidelines for school food in place but that these measures varied greatly. These methods ranged from voluntary guidelines – for example for menus and portion sizes – to comprehensive mandatory bans of vending machines and sugar-sweetened drinks, as well as a prohibition on the marketing thereof.¹⁰⁰⁷ At a country level, it appears that the balance between voluntary guidance and mandatory rules is even.¹⁰⁰⁸

¹⁰⁰² Rule 210.30 of the proposed rules for the National School Lunch Act. The “school campus” would include the school building and adjacent areas, the parking lot, sports fields, and school buses or other vehicles used to transport children. “School day” is defined as from midnight to 30 minutes after the end of the official school day. United States Department of Agriculture “Local School Wellness Policy Implementation Under the Healthy, Hunger-Free Kids Act of 2010” available at <http://www.fns.usda.gov/sites/default/files/Local_School_Wellness_Proposed_Rule_022614.pdf> (accessed 28-03-2015); Eat Smart Move More “Unhealthy Food Marketing in schools: Reading, writing, and a candy ad?” (17-03-2014) *Eat Smart Move More* .

¹⁰⁰³ Eat Smart Move More “Unhealthy Food Marketing in schools: Reading, writing, and a candy ad?” (17-03-2014) *Eat Smart Move More* ; United States Department of Agriculture “Local School Wellness Policy Implementation Under the Healthy, Hunger-Free Kids Act of 2010” available at <http://www.fns.usda.gov/sites/default/files/Local_School_Wellness_Proposed_Rule_022614.pdf> (accessed 28-03-2015).

¹⁰⁰⁴ Eat Smart Move More “Unhealthy Food Marketing in schools: Reading, writing, and a candy ad?” (17-03-2014) *Eat Smart Move More* .

¹⁰⁰⁵ United States Department of Agriculture “Local School Wellness Policy Implementation Under the Healthy, Hunger-Free Kids Act of 2010” available at <http://www.fns.usda.gov/sites/default/files/Local_School_Wellness_Proposed_Rule_022614.pdf> (accessed 28-03-2015 and 13-08-2016).

¹⁰⁰⁶ The countries which were studied were Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, Switzerland, and the UK. European Commission Press Release “Study maps EU school food policies for the first time” (16-07-2014) *European Commission Press Release* <http://europa.eu/rapid/press-release_IP-14-834_en.htm> (accessed 28-03-2015).

¹⁰⁰⁷ European Commission Press Release “Study maps EU school food policies for the first time” (16-07-2014) *European Commission Press Release*.

¹⁰⁰⁸ S Storcksdieck Genannt Bonsmann, T Kardakis, J Wollgast, M Nelson & S Louro Caldeira *Mapping of National School Food Policies across the EU28 plus Norway and Switzerland* (2014) 13.

The study found that the overwhelming objectives of all school food policies are to improve child nutrition, to teach healthy diet and lifestyle habits as well as to reduce or prevent childhood obesity.¹⁰⁰⁹ In 76 percent of the 34¹⁰¹⁰ school food policies studied, food marketing limitations apply, with four policies restricting the marketing of foods and drinks high in sugar, fat or salt; 17 specifying generic marketing restrictions; and five policies setting restrictions for both.¹⁰¹¹ Foods offered in vending machines are restricted in 53 percent of the school policies. These measures range from (more) healthful options being recommended or promoted; offers being in line with healthy eating standards; (certain) unhealthful foods and drinks not allowed in vending machines; and vending machines being banned from school premises.¹⁰¹²

Marketing of any product in schools is prohibited in Wallonia (the French speaking province of Belgium), Portugal, and in certain parts of Germany.¹⁰¹³ In Finland, marketing in schools and day-care centres is also not allowed but may be permitted in certain circumstances and if the prior consent of parents have been obtained.¹⁰¹⁴ France, Greece, and Luxembourg also prohibit in-school marketing unless a school official approves it and it has an educational purpose.¹⁰¹⁵ In 2011, the Spanish government approved a Law on Nutrition and Food Safety stating that schools and pre-schools should be free from advertising. The implementation of this act, however, is at the discretion of regional authorities and is reportedly not being enforced.¹⁰¹⁶

Other non-European jurisdictions which prohibit marketing in schools are those of Quebec, Vietnam and since 2015, Uruguay.¹⁰¹⁷ The Healthy Foods in Schools Act

¹⁰⁰⁹ European Commission Press Release “Study maps EU school food policies for the first time” (16-07-2014) *European Commission Press Release*.

¹⁰¹⁰ Both provinces in Belgium, Flanders and Wallonia, and the four separate countries of England, Scotland, Wales and Northern Ireland in the UK have separate policies.

¹⁰¹¹ Storcksdieck Genannt Bonsmann *et al National School Policies in Europe* 5.

¹⁰¹² 5.

¹⁰¹³ Hawkes *Marketing Food to Children* 33-34; Center for Science in the Public Interest (CSPI) “Food Marketing in Other Countries” (2004) *Center for Science in the Public Interest* <https://www.cspinet.org/nutritionpolicy/foodmarketing_abroad.pdf> (accessed 28-03-2015).

¹⁰¹⁴ Hawkes *Marketing Food to Children* 33.

¹⁰¹⁵ Center for Science in the Public Interest (CSPI) “Food Marketing in Other Countries” (2004) *Center for Science in the Public Interest*.

¹⁰¹⁶ WCRF International Nourishing Framework “Restrict food advertising and other forms of commercial promotion” (2015) *WCRF International Nourishing Framework*.

¹⁰¹⁷ Hawkes *Marketing Food to Children* 33-34; Center for Science in the Public Interest (CSPI) “Food Marketing in Other Countries” (2004) *Center for Science in the Public Interest*; WCRF International Nourishing Framework “Restrict food advertising and other forms of commercial promotion” (2015) *WCRF International Nourishing Framework*. Hawkes *Marketing Food to Children* 37 reports that in many instances food marketers in Quebec have been found to be in violation of the rules. In 2000 Kellogg’s Canada was compelled to withdraw their programme to provide Quebec schools with educational materials in exchange for cereal box tops. The promotion was, however, permitted in the

(*Alimentación saludable en los centros de enseñanza*) prohibits the advertising and marketing of foods and drinks that do not meet certain nutritional standards in Uruguay. These standards can be found in Article 3 of the act and outlined in school nutrition recommendations published by the Uruguayan Ministry of Health in 2014. In terms of the standards, foods with “natural nutritional value” with a minimum degree of processing and a limited amount of free sugars, saturated fat, trans fat and sodium may be promoted. Advertising of all other foods and in all forms which do not meet these required standards is prohibited, including the use of posters, billboards, logos or brands on school supplies, sponsorship, distribution of prizes, free samples on school premises and the display and visibility of such food products.¹⁰¹⁸ It is also mandated that implementation of this policy will be monitored.¹⁰¹⁹

Another South American jurisdiction, namely Brazil, has been trying to combat obesity by introducing a number of measures. One such effort is the Interministerial Ordinance of 2006 in terms of which healthy diets in schools are being encouraged, along with the creation of school gardens and the provision of food services in the school environment, while fruit and vegetable consumption is incentivised. The sale and advertising of foods containing high levels of saturated fat, trans fat, white sugar and salt in the school is limited in secondary schools and the sale of sodas and other sugary drinks prohibited.¹⁰²⁰ As was discussed above, in terms of Resolution 163 issued in March of 2014, all marketing communications, including those within day-care centres, kindergarten and elementary schools, including marketing communications placed on school uniforms or in textbooks, is considered abusive, and banned as a result.¹⁰²¹

Many other jurisdictions, including the UK and Australia, focus their efforts on setting standards for the food products, which are provided as part of the school

rest of Canada. Another Kellogg’s campaign inviting school children to design a float for the 2001 Carnaval de Quebec was also prohibited as the promotional materials were found to be in contravention of the rules. Also in 2001 Campbell’s Soup was forced to pull its “Labels for Education” programme for similar reasons.

¹⁰¹⁸ WCRF International Nourishing Framework “Offer healthy foods and set standards in public institutions and other specific settings” (2015) *WCRF International Nourishing Framework* <http://www.wcrf.org/sites/default/files/2_Offer%20Healthy%20Food_Final.pdf> (accessed 10-03-2015).

¹⁰¹⁹ WCRF International Nourishing Framework “Offer healthy foods and set standards in public institutions and other specific settings” (2015) *WCRF International Nourishing Framework*.

¹⁰²⁰ ACF Silva, GA Bortolini & PC Jaime “Brazil’s national programs targeting childhood obesity prevention” (2013) 3 *Int J Obes Suppl* S10.

¹⁰²¹ Soares “Brazil: New Resolution Bans Advertising to Children Under Age 12” (22-04-2014) *Library of Congress*.

feeding programme, and do not restrict the marketing of products in schools. However, in the UK the standards restrict the availability of HFSS foods as well as low quality reformed or reconstituted foods. These standards are imposed in terms of School Food Regulations 2014 (No 1603) in England; the Nutritional Requirements for Food and Drink in Schools Regulations 2008 in Scotland; the Nutritional Standards for School Lunches 2007, and Nutritional Standards for Other Food and Drinks in Schools 2008 in Northern Ireland; and the Healthy Eating in Schools (Nutritional Standards and Requirements) Regulations 2013 (No 1984 (W194) in Wales.¹⁰²²

There are no mandatory national standards that have to be met in Australia, but each of the six states and territories has implemented their own obligatory standards.¹⁰²³ All of these states and territories identify “red category” foods, which are either completely banned in schools or heavily restricted by offering them perhaps only once or twice per term. In Queensland school nutrition standards separate foods and drinks into green, amber and red categories based on their energy, saturated fat, sugar, sodium and fibre content. In terms of this “Smart Choices” programme foods and drinks which are classified as “red” may not be offered anywhere across the whole school environment.¹⁰²⁴ In addition, in Western Australia, South Australia, New South Wales, England, Scotland and in certain Canadian provinces the consumption of fruit, vegetables and water is promoted by providing children with free fruits and vegetables on a regular basis and in terms of various School Fruit and Vegetable Schemes.¹⁰²⁵

2 4 Sponsorship

The main source of guidelines regarding sponsorship is that of the ICC’s Sponsorship Code, contained in the self-imposed ICC International Code of Advertising Practice.¹⁰²⁶ These guidelines emphasise the principles of good faith and autonomy in

¹⁰²² WCRF International Nourishing Framework “Offer healthy foods and set standards in public institutions and other specific settings” (2015) *WCRF International Nourishing Framework*.

¹⁰²³ The Australian Capital Territory did so in 2012, New South Wales in 2011, the Northern Territory in 2009, Queensland already in 2007, South Australia in the following year, and Western Australia in 2014. WCRF International Nourishing Framework “Offer healthy foods and set standards in public institutions and other specific settings” (2015) *WCRF International Nourishing Framework*.

¹⁰²⁴ WCRF International Nourishing Framework “Offer healthy foods and set standards in public institutions and other specific settings” (2015) *WCRF International Nourishing Framework*.

¹⁰²⁵ WCRF International Nourishing Framework “Offer healthy foods and set standards in public institutions and other specific settings” (2015) *WCRF International Nourishing Framework*.

¹⁰²⁶ International Chamber of Commerce “Consolidated ICC Code of Advertising and Marketing Communication Practice: Building Consumer Trust through Best Marketing Practice” (2011) *International Chamber of Commerce* <<http://www.iccwbo.org/advocacy-codes-and-rules/document->

the contractual relationship of a sponsorship, as well as respect for the sponsorship property and the sponsor. There is, however, no specific reference to children or food in the Sponsorship Code. In much the same way there are a number of jurisdictions in which some aspects of sponsorship are being regulated. Yet, regulations that are specific to food sponsorship of children's activities, are extremely rare.¹⁰²⁷ On the few occasions where regulations make mention of children and sponsorship, it is usually found in television advertising regulations restricting or prohibiting the sponsorship of children's television programmes.¹⁰²⁸ Some form of restriction upon sponsorship is also to be found in regulations governing the marketing of food in schools, as was discussed in part 2 3 above.¹⁰²⁹ There are, however, no rules – governmentally sanctioned or industry imposed – restricting the sponsorship of, for example, major sporting events by food and beverage manufacturers. Some restrictions in the name of public health nonetheless apply with regard to tobacco and alcoholic products.¹⁰³⁰

2 5 Sales promotions, branding and packaging

Chapter 2 briefly explained some of the numerous methods of sales promotions that manufacturers and marketers use to promote products to consumers. In March of 2014 Brazil's National Council of the Rights of the Child and the Adolescent promulgated pioneering legislation by the enactment of Resolution 163 which prohibits all forms of sales promotions targeting children younger than 12. The types of marketing communications which are prohibited include messages which have the intention of persuading the children to consume any product or service using, *inter alia*, childish language, special effects, and excessive colours; soundtracks with children's songs, including those sung by children; representations of children; images of people or celebrities who appeal to children; characters or hosts of children

centre/2011/advertising-and-marketing-communication-practice-(consolidated-icc-code)/> (accessed 10-02-2015) as discussed in ch 4.

¹⁰²⁷ Hawkes *Marketing Food to Children* 43.

¹⁰²⁸ For a list of such examples see Hawkes *Marketing Food to Children* 43-44 and in section 2 1 of this chapter of the thesis.

¹⁰²⁹ See for example also The Welsh Government "Guidance on Sponsorship in Schools" (2011) *The Welsh Government* <http://dera.ioe.ac.uk/13200/7/111017sponsorshipschoolsen_Redacted.pdf> (accessed 15-04-2015).

¹⁰³⁰ Although sponsorship of especially sporting events by tobacco manufacturing companies is prohibited in a number of jurisdictions, a sport such as rodeo is still sponsored by the tobacco industry. PM Ling, LA Haber & S Wedl "Branding the Rodeo: A Case Study of Tobacco Sports Sponsorship" (2010) *Am J Pub Health* 32-41. The sponsorship of sporting events by alcoholic beverage companies have also been reigned in of late.

programs; cartoons or animation; dolls or similar products; promotions with distribution of prizes or gifts or collectibles that appeal to children; and promotional competitions or games that appeal to children.¹⁰³¹ In terms of article 2 of this resolution, these types of sales promotions are in fact considered abusive.¹⁰³²

One of the most infamous methods of marketing food to children is the accompaniment of toys with the sale of food and beverages. In South Korea food manufacturers, processors, distributors and vendors of food products are not allowed to promote children's "favorite [sic] foods" by advertising the inclusion of free non-food items such as toys or other items which may encourage the purchase by children through means of the radio, television or the internet.¹⁰³³ In 2010 the legislators of Santa Clara County, California, and San Francisco also introduced legislation which prohibits "free" toys from being included in meals sold at fast food restaurants and which do not meet certain nutritional requirements.¹⁰³⁴ New York City has reportedly likewise been considering allowing toys only to be included in meal packages which contain less than 500 calories, 600 milligrams of sodium, and in which less than 35 percent of the calories come from fat. The meals must furthermore contain a half a cup of fruit or vegetables or one serving of whole-grain products.¹⁰³⁵ To date these measures have not yet been implemented in New York, mainly due to the reaction from both the fast food industry as well as parents.¹⁰³⁶ In the meantime, McDonald's

¹⁰³¹ Consumers International "Advertising to children now illegal in Brazil" (2014) *Consumers International*; Soares "Brazil: New Resolution Bans Advertising to Children Under Age 12" (22-04-2014) *Library of Congress* .

¹⁰³² Art 1(2) in Soares "Brazil: New Resolution Bans Advertising to Children Under Age 12" (22-04-2014) *Library of Congress*. See also the discussion at 2 1 1 above.

¹⁰³³ Art 10 of the Korean Ministry of Food and Drug Safety "The Special Act on the Safety Management of Children's Dietary Life" (2009) *Korean Ministry of Food and Drug Safety* <<http://www.mfds.go.kr/eng/index.do?nMenuCode=66>> (accessed 20-04-2015) art 10.

¹⁰³⁴ In San Francisco toys are banned to be included in meals containing more than 600 calories, more than 640 milligrams of sodium and more than 35% of calories from fat (with an exception for some healthy items, like nuts). J McKinley "You Want a Toy with That?" *New York Times* (03-11-2010) <<http://www.nytimes.com/2010/11/04/us/04happy.html>> (accessed 05-05-2011); C Talbert "San Francisco Joins Santa Clara County in Banning Happy Meal Toys" *The Healthy Moms Magazine* (13/06/2010) <<http://www.thehealthymoms.net/2010/06/san-francisco-joins-santa-clara-county.html>> (accessed 05-05-2010).

¹⁰³⁵ M Melnick "New York City Council Considers Banning Happy Meal Toys" *Time Healthland* (06-04-2011) <<http://healthland.time.com/2011/04/06/new-york-city-council-considers-banning-happy-meal-toys/>> (accessed 19-05-2011); CBS New York "City Councilman Introduces 'Healthy Happy Meal' Bill To Ban Toys In Certain Kids' Meals" (21-08-2014) *CBS New York* <<http://newyork.cbslocal.com/2014/08/21/city-councilman-introduces-bill-to-ban-toys-in-kids-meals/>> (accessed 17-04-2015)

¹⁰³⁶ The fast food giant, McDonald's, condemned the proposed measures, stating that said their toys should not carry the full weight of responsibility for the problem with childhood obesity but that there may be many contributing factors. The Kansas City advertising executive, Bob Bernstein, who helped create the toys in the 1970s, stated that "[t]o make a child happy and to not cost Mom any additional

in San Francisco has found a way to circumvent the rule by charging 10 cents for a toy accompanying a meal. In this way the toys are not offered free of charge while the company contends that it is not deriving any profit from such sales. The money raised from the toy sales is reportedly donated to charity.¹⁰³⁷

The CARU self-regulatory guidelines in the USA furthermore advises marketers against the use of premiums, children's clubs, sweepstakes and contests by stating in very broad terms that special care should be taken when using these kinds of promotions aimed at children.¹⁰³⁸ CARU recognises that children find it difficult to distinguish a product from a premium, and therefore states that advertising that contains a premium message should focus the child's attention primarily on the product and make the premium message clearly secondary.¹⁰³⁹ The same type of advisory guideline can be found in the recommendations by the Finnish Competition and Consumer Authority,¹⁰⁴⁰ whilst the UK Code of Non-broadcast Advertising, Sales Promotion and Direct Marketing merely provides that special care must be taken with promotions addressed to children.¹⁰⁴¹ Other principles in the Code referring to children, defined as persons under the age of 16, advise that children's credulity, loyalty, vulnerability or lack of experience must not be exploited, that parental authority should not be undermined and that promotions must make it clear that adult

money - that was the original idea. The toy was not the reigning reason for the child to order the Happy Meal." Parents have reacted by stating that these types of measures are those of a nanny state. CBS News Healthwatch "Happy Meal Toy Ban Faces Vote in Calif. County" (27-04-2010) *CBS News Healthwatch* <<http://www.cbsnews.com/stories/2010/04/27/health/main6436917.shtml>> (accessed 20-05-2011). See also ch 1 above.

¹⁰³⁷ CBS News "San Francisco McDonald's find way around toy ban" (30-11-2011) *CBS News* <<http://www.cbsnews.com/news/san-francisco-mcdonalds-find-way-around-toy-ban/>> (accessed 20-04-2015).

¹⁰³⁸ Children's Advertising Review Unit "Self-Regulatory Program for Children's Advertising" (2009) *Children's Advertising Review Unit* 10.

¹⁰³⁹ Children's Advertising Review Unit "Self-Regulatory Program for Children's Advertising" (2009) *Children's Advertising Review Unit* 10.

¹⁰⁴⁰ The Facts and Advice on the Authority's Website provides as follows: "Children are not able to assess the value of a free gift in the same way as adults. A free toy of insignificant monetary value may be more tempting to a child than the product itself, which makes it an easy way of influencing purchase decisions. Therefore, advertisers of products that may be of interest to children must ensure in particular that the presentation of a free gift does not assume the central focus of an advertisement or package." Finnish Competition and Consumer Authority "Free gifts and added bonuses" (21-03-2015) *Finnish Competition and Consumer Authority* <<http://www.kkv.fi/en/facts-and-advice/marketing-and-advertising/sales-and-offers/free-gifts-and-added-bonuses/>> (accessed 20-04-2015)

¹⁰⁴¹ Committee of Advertising Practice "The UK Code of Non-broadcast Advertising, Sales Promotion and Direct Marketing" (2015) *Committee of Advertising Practice* <<http://cap.org.uk/Advertising-Codes/~media/Files/CAP/Codes%20CAP%20pdf/The%20CAP%20Code.ashx>> (accessed 20-04-2015) principle 8 8.

permission is required if a prize or an incentive might cause conflict between a child's desire and that of a parent or other care-giver.¹⁰⁴²

In contradistinction to the apparent shortage in regulatory efforts pertaining to sales promotions, there are many jurisdictions that impose certain minimum requirements, that food packaging must adhere to. In terms of legislative measures implemented in Argentina, Australia, Brazil, Canada, Chile, China, Costa Rica, El Salvador, Guatemala, Honduras, Hong Kong, Israel, Mexico, New Zealand, Nicaragua, Paraguay, Uruguay, the USA and Venezuela food manufacturers and retailers have to provide a list of the nutritional content of pre-packaged foods, whether or not a nutritional or health claim is being made or not. The rules also provide which nutrients must be listed and on what basis.¹⁰⁴³ From 2016, and in terms of European Union Regulation 1169/2011, EU member states are required to list the nutrient content of food on the back of products.¹⁰⁴⁴ Legislation in some other jurisdictions require only certain types of foodstuffs to carry a nutrient content list,¹⁰⁴⁵ whereas in South Korea this requirement is imposed particularly for use on the front of pre-packaged foods popular with children. In terms of the Special Act on Safety Control of Children's Dietary Life a colour-coded labelling system is used in terms of which three permitted designs depicting green, amber and red, identifies whether products contain low, medium or high levels of total sugars, fat, saturated fat, and sodium.¹⁰⁴⁶ This so-called "traffic light system" is to be displayed on the packaging of cookies, candies, popsicles, breads, chocolates, dairy products, sausage (fish or meat based), some beverages, instant noodles and fast foods (seaweed rolls, hamburgers, and sandwiches).¹⁰⁴⁷ In a

¹⁰⁴² Committee of Advertising Practice "The UK Code of Non-broadcast Advertising, Sales Promotion and Direct Marketing" (2015) Committee of Advertising Practice principle 5.

¹⁰⁴³ For example if it should be indicated per 100g or per serving size. WCRF International Nourishing Framework "Nutrition label standards and regulations on the use of claims and implied claims on foods" <<http://www.wcrf.org/int/policy/nourishing-framework/nutrition-labels>> (accessed 10-03-2015).

¹⁰⁴⁴ Regulation (EU) No 1169/2011 on the provision of food information to consumers 2011 Available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:304:0018:0063:en:PDF> (accessed 20-04-2015); WCRF International Nourishing Framework "Nutrition label standards and regulations on the use of claims and implied claims on foods" <<http://www.wcrf.org/int/policy/nourishing-framework/nutrition-labels>> (accessed 10-03-2015).

¹⁰⁴⁵ Such as Malaysia and South Korea. WCRF International Nourishing Framework "Nutrition label standards and regulations on the use of claims and implied claims on foods" <<http://www.wcrf.org/int/policy/nourishing-framework/nutrition-labels>> (accessed 10-03-2015).

¹⁰⁴⁶ The Korean Ministry of Food and Drug Safety "The Special Act on the Safety Management of Children's Dietary Life" <<http://www.mfds.go.kr/eng/index.do?nMenuCode=66>> (accessed 20-04-2015).

¹⁰⁴⁷ WCRF International Nourishing Framework "Nutrition label standards and regulations on the use of claims and implied claims on foods" <<http://www.wcrf.org/int/policy/nourishing-framework/nutrition-labels>> (accessed 10-03-2015).

number of other jurisdictions the display of only the trans-fat content of the product is mandatory.¹⁰⁴⁸

Furthermore, warning labels, which indicate that the product contains high levels of salt, sugar or fats, are imposed on both a voluntary and obligatory basis in a number of countries, including that of France, Chile, Finland and the UK.¹⁰⁴⁹ The EU Regulation 1169/2011 on the "Provision of Food Information to Consumers" allows EU Member States to develop voluntary guidelines for front of pack nutrition information which are to be used in addition to the mandatory nutrition information on the back of the packaging of food items and came into effect in 2016.¹⁰⁵⁰ In addition, the "traffic light system" in the UK and the "keyhole system" in the Nordic countries, are two of the most well-known voluntary methods of conveying information regarding the nutritional content of foods with the explicit objective of making it easier for consumers to choose healthier options.¹⁰⁵¹ In terms of both of these systems, a colourful symbol is affixed to the product packaging, conveying a clear and immediate visual message to the consumer as to the nutritional values of the product.

2.6 "New" media

In chapter 2 of this thesis, it was explained that online marketing is continuing to increase in popularity and expenditure. Marketers are constantly finding new methods of promoting their products to potential customers and especially younger consumers. Yet, the regulation of these methods has remained largely untouched. Existing guidelines are either self-regulatory in nature or, in the event that statutory measures

¹⁰⁴⁸ This is the case in Argentina, Brazil, Canada, Chile, Hong Kong, Paraguay, South Korea, Taiwan, the USA and Uruguay. WCRF International Nourishing Framework "Nutrition label standards and regulations on the use of claims and implied claims on foods" <<http://www.wcrf.org/int/policy/nourishing-framework/nutrition-labels>> (accessed 10-03-2015).

¹⁰⁴⁹ WCRF International Nourishing Framework "Nutrition label standards and regulations on the use of claims and implied claims on foods" <<http://www.wcrf.org/int/policy/nourishing-framework/nutrition-labels>> (accessed 10-03-2015).

¹⁰⁵⁰ Regulation (EU) No 1169/2011 on the provision of food information to consumers; WCRF International Nourishing Framework "Nutrition label standards and regulations on the use of claims and implied claims on foods" <<http://www.wcrf.org/int/policy/nourishing-framework/nutrition-labels>> (accessed 10-03-2015).

¹⁰⁵¹ WCRF International Nourishing Framework "Nutrition label standards and regulations on the use of claims and implied claims on foods" <<http://www.wcrf.org/int/policy/nourishing-framework/nutrition-labels>> (accessed 10-03-2015). The keyhole symbol has been used for more than 20 years in Sweden and may only be used on food products which meet certain nutritional criteria. The system has since been also implemented in Norway, Denmark and Iceland. The Nordic Council of Ministers "About the Keyhole" <<http://www.norden.org/en/nordic-council-of-ministers/council-of-ministers/nordic-council-of-ministers-for-fisheries-and-aquaculture-agriculture-foodstuffs-and-forestry-mr-fjls/keyhole-nutrition-label>> (accessed 20-04-2015).

exist, focussed on protecting children's privacy online. Due to the global and interactive nature of the internet, the regulation of marketing practices online presents a set of unique challenges not found in other forms of broadcast media such as television advertising.¹⁰⁵² Nonetheless, many of the rules follow the same general ethical guidelines in that online marketing should not mislead customers, care should be taken when marketing to children, and that parental permission should be obtained when collecting data from children online.¹⁰⁵³ Online advertising should also not cause children any harm or exploit their credulity.¹⁰⁵⁴

It appears that online food marketing endeavours will remain fairly unrestrained for the foreseeable future. The response by the UK Committee of Advertising Practice ("CAP") may serve as one example of a reluctance to intervene in this sphere of promotion: following a recent Family Kids & Youth Review commissioned by the CAP, the Committee responded by stating that it thought that "the current evidence does not merit changes to its food and soft drink advertising rules at this time."¹⁰⁵⁵ This came in the wake of the findings of an independent literature review published in February 2015, and also acknowledged by the CAP, which found that there is "some uncertainty about the extent to which children can identify online marketing, specifically immersive techniques like advergames".¹⁰⁵⁶ The CAP's own review showed that the available evidence on advertising's impact on children's dietary choices is limited. The CAP therefore advises that advertisers review their online marketing to children and, in

¹⁰⁵² Hawkes *Marketing Food to Children* 50. Hawkes refers to an example of where companies based in the USA promoting and selling their products through websites in Denmark, refused to comply with Danish advertising standards on their website. The argument advanced by Kellogg's and Walt Disney in this instance was that the "country of origin" principle is applicable and that USA advertising rules were, as a result, the relevant standard which had to be met.

¹⁰⁵³ See, for example, the Federal Trade Commission "Advertising and Marketing on the Internet: Rules of the Road" *Federal Trade Commission* <<https://www.ftc.gov/system/files/documents/plain-language/bus28-advertising-and-marketing-internet-rules-road.pdf>> (accessed 28-04-2015); The Committees of Advertising Practice (CAP) "UK Code of Non-broadcast Advertising, Sales Promotion and Direct Marketing (CAP Code)" (2015) *The Committees of Advertising Practice* <<http://cap.org.uk/Advertising-Codes/Non-Broadcast/CodelItem.aspx?cscid={e6da4940-2a3f-40e1-9820-72f248e750d5}#.VTT7uk0cTIU>> (accessed 28-04-2015).

¹⁰⁵⁴ The Committees of Advertising Practice (CAP) "UK Code of Non-broadcast Advertising, Sales Promotion and Direct Marketing (CAP Code)" 2015) *The Committees of Advertising Practice*.

¹⁰⁵⁵ Committee of Advertising Practice "Advertisers reminded of the need to be clear with kids online" (2015) *Committee of Advertising Practice*.

¹⁰⁵⁶ Committee of Advertising Practice "Advertisers reminded of the need to be clear with kids online" (2015) *Committee of Advertising Practice*.

accordance with the relevant CAP Codes of Conduct, to ensure that it is clearly identifiable as advertising.¹⁰⁵⁷

3 Other legislative efforts to combat obesity

Although one of the purposes of this thesis is to examine various regulatory measures which may curb food-marketing practices aimed at children, it is important to also briefly refer to some of the other efforts which may be used to reduce obesity levels. Such methods include regulations limiting the levels of salt, sugars and fats to be used in food products, limiting the portion sizes to be sold to consumers and taxes imposed upon certain food items. As part of a “nudging” approach, many governments have opted to also encourage healthier lifestyles by introducing these measures that may assist consumers in making healthier choices.¹⁰⁵⁸ Whereas the motivation for the imposition of taxes and duties on certain products has often been linked to the fiscal revenues generated, the potential public health benefits of such taxes have recently played a much more important role.¹⁰⁵⁹ It is believed that the key public health rationale for the use of taxes on health-related commodities lies in their ability to change consumption behaviour. In addition, some health benefits may furthermore also follow from taxes when it proves to be an incentive to product reformulation.¹⁰⁶⁰

3.1 Food reformulation

Already in 1990, the West-African country of Ghana introduced standards for the permissible amounts of fat in meat such as pork, beef, mutton and poultry.¹⁰⁶¹ These

¹⁰⁵⁷ Committee of Advertising Practice “Advertisers reminded of the need to be clear with kids online” (2015) *Committee of Advertising Practice*. In September 2015 the Committee of Advertising Practice announced that it would be starting a public consultation process in order to draft new marketing rules regarding food marketing using non-broadcast media in 2016. N Michail “UK body set for public consultation on junk food advertising rules” (30-09-2015) *Food and Drink Europe* <<http://www.foodanddrinkeurope.com/Products-Marketing/CAP-announces-consultation-on-junk-food-advertising-rules>> (accessed 06-10-2015).

¹⁰⁵⁸ A Alemanno “Nudging healthier lifestyles Informing the non-communicable diseases agenda with behavioural insights” in A Alemanno & A Garde (eds) *Regulating Lifestyle Risks: The EU, Alcohol, Tobacco and Unhealthy Diets* (2015) 309 - 331.

¹⁰⁵⁹ F Sassi, A Belloni, C Capobianco & A Allemano “Taxation and Economic Incentives” in A Alemanno & A Garde (eds) *Regulating Lifestyle Risks: The EU, Alcohol, Tobacco and Unhealthy Diets* (2015) 94.

¹⁰⁶⁰ Sassi *et al* at 94 uses the example of beer producers in the UK who decreased the alcohol content of their brands in order to avoid an increase in taxes of their products sold in the UK.

¹⁰⁶¹ A Thow, R Annan, L Mensah & SN Chowdhury “Development, implementation and outcome of standards to restrict fatty meat in the food supply and prevent NCDs: learning from an innovative trade/food policy in Ghana” (2014) 14 *BMC Public Health* 249 251; WCRF International Nourishing Framework “Improve nutritional quality of the whole food supply” (2015) *WCRF International Nourishing*

standards, published by the Ghana Standards Authority, have since been amended on a number of occasions and provide that carcasses and cuts of pork and beef may not contain more than 25 percent fat, poultry no more than 15 percent fat and lamb not more than 30 percent fat.¹⁰⁶²

Many other jurisdictions prohibit trans-fats from foods. Trans fats are the type of chemically modified unsaturated fats associated with coronary heart disease and typically found in products such as processed foods containing partially hydrogenated vegetable oils, including certain types of margarine, many pre-packaged or processed foods, some fast-food products, chips and commercial baked goods.¹⁰⁶³ Denmark became the first country to essentially ban trans fats in 2003, restricting the permissible amount to no more than 2 grams per 100 grams of fat or oil.¹⁰⁶⁴ After initiating legal proceedings against Denmark in 2005 for obstructing the single market, the European Commission withdrew its opposition to this type of legislation in March 2007 after it was scientifically proven that trans fats pose serious health risks.¹⁰⁶⁵ Denmark has since reported a 70 percent decline in cardiovascular deaths between 1985 and 2009. The reduction in trans-fat consumption in Denmark is reported to have been a leading contributing factor to this decline of the leading cause of death in Europe.¹⁰⁶⁶ Austria, Hungary, Iceland, Norway and Switzerland have set similar limitations on trans fats,¹⁰⁶⁷ whilst outside of Europe, Argentina, Brazil, Chile, Hungary and Iran have promulgated legislation which prohibits or limits the percentages of trans fats found in oils and food products produced and sold in these countries.¹⁰⁶⁸ South Africa too restricts the trans-fat content found in any food product intended for human

Framework <http://www.wcrf.org/sites/default/files/5_Improve%20Nutritional%20Quality_Final.pdf> (accessed 01-05-2015).

¹⁰⁶² Thow *et al* (2014) *BMC Public Health* 251.

¹⁰⁶³ World Health Organisation: Europe Regional Office "Europe leads the world in eliminating trans fats" <<http://www.euro.who.int/en/media-centre/sections/press-releases/2014/europe-leads-the-world-in-eliminating-trans-fats>> (accessed 28-04-2015).

¹⁰⁶⁴ EurActiv "Denmark sees 70% fall in cardiovascular disease deaths" (06-05-2014) *EurActiv* <<http://www.euractiv.com/sections/health-consumers/denmark-sees-70-fall-cardiovascular-disease-deaths-301951>> (accessed 29-04-2015).

¹⁰⁶⁵ S Stender, A Astrup & J Dyerberg "Tracing artificial *trans* fat in popular foods in Europe: a market basket investigation" (2014) 4 *British Journal of Medicine (BMJ Open)* 1 2; EurActiv "Denmark sees 70% fall in cardiovascular disease deaths" (06-05-2014) *EurActiv* .

¹⁰⁶⁶ EurActiv "Denmark sees 70% fall in cardiovascular disease deaths" (06-05-2014) *EurActiv*.

¹⁰⁶⁷ World Health Organisation: Europe Regional Office "Europe leads the world in eliminating trans fats" <<http://www.euro.who.int/en/media-centre/sections/press-releases/2014/europe-leads-the-world-in-eliminating-trans-fats>> (accessed 28-04-2015).

¹⁰⁶⁸ WCRF International Nourishing Framework "Improve nutritional quality of the whole food supply" (2015) *WCRF International Nourishing Framework* ; R Coombes "Trans fats: chasing a global ban" (2011) 343 *British Journal of Medicine (BMJ)* 1 3.

consumption, including that found in the retail trade, catering businesses, restaurants, institutions, bakeries and other outlets, to no more than 2 grams per 100 grams of oil or fat.¹⁰⁶⁹ In various cities and states of the USA and Canada trans-fat labelling is mandatory but the UK, France and Germany prefer a self-regulatory approach where many of the retail outlets have removed trans fats from their product range.¹⁰⁷⁰

In 2013, South Africa and Argentina became the first countries in the world to introduce legislation restricting the levels of salt in certain foods.¹⁰⁷¹ In terms of a stepped approach, certain targets of reduced sodium levels will have to be met by certain deadlines.¹⁰⁷² Many other jurisdictions, including Belgium, Portugal, Bulgaria, Iran and Greece, impose mandatory levels of salt content for bread, whilst Australia, Canada, Chile, France, Italy, New-Zealand, the UK and the USA have voluntary agreements with food manufacturers in place to reduce the levels of salt in food.¹⁰⁷³

As far as sugar is concerned, no record of any national mandatory regulations to reduce the levels of sugar found in foodstuffs could be found. In March 2015, the WHO published its *Guideline: sugars intake for adults and children*, recommending that both adults and children reduce their daily free sugar¹⁰⁷⁴ intake to less than 10 percent of total energy and preferably to below 5 percent of total calories consumed in a day.¹⁰⁷⁵ This means that for an average daily diet containing 2 000 calories, about 50 grams (approximately 12,5 teaspoons) of sugar should be consumed.¹⁰⁷⁶ In its report entitled

¹⁰⁶⁹ Regulations Relating to Trans-Fat in Foodstuffs GN R 127 of 2011 GG 34029 of 17-02-2011.

¹⁰⁷⁰ Coombes (2011) *BMJ* 3; S M Downs, AM Thow & SL Leeder "The effectiveness of policies for reducing dietary trans-fat: a systematic review of the evidence" (2013) 91 *Bulletin of the World Health Organization* 262-269.

¹⁰⁷¹ Regulations Relating to the Reduction of Sodium in Certain Foodstuffs and Related Matters GN R 214 in GG 36274 of 20-03-2013; WCRF International Nourishing Framework "Improve nutritional quality of the whole food supply" (2015) *WCRF International Nourishing Framework*.

¹⁰⁷² Regulations R214, introduced by the South African Department of Health, for example, prescribes that the levels of salt found in bread, breakfast cereals, processed meats, fats and buttered spreads, savoury snacks and soups and sauces first had to be reduced by 30 June 2016 and be further reduced by 30 June 2019.

¹⁰⁷³ WCRF International Nourishing Framework "Improve nutritional quality of the whole food supply" <http://www.wcrf.org/sites/default/files/5_Improve%20Nutritional%20Quality_Final.pdf> (accessed 01-05-2015).

¹⁰⁷⁴ The WHO Guideline explains that "free sugars" refer to "all monosaccharides and disaccharides added to foods by the manufacturer, cook or consumer, plus sugars naturally present in honey, syrups, ... fruit juice [and] fruit juice concentrates". World Health Organization *Guideline: Sugars intake for adults and children* (2015) 1.

¹⁰⁷⁵ 4.

¹⁰⁷⁶ For further (dental) health benefits, the guideline suggests keeping sugar consumption to below 5% of total calories per day, the equivalent of about 25 grams of sugar or around 6 teaspoons. See also World Cancer Research Fund International "Curbing global sugar consumption: Effective food policy actions to help promote healthy diets & tackle obesity" (2015) *World Cancer Research Fund International* 3 < <http://www.wcrf.org/sites/default/files/Curbing-Global-Sugar-Consumption.pdf>> (accessed 10-07-2016).

Curbing global sugar consumption: Effective food policy actions to help promote healthy diets & tackle obesity the World Cancer Research Fund International (WCRF) reports that in many countries, including that of Brazil, Canada, South Africa, the UK and the USA, sugar is consumed at levels which far exceed this guideline set by the WHO.¹⁰⁷⁷ Currently, a 330 ml can of carbonated soft drink, on average, contains 40 grams of sugar, while sweetened fruit juice contains approximately 45 grams of sugar.¹⁰⁷⁸

The French and Swiss governments have reached voluntary agreements with food companies in terms of which these manufacturers have agreed to reduce the amount of sugar they use in certain of their products.¹⁰⁷⁹ In New York a rule, which limited the portion size of sugary drinks sold in this state to 16 ounces (or 473 ml), was struck down in 2014 by the New York Court of Appeals.¹⁰⁸⁰ The court found that, in introducing the Sugary Drinks Portion Cap Rule, the New York City Board of Health exceeded its regulatory authority.¹⁰⁸¹ At the time of writing this thesis, a bill proposing the mandatory inclusion of a health warning on sugary drinks has been introduced to the New York State Assembly and is awaiting further endorsement.¹⁰⁸² Many other governments have considered the introduction of “sugar tax” as a more appealing method of reducing daily sugar consumption.

3.2 Taxes

There are several jurisdictions worldwide that are considering the introduction of a tax additional to sales and value-added tax on products which contain high amounts of

¹⁰⁷⁷ World Cancer Research Fund International “Curbing global sugar consumption: Effective food policy actions to help promote healthy diets & tackle obesity” 3 (2015) *World Cancer Research Fund International*. The WCRF further reports that almost three quarters of global sugar consumption each year takes place in developing countries, and the consumption is only increasing: globally during 2000/2001 and 2013/2014 global sugar consumption grew from about 130 to 178 million tonnes, and is expected to reach about 182 million tonnes in 2014/2015.

¹⁰⁷⁸ M Manyema, LJ Veerman, L Chola, A Tugendhaft, B Sartorius, D Labadarios & KJ Hofman “The potential impact of a 20% tax on sugar-sweetened beverages on obesity in South African adults: a mathematical model” (2014) 9 *PLoS ONE* 1 2.

¹⁰⁷⁹ WCRF International Nourishing Framework “Improve nutritional quality of the whole food supply” (2015) *WCRF International Nourishing Framework*.

¹⁰⁸⁰ SM Kansagra, MO Kennelly, CA Nonas, CJ Curtis “Reducing Sugary Drink Consumption: New York City’s Approach” (2015) 105 *Am J Pub Health* e62; H Draznin “NYC loses appeal to ban large sugary drinks” <<http://edition.cnn.com/2014/06/26/justice/ny-sugary-drink-rulling/>> (accessed 01/05/2015).

¹⁰⁸¹ H Draznin “NYC loses appeal to ban large sugary drinks” (26-06-2014) *CNN* <<http://edition.cnn.com/2014/06/26/justice/ny-sugary-drink-rulling/>> (accessed 01-05-2015).

¹⁰⁸² Associated Press “Bill to require warning label on sugary sodas advances in NY” (30-04-2015) *Observer Dispatch* <<http://www.uticaod.com/article/20150430/NEWS/150439987>> (accessed 01-05-2015).

fat, salt and especially sugar.¹⁰⁸³ Whereas the original motivation for taxes on certain items such as tobacco and alcoholic beverages was to generate fiscal income, recent efforts have been focussed on using fiscal measures to increase global health by reducing consumption of certain products.¹⁰⁸⁴ Denmark implemented an additional tax on sugar-sweetened beverages (SSBs) in the 1930s while France and Hungary followed suit in 2011 and 2012 respectively, and Mexico did so in 2014.¹⁰⁸⁵ However, in 2013 Denmark repealed these tax laws and withdrew initial plans to introduce further taxes upon foods containing high amounts of sugar and fat since these taxes were found to put jobs at risk, inflated food prices and increased cross border shopping in neighbouring countries.¹⁰⁸⁶ The most recent examples of such proposed taxation measures are found in South Africa and the UK. On 24 February 2016, the South African Minister of Finance, Pravin Gordhan, announced in his budget speech that one of the Treasury's proposals is that of the introduction of a tax on SSB's.¹⁰⁸⁷ On 16 March 2016, Chancellor George Osborne of the UK announced the introduction of a sugar tax on soft drinks. He explained that the income derived from this levy, which will be implemented from April 2018, will be used to enhance sports in schools.¹⁰⁸⁸

The efficacy of such taxes has been reported to vary depending on the type of product, and the increase of the price of the product that is being taxed.¹⁰⁸⁹ One meta-analysis found that taxing SSB's may prove effective in reducing obesity rates since the increase in price of soda drinks is associated with a decrease in consumption.¹⁰⁹⁰

¹⁰⁸³ Some of the jurisdictions where the debate regarding the implementation of a sugar tax is currently alive, include the UK (ADM Briggs, OT Mytton, A Kehlbacher, R Tiffin, M Rayner & P Scarborough "Overall and income specific effect on prevalence of overweight and obesity of 20% sugar sweetened drink tax in UK: econometric and comparative risk assessment modelling study" (2013) 347 *BMJ*), Australia (Obesity Policy Coalition "The case for an Australian tax on sugar-sweetened beverages" *Obesity Policy Coalition* ; Brazil, Chile, Taiwan, and Thailand (J Jou & W Techakehakij "International application of sugar-sweetened beverage (SSB) taxation in obesity reduction: Factors that may influence policy effectiveness in country-specific contexts" (2012) 107 *Health Policy Plan* 83 84.

¹⁰⁸⁴ Sassi *et al* "Taxation and Economic Incentives" in *Regulating Lifestyle Risks* 94.

¹⁰⁸⁵ Manyema (2014) *PLoS ONE* 2.

¹⁰⁸⁶ EU Food Law "Denmark drops decades old soft drinks tax" <<http://www.eurofoodlaw.com/country-reports/eu-member-states/denmark/denmark-drops-decades-old-soft-drinks-tax-64140.htm>> (accessed 01-05-2015).

¹⁰⁸⁷ Budget Speech of Pravin Gordhan, Minister of Finance, delivered in the South African Parliament on 24 February 2016. Available at <<http://www.treasury.gov.za/documents/national%20budget/2016/speech/speech.pdf>> (accessed 20-03-2016).

¹⁰⁸⁸ D Campbell, R Smithers & S Butler "Sugar tax: Osborne's two-tier levy brings mixed response" *The Guardian* (17-03-2016).

¹⁰⁸⁹ Sassi *et al* "Taxation and Economic Incentives" in *Regulating Lifestyle Risks* 105.

¹⁰⁹⁰ MA Cabrera Escobar, JL Veerman, SM Tollman, MY Bertram & KJ Hofman "Evidence that a tax on sugar sweetened beverages reduces the obesity rate: a meta-analysis" (2013) 13 *BMC Public Health* 1072 1080.

At the same time, the consumption of fruit juices and milk increases while, surprisingly enough, the consumption of diet drinks also decreases.¹⁰⁹¹ In Mexico, where a sugar tax took effect on 1 January 2014, a study by the National Institute of Public Health of Mexico, in conjunction with the University of North Carolina, showed a 12 percent reduction in household purchases of sugary drinks by December 2014.¹⁰⁹² The reduction level was the highest for lower socio-economic consumers and stood at 17 percent by the end of the year, whilst during 2014 the purchase of untaxed beverages, including bottled water, rose by 4 percent.¹⁰⁹³

In South Africa a recent study predicts that a 20 percent SSB tax may reduce obesity by 3,8 percent in adult males and 2,4 percent in females. The average reduction in energy intake is estimated to be 30 kilojoules per person per day. The study also proposes that, since the younger age-groups are the biggest consumers of SSB's, they may stand to benefit the most from such a tax.¹⁰⁹⁴

4 Conclusion

It is clear that there is presently no jurisdiction that has adopted a comprehensive approach which prohibits all forms of food marketing communications to children. Brazil has taken a fairly firm stance with the introduction of Resolution No 163 in 2014 but this prohibition is only applicable to marketing practices aimed at children younger than 12. Nevertheless, it is evident that Brazil, and many other jurisdictions have actively responded to the call by the WHO and have introduced a number of measures in an attempt to reduce the levels of childhood obesity. In this regard, the jurisdiction of South Korea must also be mentioned for its legislative attempts at restricting food marketing to children on television and the prohibition of using toys to promote food.

¹⁰⁹¹ 1080. The authors offer a couple of possible reasons for this, one being that bottlers and/or retailers may equalise prices between both types of beverages to counteract the tax. It has also been suggested that media reports on the negative impact of SSBs that accompany the introduction of taxes may change perceptions about both SSBs and diet drinks, in a sort of 'contamination' effect.

¹⁰⁹² Instituto Nacional de Salud Pública "Reducción en el consumo de bebidas con impuesto después de la implementación del impuesto en México" (2015) *Instituto Nacional de Salud Pública* <<http://www.insp.mx/epppo/blog/3666-reduccion-consumo-bebidas.html>> (accessed 10-07-2016).

¹⁰⁹³ Instituto Nacional de Salud Pública "Reducción en el consumo de bebidas con impuesto después de la implementación del impuesto en México" (2015) *Instituto Nacional de Salud Pública*.

¹⁰⁹⁴ Manyema *et al* (2014) *PLoS ONE* 5. In the UK there have been numerous calls for a sugar tax, the most recent of which came from the British Medical Association calling for a 20% tax on sugar-sweetened drinks to pay for subsidies on fruit and vegetables. S Boseley "Doctors demand a 20% tax on sugary drinks to fight UK obesity epidemic" *The Guardian* (13-07-2015).

Their food labelling system also appears to provide clear information to consumers in a visual and simple format.

Another aspect which must be highlighted, is the fact that many jurisdictions have chosen to introduce both self-regulatory and legislative measures. This seems to be the type of approach especially adopted with respect to television advertising. In this regard it must furthermore be stressed that the range of regulatory measures which have been adopted range from a complete governmental prohibition on television advertising to children – albeit a limited form of prohibition – to restrictions imposed on certain types of food and at certain times of the day or to certain audiences.

As to other forms of promotional activities, it appears that the regulation of marketing messages on the internet and other online platforms provides a particular challenge. To date no practical and comprehensive solution to this legal loophole has been provided and it is submitted that this aspect of marketing communications will require an international and uniform approach. This is also the situation in respect of product placement and sponsorship of major and global sporting events. Fortunately, within the realm of marketing in schools and at places where children normally gather, national governments appear to be able to provide much more certainty by prohibiting all forms of marketing at such venues. Other legislative efforts to reduce global obesity levels, in the form of taxes and the compulsory reformulation of food products, also seem to gain popularity.

A final aspect that needs to be emphasised, is the fact that in none of the research pertaining to foreign regulatory measures conducted for this thesis, any mention of the best interests of the child was found to be made. It may of course be argued that many jurisdictions in effect bear this principle and the rights of the child in mind by introducing regulatory restrictions to food marketing but it is never expressly mentioned as such.

CHAPTER 7: THE REGULATORY FRAMEWORK IN SOUTH AFRICA

1 Introduction

From the preceding chapters of this thesis it is clear that several marketing techniques are used in a number of ways to promote unhealthy foods to children. Children react to such marketing techniques by consuming more foods that contain high levels of salt, sugar and fat. This fact is a contributing factor to the increasing numbers of obese children, and it affects children's health and development. Consequently, the WHO and other bodies have called for a restriction to be placed on the marketing of nutritionally poor foods to children. In doing so, these organisations have explicitly called upon governments to play the leading role. Various jurisdictions have interpreted this call in various ways by introducing and implementing different measures of regulation. One of the questions which this research set out to answer is whether South Africa adheres to this call, but more importantly, whether it fulfils its international and constitutional obligations by applying the standard of the best interests of the child when food-marketing practices to children are employed. The purpose of this chapter is to explain what the current regulatory framework pertaining to food marketing to children in South Africa is. An assessment of this framework and whether it meets the requirements set out in the preceding chapters, will take place in chapter 8. Chapter 7 also contains a description of the proposed measures introduced by the South African Department of Health in May 2014. In terms of these proposals, no food or non-alcoholic beverages shall be marketed to children unless it complies with certain criteria. The impact and efficacy of these proposed regulations, including its ability to promote the best interests of the child, will be assessed in chapter 8.

However, it is also necessary to understand the value of the best interests of the child in a South African context. Whereas chapter 3 provided the theoretical and practical foundation for the assessment of food-marketing practices, and in particular discussed the interpretation and meaning of the term as found in Article 3(1) of the CRC, chapter 7 will do so in light of the provisions of the South African Constitution and legislation. Since the South African government has to comply with the obligations emanating from both the international and domestic law, such an assessment will be conducted in chapter 8.

2 Considering the best interests of the child in South Africa

2.1 General

Chapter 3 explained how the best interest concept in international law developed from one in terms of which children's welfare was considered to imply that they only need protection, into one where a variety of children's rights, including their participatory rights, have to be promoted. Today the best interests is a universally recognised principle of interpretation, a procedural standard and an independent right, enshrined in several international instruments, constitutions and legislation.

The "best interests of the child" is also not a new concept to South African law. A search through the first reported decisions reveals that South African courts considered the interests of the child as early as 1893¹⁰⁹⁵ and regarded it of paramount importance in a number of custody disputes.¹⁰⁹⁶ Currently there are various legislative measures in force in South Africa with the objective to provide for the implementation of the best interests of the child principle.¹⁰⁹⁷ The meaning and value of this term has also been given content by a pragmatic child rights approach in terms of which the child is recognised as a human being with fundamental rights that always have to be prioritised.¹⁰⁹⁸

¹⁰⁹⁵ *Alexander v Alexander* 1893 H 183 (Supreme Court of the Transvaal). See also *Susannah MW Smith v JP Waller and R Bowlby, Executors Testamentary in Estate of Late John Smith* (1879–1880) 1 NLR 81 referring to the "interests of any minors".

¹⁰⁹⁶ See for example *Cronje v Cronje* 1907 TS 871 872 (Supreme Court of the Transvaal); *Tabb v Tabb* 1909 TS 1033 stating that "the guiding principle to be borne in mind is not what are the feelings of the parents, but what is best for the children" and *Ramsay v Ramsay* 1935 SR 84 where the court stated that it "would always assume the parents would have the best interests of the child at heart, and are not likely to make any arrangements as to custody which would not be in the interests of the child." See furthermore *Matthews v Haswari* 1937 WLD 110 111; *Christian v Christian* 1945 TPD 434 438. In England the Guardianship of Infants Act of 1925 provided that the welfare of the infant was to be the first and paramount consideration for the court in deciding a question of the custody or upbringing of the infant. Many South African judges regarded this to be statutory confirmation of the "previous practice" in England and of the common law position in South Africa. See for example Schreiner JA in *Fletcher v Fletcher* 1948 1 SA 130 (A) at 144 – 145. In *Fletcher v Fletcher* at 134 the Appellate Division furthermore confirmed that in custody disputes subsequent to an order of divorce, the interests of the children must override considerations of guilt or innocence of either of their divorcing parents.

¹⁰⁹⁷ Space does not allow for all of these pieces of legislation, such as the Films and Publication Act 65 of 1996, the Child Justice Act 75 of 2008, or the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, to be described here. Some of the more pertinent provisions of the Children's Act, however, will receive attention.

¹⁰⁹⁸ This aspect is evident from s 28 of the Constitution, a study of several pieces of legislation, some of which are mentioned in the footnote above, and from examining the approach adopted by South African courts in numerous cases concerning children, some of which will be discussed below.

2.2 Section 28(2) of the Constitution of the Republic of South Africa

It has already been explained in chapter 1 that section 28(2) of the Constitution prescribes that in any matter concerning a child, the paramount consideration is to be the best interests of that child. The wording of the current provision in itself serves as an illustration of the constitutional prominence given to the child's best interests. The current wording is an important departure from section 30(3) of the Interim Constitution, which provided that the best interests would be of paramount importance only in matters relating to the children's-rights clause contained in the Interim Constitution itself.¹⁰⁹⁹ The South African constitutional protection also differs from that offered by the CRC and the ACRWC in that it regards the best interests to be of "paramount importance", rather than "a primary consideration" or "the primary consideration". The Oxford English Dictionary defines something that is "paramount" to be "highest in rank, power, or jurisdiction; supreme".¹¹⁰⁰ Section 28(2) of the Constitution therefore elevates the best interests of the child not only to be the first issue to be considered but also to the supreme issue in any matter concerning the child.¹¹⁰¹

The South African courts have given practical guidance to what it means when something is of paramount importance. In *Centre for Child Law v Minister of Justice and Constitutional Development* the Constitutional Court accurately summarised the effect of section 28(2) of the Constitution by explaining that the child's interests are more important than anything else, but it does not follow that everything else is unimportant.¹¹⁰² In *S v M* Sachs J called for an approach in which the paramountcy principle is applied in a meaningful way. In terms of this approach, other valuable and constitutionally protected interests may not be unduly obliterated.¹¹⁰³ However, the law and all other judicial, administrative and legislative bodies must attach the highest value to the best interests of the child.¹¹⁰⁴ As a result, the law must always be child

¹⁰⁹⁹ J Heaton "An individualised, contextualised and child-centred determination of the child's best interests, and the implications of such an approach in the South African context" (2009) 34 *JJS* 2.

¹¹⁰⁰ Oxford English Dictionary "*paramount, adj., n., and adv.*"

¹¹⁰¹ See also Heaton (2009) *JJS* 4.

¹¹⁰² *Centre for Child Law v Minister of Justice and Constitutional Development* 2009 6 SA 632 (CC) [29].

¹¹⁰³ *S v M (Centre for Child Law as Amicus Curiae)* 2008 3 SA 232 (CC) [25].

¹¹⁰⁴ At [40] of the decision Sachs J explains that:

"The paramountcy principle, ... , requires that the interests of children who stand to be affected receive due consideration. It does not necessitate overriding all other considerations. Rather, it calls for appropriate weight to be given in each case to a consideration to which the law attaches the highest value, namely, the interests of children who may be concerned."

sensitive: the common law must be developed and statutes must be interpreted in ways which favours and advances children's interests, while courts must perform their duties in a manner which at all times promotes children's rights.¹¹⁰⁵

The Constitutional Court has explained that, although the law cannot isolate or quarantine children from all harms, it can create conditions to protect children from abuse and maximise their prospects of productive and happy lives.¹¹⁰⁶ In this regard the Constitutional Court on numerous occasions has reminded the state of its important duty in promoting the best interests of the child. This court confirmed that the state's duty as *parens patriae* is to provide legislative and other measures to provide as much support as possible to parents in order to minimise possible risk. It has, for example, stated the following in *S v M*:

“[Section] 28 requires the law to make best efforts to avoid, where possible, any breakdown of family life or parental care that may threaten to put children at increased risk. Similarly, in situations where rupture of the family becomes inevitable, the State is obliged to minimise the consequent negative effect on children as far as it can.”¹¹⁰⁷

It has also transpired through the South African case law, that it was not always clear as to whether the best interests of the child is to be applied as an independent right, a principle or a standard.¹¹⁰⁸ Thus, for example, in *Christian Education South Africa v Minister of Education*¹¹⁰⁹ the Constitutional Court referred to the best interests of the child as a “right which every child has.”¹¹¹⁰ In the next sentence of the judgment the best interests of the child are being referred to as a “principle”.¹¹¹¹ Similarly, in *Minister of Welfare & Population Development v Fitzpatrick*, while the Constitutional Court confirmed that section 28(2) creates an independent right from those contained in

¹¹⁰⁵ [15]; and *Director of Public Prosecutions, Transvaal, v Minister of Justice and Constitutional Development* 2009 4 SA 222 (CC) [74] and [84].

¹¹⁰⁶ *S v M (Centre for Child Law as Amicus Curiae)* 2008 3 SA 232 (CC) [20].

¹¹⁰⁷ [20].

¹¹⁰⁸ For criticism of the courts' use of different terminology and its failure to apply the two-stage enquiry imposed by s 36 in cases where the right of the best interests of the child have been identified as being applicable, see E Bonthuys “The Best Interests of Children in the South African Constitution” (2006) 20 *Int J Law Policy Family* 23 26-29.

¹¹⁰⁹ 2000 4 SA 757 (CC) [41].

¹¹¹⁰ See also *Laerskool Middelburg v Departementshoof, Mpumalanga Departement van Onderwys*, 2003 4 SA 160 (T) 176G referring to the fundamental right contained in s 28(2) and in particular at 178C one which “stands first in the queue”(own translation); and *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division* 2003 2 SACR 445 (CC) [55] where the court held that “s 28(2), like the other rights enshrined in the Bill of Rights, is subject to limitations that are reasonable and justifiable in compliance with s 36.”

¹¹¹¹ The Court held that “[t]he principle is not excluded in cases where the religious rights of the parent are involved.”

section 28(1),¹¹¹² it also referred to the best interests “standard”.¹¹¹³ In the fairly recent decision by the Constitutional Court in *C v Department of Health and Social Development, Gauteng*¹¹¹⁴ both the minority judgment of Skweyiya J¹¹¹⁵ as well as the majority decision by Yacoob J¹¹¹⁶ performed a limitation inquiry and found that the relevant provisions of the Children's Act imposed a limitation on the “right” contained in section 28(2) of the Constitution, in that the legislative provisions did not provide for adequate consideration of the best interests of the child.¹¹¹⁷

As was explained above in chapter 3, the Committee on the Rights of the Child has now, however, in its General Comment No 14, confirmed that the concept of the best interests of the child is a multifaceted one existing as a substantive right, a fundamental, interpretative legal principle and as a rule of procedure.¹¹¹⁸ The Constitutional Court too has on numerous occasions emphasised that section 28 establishes not only a mere guideline but rights that the courts are obliged to enforce.¹¹¹⁹ Furthermore, as was also referred to above, the South African Constitutional Court has explicitly recognised the best interests of the child as a substantive right that may stand in conflict with other rights. This would mean that in such instances of conflicting rights, a proportional analysis in terms of section 36 must be performed.¹¹²⁰

¹¹¹² 2000 3 SA 422 (CC) [17].

¹¹¹³ [18].

¹¹¹⁴ *C v Department of Health and Social Development, Gauteng* 2012 2 SA 208 (CC).

¹¹¹⁵ Froneman J concurring.

¹¹¹⁶ Moseneke DCJ, Khampepe J, Nkabinde J and Van der Westhuizen J concurring.

¹¹¹⁷ Para 27 of the decision by Skweyiya J. In this instance the majority of the Court held that ss 151 and 152 of the Children's Act, which provided for the removal of children to temporary safe care, infringed the rights of children, including their best interests, by failing to provide for automatic review by a court of such removals. At [77] the majority found that “[i]n this sense, and to this extent, the laws are not in the best interests of children. They therefore limit the rights contained in s 28(2).” In *Du Toit v Minister of Welfare & Population Development (Lesbian & Gay Equality Project as Amicus Curiae)* 2003 2 SA 198 (CC) (2002 10 BCLR 1006) [22] the Court declared the exclusion of same sex life partnerships from adopting children jointly to be in conflict with the “principle” enshrined in s 28(2) of the Constitution, while the Court in *Sonderup v Tondelli* 2001 1 SA 1171 (CC) [29] referred to s 28(2) as “an expansive guarantee”. The Children's Act, in turn, seems to consistently refer to the best interests of the child “standard” to be applied as a matter of paramount importance.

¹¹¹⁸ “General Comment No 14 (2013) 4. See also, for example, Zermatten (2010) *Int'l J Child Rts* 483–499 offering many of the same views on the three facets of the concept.

¹¹¹⁹ *S v M (Centre for Child Law as Amicus Curiae)* 2008 3 SA 232 (CC) [14]; *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division* 2003 2 SACR 445 (CC) [54]-[55]; *Sonderup v Tondelli* 2001 1 SA 1171 (CC) and *Minister of Welfare and Population Development v Fitzpatrick* 2000 3 SA 422 (CC) [17].

¹¹²⁰ See further Skelton “Constitutional protection of children's rights” in *Child Law in South Africa* 265 explaining that s 28(2) of the Constitution has three functions namely as a tool for interpreting s 28(1) of the Constitution, a tool for establishing the scope of other constitutional rights and possible limits and an independent right. See also M Couzens “The Constitutional Court Consolidates its Child-focused

As a result, the best interests of the child, both as a principle and as an independent right, can itself be subject to limitation in terms of section 36 of the Constitution.¹¹²¹ In each instance a balancing exercise must be conducted and, in terms of section 36, it must be determined whether or not the “limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors.”¹¹²² It is especially important to bear in mind that in a constitutional value system, fundamental rights are often related and interdependent upon each other.¹¹²³ As was mentioned above, in an instance where the best interests of the child has to be balanced against other rights, the Constitutional Court has proposed an approach which does not unduly obliterate other valuable and constitutionally protected interests.¹¹²⁴ At paragraph 40 of the decision in *S v M* the court ruled as follows in this respect:

“The paramountcy principle ... requires that the interests of children who stand to be affected receive due consideration. It does not necessitate overriding all other considerations. Rather, it calls for appropriate weight to be given in each case to a consideration to which the law attaches the highest value, namely, the interests of children who may be concerned.”¹¹²⁵

Consequently, as is the case with all constitutional rights, children’s rights in South Africa can be lawfully limited by other competing constitutional rights and will not trump all other rights in all circumstances. The best interests of children will not always prevail and other constitutional rights cannot simply be ignored.¹¹²⁶ Yet, the Gauteng High Court has remarked that it is notable that in terms of section 28 of the Constitution, children's rights, in comparison to other socio-economic rights, contains no internal

Jurisprudence: The Case of *C v Department of Health and Social Development, Gauteng* (2013) 130 SALJ 672 684.

¹¹²¹ R Malherbe “The constitutional dimension of the best interests of the child as applied in education” (2008) 2 TSAR 267 284.

¹¹²² S 36(1) of the Constitution.

¹¹²³ See for example also *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division* 2003 2 SACR 445 (CC) [55]

¹¹²⁴ *S v M (Centre for Child Law as Amicus Curiae)* 2008 3 SA 232 (CC) [25].

¹¹²⁵ [40].

¹¹²⁶ In *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division* 2003 2 SACR 445 (CC) [55] the court held that “s 28(2), like the other rights enshrined in the Bill of Rights, is subject to limitations that are reasonable and justifiable in compliance with s 36.” It is also important to note that the Gauteng High Court has remarked that it is notable that in terms of s 28 of the Constitution, children's rights, in comparison to other socio-economic rights, contains no internal limitation subjecting them to the availability of resources and legislative measures for their progressive realisation. Like all rights, they remain subject to reasonable and proportional limitation, “but the absence of any internal limitation entrenches the rights as unqualified and immediate.” *Centre for Child Law v MEC for Education, Gauteng* 2008 1 SA 223 (T) 227I-J.

limitation subjecting them to the availability of resources and legislative measures for their progressive realisation. Like all rights, they remain subject to reasonable and proportional limitation, “but the absence of any internal limitation entrenches the rights as unqualified and immediate.”¹¹²⁷

2.3 The Children’s Act 38 of 2005

Apart from the constitutional protection that the best interests of the child enjoys in South Africa, a number of legislative measures also employ the term. The Children’s Act, for example, makes 57 references to the best interests of the child. One such reference is found in section 8 of the act which explains that the rights that a child has in terms of the Children’s Act supplement the rights which a child has in terms of the Constitution. The preamble of the Children’s Act confirms that these rights must be respected, protected, promoted and fulfilled and also recognises the important role which children play in the community. Children do not live in isolation: their circumstances are affected by and affect those societies in which they live. Accordingly, the act calls for an advancement of children’s rights so as to also improve the lives of families and the communities. Of particular importance for the purposes of this research is the fact that the preamble also stresses that it is necessary to effect changes to existing laws relating to children in order to afford them the necessary protection and assistance enabling children to assume their corresponding responsibilities within the community. Ultimately, these changes are required for the full and harmonious development of a child’s personality, so that she can grow up in a family environment and in an atmosphere of happiness, love and understanding.¹¹²⁸

In addition, section 6 of the Children’s Act contains a number of general principles that must guide all proceedings, actions and decisions by any organ of state in any matter concerning a child or children in general. One of these guidelines consists of a peremptory provision that all proceedings, actions or decisions in a matter concerning a child must respect, protect, promote and fulfil the child’s rights set out in the Bill of Rights of the Constitution, the best interests of the child standard set out in section 7 of the act, and the other rights and principles contained in the act.¹¹²⁹

¹¹²⁷ *Centre for Child Law v MEC for Education, Gauteng* 2008 1 SA 223 (T) 227I-J.

¹¹²⁸ Preamble to the Children’s Act.

¹¹²⁹ S 6(2)(a).

Section 9 of the Children's Act confirms that the child's best interests are of paramount importance, while section 7 of the act lists fourteen factors to be taken into consideration whenever a provision of this act requires the best interests of the child standard to be applied. A list of factors, which were originally formulated as a checklist in the custody related matter of *McCall v McCall*,¹¹³⁰ provided the basis for this list contained in section 7.¹¹³¹ As a result, the factors listed in the Children's Act predominantly relate to the environment of family court proceedings and in instances where issues of guardianship, care and contact between parents and children are in dispute.¹¹³²

2 4 An individualised determination applied in all environments

It is interesting to note that, whereas the list in the *McCall* decision contains a clause enabling a court to consider "any other factor which is relevant to the particular case with which the Court is concerned", the Children's Act does not contain such an open-

¹¹³⁰ 1994 3 SA 201 (C).

¹¹³¹ The list of factors is explained to be as follows:

"(a) the nature of the personal relationship between - (i) the child and the parents, or any specific parent; and (ii) the child and any other care-giver or person relevant in those circumstances; (b) the attitude of the parents, or any specific parent, towards - (i) the child; and (ii) the exercise of parental responsibilities and rights in respect of the child; (c) the capacity of the parents, or any specific parent, or of any other care-giver or person, to provide for the needs of the child, including emotional and intellectual needs; (d) the likely effect on the child of any change in the child's circumstances, including the likely effect on the child of any separation from - (i) both or either of the parents; or (ii) any brother or sister or other child, or any other care-giver or person, with whom the child has been living; (e) the practical difficulty and expense of a child having contact with the parents, or any specific parent, and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with the parents, or any specific parent, on a regular basis; (f) the need for the child- (i) to remain in the care of his or her parent, family and extended family; and (ii) to maintain a connection with his or her family, extended family, culture or tradition; (g) the child's - (i) age, maturity and stage of development; (ii) gender; (iii) background; and (iv) any other relevant characteristics of the child; (h) the child's physical and emotional security and his or her intellectual, emotional, social and cultural development; (i) any disability that a child may have; (j) any chronic illness from which a child may suffer; (k) the need for a child to be brought up within a stable family environment and, where this is not possible, in an environment resembling as closely as possible a caring family environment; (l) the need to protect the child from any physical or psychological harm that may be caused by - (i) subjecting the child to maltreatment, abuse, neglect, exploitation or degradation or exposing the child to violence or exploitation or other harmful behaviour; or (ii) exposing the child to maltreatment, abuse, degradation, ill-treatment, violence or harmful behaviour towards another person; (m) any family violence involving the child or a family member of the child; and (n) which action or decision would avoid or minimise further legal or administrative proceedings in relation to the child."

¹¹³² Schäfer is of the opinion that the courts still prefer to use to the *McCall* list, rather than the more extensive one contained in s 7 of the Children's Act. Schäfer *Child Law in South Africa* 159 refers to a number of recent cases which used the *McCall* list instead of referring to the factors contained in s 7.

ended provision.¹¹³³ The omission of such a clause should not be interpreted to mean that there are only a limited amount of factors which should always be taken into account. In this respect Heaton, for example, calls for a contextualised and child-centred determination of the child's best interests.¹¹³⁴ Each set of facts will require its own factors to be taken into account in order to determine what will be the best of the child or children in the particular circumstances. As has already been explained in chapter 3, a rights-based approach, in terms of which various rights may be relevant in different situations, is one which provides appropriate content to this term.

Moreover, it is imbedded in South African law that the best interests principle operates in the sphere of family law but also in many other areas of law. Thus, for example, in *S v M* the Constitutional Court explained that section 28(2) of the Constitution has expanded the application of the best interests from the traditional sphere of family law to every matter concerning the child:

“[T]aken literally, it would cover virtually all laws and all forms of public action, since very few measures would not have a direct or indirect impact on children, and thereby concern them. Similarly, a vast range of private actions will have some consequences for children.”¹¹³⁵

This all-encompassing approach is furthermore underscored by the approach prescribed, in particular, by section 6 of the Children's Act, as referred to above. The Constitutional Court and the Children's Act therefore confirm that policy decisions and regulatory measures pertaining to food marketing to children must consider the impact that these decisions, or a lack thereof, can have on the best interests of the child. It is submitted that also in this context the South African government has the obligation to consider all of the constitutionally protected rights of children that can be affected by marketing practices. In line with the rights already mentioned in chapter 3 of this thesis, it is submitted that these rights include the child's right to health,¹¹³⁶ to life,¹¹³⁷ to

¹¹³³ For criticism of this aspect, see T Davel “General Principles” in CJ Davel & A Skelton (eds) *Commentary on the Children's Act* (2007) 2-6 and S Ferreira “The best interests of the child: From complete indeterminacy to guidance by the Children's Act” (2010) *THRHR* 73 201 212.

¹¹³⁴ Heaton (2009) *JJS* 1-15. See also, for example CJ Davel & PJ de Kock “In 'n kind se beste belang” (2001) *De Jure* 272 274; Ferreira (2010) *THRHR* 202.

¹¹³⁵ [25].

¹¹³⁶ As protected by s 27 and 28(1)(c) of the Constitution and s 13 of the Children's Act.

¹¹³⁷ As protected by s 11 of the Constitution.

education,¹¹³⁸ to access of information,¹¹³⁹ and to be protected against maltreatment, degradation, abuse and neglect.¹¹⁴⁰

It therefore follows that a determination should be made as to whether or not the best interests of the child are indeed considered to be the most important aspect in the regulation of marketing food practices to children in South Africa. The following section of this chapter will explain the current regulatory position in South Africa. It will also provide some comments as to the relevance and efficacy of these provisions in light of the obligations described above.

3 The regulation of food marketing to children in South Africa

3.1 General measures of consumer protection

The Consumer Protection Act 68 of 2008 (“CPA”) is the final product of numerous attempts at addressing the previous lack of all-encompassing consumer law regulating the interaction between consumers and commercial enterprises in South Africa.¹¹⁴¹ The preamble to the CPA explains that the act seeks to protect the interests of all consumers, and ensure that consumers, who have been subjected to abuse or exploitation, have access to efficient redress. To this end, the CPA sets out to improve the access to and quality of information which will enable consumers to make informed choices according to their individual wishes and needs.¹¹⁴² It furthermore aims to protect consumers from “unconscionable, unfair, unreasonable, unjust or otherwise improper trade practices; ... deceptive, misleading, unfair or fraudulent conduct”; to improve consumer awareness and information; and encourage responsible and informed consumer choice and behaviour.¹¹⁴³ It is clear that the CPA seeks to promote the rights of all consumers to have as much information as possible to enable them to make autonomous decisions.

The CPA specifically seeks to reduce and ameliorate the disadvantages that particular groups such as minors, seniors or other similarly vulnerable consumers have experienced in accessing any supply of goods or services in the past.¹¹⁴⁴ Even though

¹¹³⁸ As protected by s 29.

¹¹³⁹ As protected by s 32.

¹¹⁴⁰ As protected by s 28(1)(d).

¹¹⁴¹ Department of Trade and Industry 2004 *Draft Green Paper on the Consumer Policy Framework* GN 1957 in GG 26774 of 9 September 2004 9.

¹¹⁴² The preamble to the CPA.

¹¹⁴³ S 3(1)(d) and (e).

¹¹⁴⁴ S 3(1)(b)(iii).

discriminatory marketing practices are prohibited in section 8 of the act, it is permissible, in terms of section 9(1)(d)(i), to advertise,¹¹⁴⁵ or to offer and supply goods at discounted prices to a consumer who is a minor or to an adult person who has attained a specified age of at least 60 years. In allowing this exception, the CPA acknowledges that children are particularly susceptible to marketing practices but does not prohibit advertising aimed at children either.

Except for these few measures contained in sections 3 and 9(1)(d)(i), there are no other provisions which provide for the marketing of products to children as a specific group of consumers. Nevertheless, a child, like any other consumer, also has the right to restrict any unwanted direct marketing.¹¹⁴⁶ Section 11 provides the relevant protection in this regard by providing the methods in which this type of invasion of privacy may be blocked and discontinued. Section 36 of the CPA in turn provides for acceptable rules applicable to promotional competitions. It is important to note that the act prohibits charges of any kind for the entering of promotional competitions, whether in the form of a “premium sms” or any other form and only the reasonable costs of posting or otherwise transmitting an entry form, such as postage or the cost of a standard sms, may be charged.

Part E of Chapter 2 of the CPA protects the consumer’s right to fair and responsible marketing and provides that no false or misleading representation may be made in any respect relating to goods or services.¹¹⁴⁷ Misleading, fraudulent or deceptive marketing may not be used in relation to the nature, properties, advantages or uses of the goods or services or the manner in or conditions on which those goods or services may be supplied, including the sponsorship of any event.¹¹⁴⁸ False, misleading or deceptive practices would include the use of “exaggeration, innuendo or ambiguity to a material fact” or the failure to correct an apparent misapprehension on the part of

¹¹⁴⁵ In terms of s 1 “advertisement” means any direct or indirect visual or oral communication transmitted by any medium, or any representation or reference written, inscribed, recorded, encoded upon or embedded within any medium, by means of which a person seeks to (a) bring to the attention of all or part of the public (i) the existence or identity of a supplier; or (ii) the existence, nature, availability, properties, advantages or uses of any goods or services that are available for supply, or the conditions on, or prices at, which any goods or services are available for supply; (b) promote the supply of any goods or services; or (c) promote any cause”.

¹¹⁴⁶ That is marketing which approaches “a person, either in person or by mail or electronic communication, for the direct or indirect purpose of (a) promoting or offering to supply, in the ordinary course of business, any goods or services to the person; or (b) requesting the person to make a donation of any kind for any reason”.

¹¹⁴⁷ S 29 (a).

¹¹⁴⁸ S 29 (b).

the consumer.¹¹⁴⁹ It would also be construed as false, misleading or deceptive advertising if the supplier falsely states or implies that it has any particular status, affiliation or approval which they do not have and their goods or services “have ingredients, performance characteristics, accessories, uses, benefits, qualities, sponsorship or approval that they do not have.”¹¹⁵⁰ A provision with the same effect is found in section 5 of the Foodstuffs, Cosmetics and Disinfectants Act 54 of 1972 (“Foodstuffs, Cosmetics and Disinfectants Act”) which provides that any person who publishes a false or misleading advertisement¹¹⁵¹ of any foodstuff, cosmetic or disinfectant or make any false claims regarding the origin, nature, substance, composition, quality, strength, nutritive value or other properties or the time, mode or place of its manufacture shall be guilty of an offence. Any person found guilty of any offence in terms of the act, may be sentenced to a fine and/or imprisonment of up to two years.¹¹⁵²

It is submitted that these provisions are very important instruments of protection for the child consumer in particular. However, bearing in mind that the “fun” theme is often employed to advertise food to children, it will be rather challenging to prove that some of the qualities which marketers seem to imply that food products have, are false. Therefore, in instances such as the character Spiderman telling children that because he loves certain unhealthy foods so much, he has the superpower that enables him to swing between high rise city buildings, it may quite easily be established that this advertisement is deceptive.¹¹⁵³ However, in instances where a fast food chain claims that eating food at its establishments is fun and considered to be “cool”, whereas not eating the particular products would lead to a dull and dreary life, the onus of proving that the advertisement is false and misleading becomes more problematic.

¹¹⁴⁹ S 41(1)(b) and (c).

¹¹⁵⁰ S 41(3)(a) and (b).

¹¹⁵¹ “Advertisement” is defined in s 1 of this act as referring to “any written, pictorial, visual or other descriptive matter or verbal statement, communication, representation or reference (a) appearing in a newspaper or other publication; or (b) distributed to members of the public; or (c) brought to the notice of members of the public in any manner, and which is intended to promote the sale or encourage the use of such foodstuff, cosmetic or disinfectant; and ‘advertise’ has a corresponding meaning.”

¹¹⁵² S 18.

¹¹⁵³ See for example the commercials aired on South African television during April and May 2014 in which Spiderman promotes McDonald’s Happy Meals in this way. In the USA version available at <<http://www.youtube.com/watch?v=ksbOwtLAMUg>> (accessed 19-05-2014) children were told that they will receive superpowers from dairy and fruit.

Other types of behaviour which are prohibited in terms of the CPA is that of “unfair tactics”, considered to be an example of “unconscionable conduct”¹¹⁵⁴ and are proscribed in terms of section 40 of the CPA. A supplier would be guilty of unconscionable conduct if it knowingly takes advantage of the fact that a consumer is “substantially unable to protect the consumer’s own interests because of physical or mental disability, illiteracy, ignorance, inability to understand the language of an agreement, or any other similar factor”.¹¹⁵⁵ It is submitted that this provision, in particular, applies to the promotional practices that are in some instances aimed at child consumers. In chapter 3 of this thesis it was explained that research has shown that children under the age of eight are unable to distinguish between television programmes and advertisements. Accepting the evidence in this respect, the Canadian Supreme Court held that television advertising aimed at young children is *per se* manipulative and deceiving.¹¹⁵⁶ In instances where older children are confronted, for example, with embedded marketing practices, this fact is also true for them, with the effect that also these children are unable to defend themselves against marketing ploys. As a result, it can be argued that section 40 of the CPA prohibits marketing practices to children since marketing to children is intrinsically unfair and deceptive. However, this argument has not yet been raised before to call for a prohibition on marketing to children and it is submitted that this is doubtful that this route would offer the best possible solution to the problem. Nevertheless, it can be said that the provisions of the CPA aim to protect the rights of children by recognising the harmful effects which marketing techniques may have on a group of people who do not fully comprehend the nature and purpose of such messages.

The child consumer is also entitled to receive any information, whether in visual or verbal format, in plain and understandable language. In circumstances where the product is specifically marketed towards a certain group of consumers such as children, it will be determined whether or not the language is plain by asking if it is reasonable to expect an ordinary child consumer of this particular age, taking into account the average literacy skills and minimal experience as a consumer, to

¹¹⁵⁴ Although the term “unfair tactics” is not defined in terms of the Act, “unconscionable conduct” is described in s 1 as being conduct which is “unethical or improper to a degree that would shock the conscience of a reasonable person.”

¹¹⁵⁵ S 40(2).

¹¹⁵⁶ See the discussion of *Irwin Toy Ltd v Quebec (Attorney General)* [1989] 1 SCR 927; 1989 CanLII 87 (SCC) in ch 3 at 4 7.

understand, without undue effort, the content, significance and import of the advertisement or notice.¹¹⁵⁷ It is therefore submitted that section 22 of the CPA stipulates that the language which is used to convey information on product labels, must be of such a nature that a child consumer will be able to understand it. This enabling provision must be read in conjunction with other regulatory measures which provides further practical meaning to it: the requirements for food product labelling is set out in detail in the regulations promulgated in terms of section 15 of the Foodstuffs, Cosmetics and Disinfectants Act. Of these, regulations R146 are relevant since it requires that the nutritional information should be provided in instances where a nutritional claim is being made.¹¹⁵⁸ These values are provided for the product per 100g or 100ml, as well per single portion size, and in terms such as the “glycaemic carbohydrate”, “mono-unsaturated fat”, “poly-unsaturated fat”, “sodium” and “cholesterol”.¹¹⁵⁹ The letters used to convey this information should be no less than 1mm in size,¹¹⁶⁰ and printed in English and where possible, in one other official South African language. At present, there is no provision in South African law for the dissemination of product information on labels to also be provided in braille.

Parts H and I of Chapter 2 of the CPA provides for the rights of the consumer to fair value, good quality and safety, as well as her rights to recourse and the supplier’s liability towards consumers. Of particular interest is the description of goods or services which are hazardous or unsafe: a “hazard” is defined as a “characteristic that has been identified as, or declared to be a hazard in terms of any other law” or “presents a significant risk of personal injury to any person, or damage to property, when the goods are utilised” while “unsafe” means that, due to a characteristic, failure, defect or hazard, particular goods present an extreme risk of personal injury or property damage to the consumer or to other persons.”¹¹⁶¹ Although it can be said that foods saturated in fat, salt and sugar poses serious health risks if consumed in large quantities, it is difficult to argue that the mere consumption thereof presents a significant risk, or that it is unsafe to use. As a result, such foods are currently not considered to be a hazard in terms of the CPA, and also not in terms of any other law

¹¹⁵⁷ S 22.

¹¹⁵⁸ Regulations Relating to the Labelling and Advertising of Foodstuffs GN R146 in GG 32975 of 01-03-2010. Further details and provisions of this set of regulations will be discussed below.

¹¹⁵⁹ Anexure 2 to R146.

¹¹⁶⁰ Reg 8 of R146.

¹¹⁶¹ S 53(1)(c) and (d).

of South Africa. Nevertheless, as was explained in chapter 6, it must be borne in mind that some jurisdictions elsewhere have introduced, or are considering to introduce, health warnings on food labels, indicating that the product contains high levels of salt, sugar or fats.¹¹⁶²

In Part B of Chapter 4 the CPA endorses the use of industry codes in cases where disputes between the relevant sector of the industry and consumers need to be resolved. Such industry codes must, however, be consistent with the purposes and policies of the CPA and the National Consumer Commission must review the effectiveness of an industry code every five years.¹¹⁶³ This means that certain self-regulatory codes such as those of the Advertising Standards Authority, which will be discussed below, could be used whenever the rights of a child consumer are infringed by the marketing conduct of a food company but, should these remedies fail to address the issue adequately, the avenues of redress provided by the CPA may be called upon to further assist the consumer.¹¹⁶⁴ This synergy serves as an example of the dual approach to regulation in South Africa by making use of both legislation and self-regulatory measures. The efficacy of such a relationship will consequently also be assessed in chapter 8.

3 2 Television advertising

3 2 1 Self-regulatory measures

In South Africa the Advertising Code of the South African Advertising Standards Authority (the “ASA Code”) presently governs advertising practices.¹¹⁶⁵ In the context of television advertising, it is supported, to some extent, by the Broadcasting Complaints Commission of South Africa (“BCCSA”) Codes of Conduct.¹¹⁶⁶ Even

¹¹⁶² See, for example, the discussion at 2 5 of ch 6.

¹¹⁶³ S 82(4) and (5).

¹¹⁶⁴ In the judgment of *Herbex (Proprietary) Limited v The Advertising Standards Authority of South Africa* ZAGPJHC 25-04-2016 case no 14/45774, as yet unreported (discussed below in ch 8) the court indicated at [9] that the Advertising Standards Authority has applied for its code to be recognised as the industry ombud in terms of the provisions of the CPA. At the time of the judgment, and consequently at the time of writing this thesis, this process had not yet been finalised.

¹¹⁶⁵ Advertising Standards Authority of South Africa “Advertising Code of Practice” (2016) *Advertising Standards Authority of South Africa* <<http://www.asasa.org.za/codes/advertising-code-of-practice/>> (accessed 07-07-2015). The ASA Code will be discussed below.

¹¹⁶⁶ Broadcasting Complaints Commission of South Africa “New Code of Conduct for Free-to-Air Broadcasters 2011” (2011) *Broadcasting Complaints Commission of South Africa* <http://www.bccsa.co.za/index.php?option=com_content&task=view&id=616&Itemid=35> (accessed 25-03-2105) and the Broadcasting Complaints Commission of South Africa “Code of Conduct for

though the “new” Code of Conduct for Free-to-Air Broadcasting Service Licensees, which came into effect on 1 January 2011, devotes its clause 6 to children, there are no provisions that specifically address the issue of marketing products to children.¹¹⁶⁷ One of the general provisions pertaining to broadcasting programmes to children is one that bans the broadcasting of any harmful or disturbing material to children at times when a large number of children are likely to be part of the audience.¹¹⁶⁸ This would include programming that contains scenes of explicit violence and/or sexual conduct and/or nudity and/or grossly offensive language which must be broadcast during the watershed period. In terms of the definitions clause “watershed period” means the period between 21h00 and 05h00 for free-to-air television broadcasting service licensees and 20h00 and 05h00 for subscription television broadcasting service licensees.¹¹⁶⁹

The ASA will in normal circumstances, govern questions regarding the marketing or advertising of products to children. In the hypothetical scenario where, during the broadcast of a news programme covering an event organised as a “fun day” for children and broadcasted on one of the channels of the South African Broadcasting Corporation (SABC), a claim by a mascot of a fast food chain is made, stating that their burgers were donated to the children attending the event because it is “good for them” and will make them “strong and clever”, a situation of dual jurisdiction regarding the claim may arise. In such an instance, the SABC can be held liable for broadcasting material which is not truthful, accurate or fair¹¹⁷⁰ and based on an exaggerated, unsubstantiated and irresponsible opinion.¹¹⁷¹ The fast food restaurant can, in turn, be held liable in terms of the ASA’s Code of Conduct for, *inter alia*, advertising and promoting food that does not represent a healthy dietary choice, and for misleading children about benefits from the use of their product.¹¹⁷²

Subscription Broadcasting Service Licensees” <http://www.bccsa.co.za/index.php?option=com_content&task=view&id=536&Itemid=35> (accessed 25-03-2015).

¹¹⁶⁷ In terms of the Codes a child is a person under the age of 18.

¹¹⁶⁸ CI 6(1) of Broadcasting Complaints Commission of South Africa “New Code of Conduct for Free-to-Air Broadcasters 2011” (2011) *Broadcasting Complaints Commission of South Africa*.

¹¹⁶⁹ CI 1 of Broadcasting Complaints Commission of South Africa “New Code of Conduct for Free-to-Air Broadcasters 2011” (2011) *Broadcasting Complaints Commission of South Africa*.

¹¹⁷⁰ CI 11(1) of Broadcasting Complaints Commission of South Africa “New Code of Conduct for Free-to-Air Broadcasters 2011” (2011) *Broadcasting Complaints Commission of South Africa*.

¹¹⁷¹ CIs 11(2)-(6) of Broadcasting Complaints Commission of South Africa “New Code of Conduct for Free-to-Air Broadcasters 2011” (2011) *Broadcasting Complaints Commission of South Africa*.

¹¹⁷² Advertising Standards Authority of South Africa *Appendix J - Food and Beverage Code* as discussed above.

Furthermore, in much the same way in which their counterparts in the USA and Canada have done, a number of South African companies have publicly committed themselves to promoting healthy dietary choices and healthy lifestyles when making use of marketing communications to children of twelve years of age and younger. Twenty-four companies signed the South African Marketing to Children Pledge, an initiative of the South African Consumer Goods Council.¹¹⁷³ In terms of this pledge companies have undertaken to not advertise unhealthy dietary choices but only if more than 50 percent of the audience consists of children twelve years old and under.¹¹⁷⁴ Companies have also undertaken to develop an individual company action plan that outlines how they will further enhance the core principles of the Advertising Standards Authority's Food and Beverage Code. These individual commitments, however, have not yet been published. Companies that have international pledges in place may further enhance their commitment by including provisions of those pledges in their action plans.¹¹⁷⁵

In the Preface to the South African ASA Code it is explained that the Code is based on the ICC's International Code of Advertising Practice and that it binds the advertiser, the advertising practitioner and the medium involved in publication of the advertiser's message to the public.¹¹⁷⁶ The ASA Code applies to all visual or aural communications, representations, references or notifications of any kind which is intended to promote the sale, leasing or use of any goods or services, or which appeals for or promotes the support of any cause. The definition of "advertisement" furthermore also includes promotional content displayed on material, menus, labels, and

¹¹⁷³ The Consumer Goods Council of South Africa "The South African Marketing to Children Pledge" (2016) *The Consumer Goods Council of South Africa* <http://www.cgcsa.co.za/index.php?option=com_content&view=article&id=48:the-south-african-pledge-on-marketing-to-children&catid=1:latest-news&Itemid=50> (accessed 28-04-2011). See also UCONN Rudd Center for Food Policy and Obesity "South African Pledge on Marketing to Children" <<http://pledges.uconnruddcenter.org/pledge.aspx?id=8>> (accessed 24-03-2015)

¹¹⁷⁴ The Pledge defines "children twelve years old and under" as advertising to media audiences with a minimum of 50% of children twelve years old and under. The text of the pledge is available at <https://www.ifballiance.org/sites/default/files/South_african_marketing_to_children_pledge.pdf> (accessed 24-03-2015). Companies which have made this pledge include Cadbury, Coca-Cola Danone, Kellogg's, Nestlé, Parmalat, Pepsico/Simba, Rainbow Chicken, Tigerbrands, Unilever, Famous Brands (Wimpy, Steers) KFC, McDonalds, Nando's and Pick 'n Pay.

¹¹⁷⁵ The text of the pledge is available at <https://www.ifballiance.org/sites/default/files/South_african_marketing_to_children_pledge.pdf> (accessed 24-03-2015). Many other jurisdictions have of late introduced a variation of self-regulatory measures. For further details of such measures in Europe, see Bollars *et al Marketing of foods high in fat, salt and sugar to children* 9-16 thereof in particular.

¹¹⁷⁶ Advertising Standards Authority of South Africa "Advertising Code of Practice" (2016) *Advertising Standards Authority of South Africa* Preface.

packaging.¹¹⁷⁷ Editorial material is not regarded as an advertisement, unless it is an editorial for which consideration has been given or received.¹¹⁷⁸

Apart from the general prohibitions on false and misleading, offensive and discriminatory advertising, the ASA Code also devotes a small section to advertising to children.¹¹⁷⁹ The ASA Code defines “children” as persons under the age of 18, or who is portrayed as, or who appear to be, under the age of 18.¹¹⁸⁰ This definition therefore corresponds with the internationally established and constitutional classification of a child. As a general principle of advertising to children it is advised that advertisements should not contain any statement or visual presentation which might result in harming them, mentally, morally, physically or emotionally.¹¹⁸¹ Furthermore, the general rule of interpretation whenever the impact of advertising is considered should be a narrow one, bearing specifically in mind not only the target audience but also the probable audience. This means that the test to be applied is what the impact may be on those who are likely to see or hear it, and not only upon those who the advertisement is aimed at.¹¹⁸²

The ASA Code acknowledges that children are particularly susceptible to marketing practices: it explains that children have a lack of experience, is credulous and likely to attach a more literal meaning to advertising.¹¹⁸³ Advertisements should therefore not exploit the natural credulity of children or their lack of experience and should not strain their sense of loyalty.¹¹⁸⁴ It is explained that this can happen, for example, if an advertisement suggests that a child will be failing someone or something or will be inferior in any way, unless that child buys, or unless anyone else is encouraged to buy a particular product on her behalf.¹¹⁸⁵ This type of suggestion may as a result not be

¹¹⁷⁷ Advertising Standards Authority of South Africa “Advertising Code of Practice” (2016) *Advertising Standards Authority of South Africa S i* – Introduction: cl 4.1.

¹¹⁷⁸ Advertising Standards Authority of South Africa “Advertising Code of Practice” (2016) *Advertising Standards Authority of South Africa S i* – Introduction: cl 4.1.

¹¹⁷⁹ Advertising Standards Authority of South Africa “Advertising Code of Practice” (2016) *Advertising Standards Authority of South Africa S ii* – General: cl 14.

¹¹⁸⁰ Advertising Standards Authority of South Africa “Advertising Code of Practice” (2016) *Advertising Standards Authority of South Africa S i* – Introduction: cl 4.10.

¹¹⁸¹ Advertising Standards Authority of South Africa “Advertising Code of Practice” (2016) *Advertising Standards Authority of South Africa S ii* – General: cl 14.1.1.1.

¹¹⁸² Advertising Standards Authority of South Africa “Advertising Code of Practice” (2016) *Advertising Standards Authority of South Africa S 1* – Introduction: cl 3.2.

¹¹⁸³ Advertising Standards Authority of South Africa “Advertising Code of Practice” (2016) *Advertising Standards Authority of South Africa S 1* – Introduction: cl 3.5.

¹¹⁸⁴ Advertising Standards Authority of South Africa “Advertising Code of Practice” (2016) *Advertising Standards Authority of South Africa S ii* – General: cl 14.2.1.

¹¹⁸⁵ Advertising Standards Authority of South Africa “Advertising Code of Practice” (2016) *Advertising Standards Authority of South Africa S ii* – General: cl 14.2.2.

included in an advertisement. Furthermore, the offering of a “free” gift, where the gift is not truly available without any further consideration or a condition, is also prohibited. In the advertisement the gift should be portrayed in such a manner that its size can be determined by showing it in relation to some common object.¹¹⁸⁶ The ASA Code therefore clearly endorses the inclusion of free toys or other gifts as part of sales promotions.¹¹⁸⁷

Appendix J of the Advertising Code constitutes the Food and Beverage Code and pays particular attention to the advertising of food products to children.¹¹⁸⁸ As a whole the Food and Beverage Code recommends the advertising and promotion of a healthy diet, while it discourages poor nutritional habits, an unhealthy lifestyle, and excess consumption with children. Portion sizes featured in food and beverage advertising should therefore not be excessive or more than would be reasonable to consume by a person of the age depicted.¹¹⁸⁹

Despite the ASA Code’s definition of a child being a person under the age of 18, the Food and Beverage Code identifies children of twelve years of age and younger to be particularly impressionable persons.¹¹⁹⁰ Consequently, food and beverage product advertising should not directly appeal to children of twelve years and under to persuade their parents or others to buy advertised products for them or suggest any negative consequences of not purchasing the product.¹¹⁹¹ Similar to the provisions of the CPA, the ASA Food and Beverage Code also states that food and beverage advertising should not mislead any children about benefits from the use of a product. Such benefits include, *inter alia*, the acquisition of strength, status, popularity, growth, proficiency and intelligence.¹¹⁹² Where fantasy, including animation, is used, care should be taken not to exploit the imagination of a child younger than twelve in a way that could create expectations of unattainable product benefits. Advertising should also not exploit such a child’s inability in distinguishing between real and fanciful

¹¹⁸⁶ Advertising Standards Authority of South Africa “Advertising Code of Practice” (2016) *Advertising Standards Authority of South Africa S ii* – General: cl 14.2.2.

¹¹⁸⁷ See also chap 2 at 2 1 5 where the amounts spent in using collectable toys as part of so-called “kiddies meals” in especially the USA was discussed.

¹¹⁸⁸ Advertising Standards Authority of South Africa *Appendix J - Food and Beverage Code 24/03/2015*) cl 2.

¹¹⁸⁹ Advertising Standards Authority of South Africa *Appendix J - Food and Beverage Code* cl 5.

¹¹⁹⁰ Advertising Standards Authority of South Africa *Appendix J - Food and Beverage Code* cl 7.1.

¹¹⁹¹ Advertising Standards Authority of South Africa *Appendix J - Food and Beverage Code* cl 7.3.

¹¹⁹² Advertising Standards Authority of South Africa *Appendix J - Food and Beverage Code* cl 7.1.

benefits.¹¹⁹³ In addition, advertising for food and beverage products directed towards children of twelve years and younger should not create a sense of urgency.¹¹⁹⁴ Food and beverage product advertising in general should not undermine the role of parents or others responsible for a child's welfare in guiding diet and lifestyle choices.¹¹⁹⁵

Clause 8 of the Food and Beverage Code prohibits advertisers who are promoting food and beverage products that do not represent healthy dietary choices and a healthy lifestyle,¹¹⁹⁶ from using celebrities or characters licensed from third-parties (such as cartoon characters) in television advertisements targeted at children of twelve years old and younger. This provision does not, however, apply to the use of characters on packaging, provided that the packaging does not appear in television advertising directed at children of twelve years and younger.¹¹⁹⁷

During the 18-month period of 1 January 2014 to 30 June 2015 the ASA received only five complaints pertaining to Appendix J of the ASA Code. In only two of these matters, the ASA Directorate considered the merits of the complaint and provided a ruling. In one of the matters, the respondent had already withdrawn the advertisement prior to the ASA requesting a response regarding the complaint and in two other instances the complaint also did not reach the stage where a ruling was required.¹¹⁹⁸

3 2 2 *Legislative measures*

In July 2007, the Department of Health published a set of regulations (R634) in terms of the Foodstuffs, Cosmetics and Disinfectants Act, seeking, *inter alia*, to address the matter of food marketing to children.¹¹⁹⁹ According to the Department of Health, the previous Regulations (R2034) which were promulgated in 1993, had to be replaced in order to strengthen "effectiveness, close all known 'loopholes' and incorporate new

¹¹⁹³ Advertising Standards Authority of South Africa *Appendix J - Food and Beverage Code* cl 9.3.

¹¹⁹⁴ Advertising Standards Authority of South Africa *Appendix J - Food and Beverage Code* cl 9.1.

¹¹⁹⁵ Advertising Standards Authority of South Africa *Appendix J - Food and Beverage Code* cl 7.2.

¹¹⁹⁶ In accordance with established scientific standards acceptable in terms of s ii, cl 4.1 of the Code of Advertising Practice. In terms of cl 10 of the Food and Beverage Code all claims, including nutritional information and claims about nutrition and health benefits, should also be substantiated in accordance with cl 4.1 of s ii. Cl 4.1 of the Advertising Code, however, does not actually explain what standard should be used in order to establish whether a product is healthy or not.

¹¹⁹⁷ Advertising Standards Authority of South Africa *Appendix J - Food and Beverage Code* cl 8.3.

¹¹⁹⁸ Personal communication received from Mr Leon Grobler, Manager: Dispute Resolution Advertising Standards Authority of South Africa, on 07/07/2015. The reasons for the lack of a ruling in the two matters do not appear from the communication with Mr Grobler.

¹¹⁹⁹ These regulations were published in Government Gazette No 30075 of 20 July 2007 (Regulation Gazette no 8718) for public comment for a period of three months.

developments in scientific research as well as in international Codex Standards and Guidelines.”¹²⁰⁰ The regulations sparked controversy for a number of reasons,¹²⁰¹ one being that regulation 52(2)(e) provided that a foodstuff which is not regarded essential as part of a healthy diet and a healthy lifestyle, as listed in Annexure 6 of the regulations, would not be allowed to be advertised to a child younger than 16.¹²⁰² When advertising these types of foods, the advertisement could also not make use of a child actor younger than 16 or of a cartoon type character, computer animation, or similar strategy or token or gift in order to encourage the use of such products. These foods would also not be allowed to be advertised or promoted on any school and pre-school premises or in school tuck shops. The regulations furthermore required that the foods listed in Annexure 6 were to bear the following statement on the main panel of the label in bold letters: “Use in moderation only since excessive consumption on a regular basis may lead to an unhealthy increase in weight/obesity”, or “Regular consumption not recommended for a healthy diet”. After considering a large volume of comments received and after further consultation with relevant stakeholders from the food and beverage industry, the Department of Health decided to deal with the finalization of the regulations in two phases.¹²⁰³

The regulations, which were finally published on 1 March 2010,¹²⁰⁴ contain the less controversial provisions, specifying a standard method of conveying information about foodstuffs on its labels to the consumer, enforce truthful descriptions and prevent the use of misleading and ambiguous messages regarding the characteristics of the foods

¹²⁰⁰ The Department of Health “Draft Food Labelling Regulations to improve healthy lifestyle” Press Release 26 July 2007.

¹²⁰¹ Some of the other controversial aspects were the development of a nutrient profiling model, the suggestion of serving sizes, and the development of an International Standards Organisation method to determine the Glycemic index of a foodstuff. Foodstuff South Africa “New food labelling regulations become law”, available at <<http://foodstuffsa.co.za/index.php/news-stuff/new-food-labelling-regulations-mainmenu-140/702-new-food-labelling-regulations-become-law>> (accessed 13-05-2011). See also The South African National Department of Health “Health Department publishes new Regulations Relating to the Labelling and Advertising of Foodstuffs”, available at <<http://www.doh.gov.za/docs/pr/2010/pr0309.html>> (accessed 12-05-2011).

¹²⁰² The products included in the list were described in very general terms and included carbonated and uncarbonated soft drinks, fruit nectars, sweet biscuits, tarts and cakes, chocolates and candy, fast foods, potato crisps, dry soup powders, breakfast and cereal bars and mayonnaise. There were no objective criteria in the form of nutritional values used to describe the products.

¹²⁰³ The South African National Department of Health “Health Department publishes new Regulations Relating to the Labelling and Advertising of Foodstuffs”, available at <<http://www.doh.gov.za/docs/pr/2010/pr0309.html>> (accessed 12-05-2011).

¹²⁰⁴ Regulations Relating to the Labelling and Advertising of Foodstuffs No R146. Published in the Government Gazette No 32975 (1 March 2010).

and beverages.¹²⁰⁵ This part of the regulations (R146) which came into operation in 2012 will be discussed below. Regulation 52(2)(e) and Annexure 6, however, were not published as part of regulations R146 which are currently in force.

The first point which is important to note is that, despite the fact that much of the content of the provisions of R146 relate to the prescribed format of food product labelling, the regulations also pertain to the advertising of foods. This aspect is clear from the title of the regulations, as well as regulation 2 which provides that advertisements must also adhere to the provisions of R146. Ultimately, there are only a few regulations that apply to the advertisement of food, none of which specifically pertains to advertising directed at children. These regulations will be briefly discussed below. It should also be noted that, in terms of section 1 of the Foodstuffs, Cosmetics and Disinfectants Act, advertisement means the following:

“any written, pictorial, visual or other descriptive matter or verbal statement, communication, representation or reference –
(a) appearing in a newspaper or other publication; or
(b) distributed to members of the public; or
(c) brought to the notice of members of the public in any manner,
and which is intended to promote the sale or encourage the use of such foodstuff, cosmetic or disinfectant.”

“Advertise” has a corresponding meaning in terms of the act. In terms of regulation 6 it is not permissible to refer to the Foodstuffs, Cosmetics and Disinfectants Act or the regulations promulgated in terms of the act, or to the Department of Health or any of its officials or local government departments in any advertisement.¹²⁰⁶ Regulation 13 provides for the use of endorsements and testimonials by health practitioners and other organisations in an advertisement. In addition, it prohibits the use of the words “health” or “healthy”, or “wholesome” or “nutritious”, or any other words or symbols that may convey a similar message regarding the food product. An advertisement may furthermore not claim to provide complete or balanced nutrition, also not as part of the (trade) name of the product. Regulations 51, 52 and 53 in turn provide for the use of claims, such as “low in fat” or “source of” or comparative claims such as “reduced”. Essentially, no claim may be made if it cannot be substantiated by proof that it meets

¹²⁰⁵ Health 24 “Food labelling legislation - will it help consumers?”, available at <http://www.health24.com/dietnfood/DietDocs_articles/15-1871,62728.asp> (accessed 13-05-2011).

¹²⁰⁶ Reg 6.

the requirements set for such a claim in Table 1 of the regulations. Thus, for example, if the claim is that a foodstuff or beverage is “low in fat”, it must contain less than 3 grams of fat per 100 grams of solid foods and less than 1,5 grams per 100 millilitres of fluids. A product may also not be advertised or claim to contain “no added sugar” if it contains any added honey, molasses, sucrose with added molasses, coloured sugar, fruit juice concentrate, de flavoured and/or deionised fruit juice and concentrates thereof, high-fructose corn syrup and malt or any other syrup of various origins.

3 2 3 *Proposed measures*

In May 2014, a legislative proposal for the regulation of television advertising of food products to children was published for public comment in the form of Regulations R429.¹²⁰⁷ In terms of draft regulation 65 of this set of regulations no food or non-alcoholic beverage shall be marketed to children unless it complies with all the criteria in guideline 14 of the regulations.¹²⁰⁸ Guideline 14, which was subsequently published on 2 June 2014 on the Department of Health’s website but is no longer available to view,¹²⁰⁹ contains an explanatory note as to the objective of the guidelines, the principle and rationale thereof, the background from a South African and international perspective, as well as the implications of the guidelines. This section of the guideline reads much like a policy statement. Finally, in clause 6(2) thereof,¹²¹⁰ the criteria for products that would qualify as being marketable to children, are provided. If products do not meet these requirements, they will be regarded as “unhealthy food”.

At the time of writing this thesis, there have not yet been more developments as to the enactment of R429. Nevertheless, the possible consequences of these regulations, should they be enacted in the proposed format, will be discussed below.

¹²⁰⁷ Published in terms of s 15 of the Foodstuffs, Cosmetics and Disinfectants Act. Department of Health 2014 *Regulations Relating to the Labelling and Advertising of Foods: Amendment* Published in Government Gazette No 37695 of 29 May 2014 (Regulation Gazette no 10203). Substantiated comments were to reach the Director General of Health by 29 August 2014. Regulation 65 of the regulations is attached as part of Addendum B to this thesis, while guideline 14 is attached as Addendum C.

¹²⁰⁸ The regulations do not provide a definition of “children” but the guidelines appear to refer to all persons under the age of 18.

¹²⁰⁹ It appears that the Draft Regulations are still accessible at <<http://www.health.gov.za/docs/regulation/2013/DraftAmendment.pdf>> but the guidelines are no longer available.

¹²¹⁰ Clause 6 of guideline 14 is entitled “Criteria”. This clause is divided into 15 further points, which will be referred to below as “criteria (1)” to “(15)”.

It must also be noted that draft regulation 65 prohibits all forms of marketing. Draft guideline 14 defines “commercial marketing” in the following terms:

“[A] multifaceted, integrated mix of marketing communications, campaigns and techniques that focuses on branding and building relationships with consumers and includes but is not limited to –

(a) advertising as defined by the Foodstuffs, Cosmetics and Disinfectant Act, 1972 (Act No 54 of 1972), through any media in any manner, directly or indirectly (e.g., using the happy, caring family scenario), combining traditional media, digital marketing, packaging, online sweepstakes, outdoor advertising, food companies’ websites, search engines, social networking sites and blogs, around or in films and media clips viewed online, around or in online and downloaded games and music, print media, in-school marketing and all other marketing techniques;

b) radio, television, the internet, any other electronic online medium, e-mails and text messages, mobile and viral marketing, digital marketing, packaging, online sweepstakes; and

c) cross promotions (e.g. linking foods with popular children’s movies and television characters), product placement, sales promotion, promotional activities such as redemptions, under-the-cap offerings, advergames, text message/SMS contests, etc offering prizes or rewards, cross-promotions using celebrities including sport stars, brand mascots or characters popular with children.

d) Sponsorship of TV and radio programmes, music videos, celebrity product endorsement, sponsorship of community and school events and contests, corporate gifts of educational materials and equipment, corporate support of health campaigns, sports clubs, school meals.”¹²¹¹

From this rather comprehensive definition, the intention of the Department of Health appears to be to prohibit all possible marketing techniques and means of promotion. Therefore, much of which will be discussed in this section regarding television advertising will also be applicable to other forms of marketing.

In terms of criteria (2) food products a) must pass a nutrient profiling model (NPM), found at the bottom of the web page of the Directorate: Food Control on the website of the Department of Health; b) may not contain any added fructose, added non-nutritive sweeteners, added fluoride or added aluminium through an additive or ingredient; and c) may not exceed the nutrient levels in the food or beverage per 100 g/ml as indicated in a table printed in the guideline. This means that in addition to meeting the first two requirements, only products which, per 100 grams, contain less than 5 grams of sugar, 3 grams of fat — of which 1.5 grams are saturated — and 120

¹²¹¹ Clause 5.

milligrams sodium per 0,3 grams of salt may be marketed to children. These values for non-alcoholic beverages, per 100 millilitres, are 2,5 grams of sugar, 1,5 grams of fat – of which 0,75 grams are saturated, and 120 milligrams sodium per 0,3 grams of salt. It is stated that these values are based on the UK Food Standards Agency Criteria which were published in January 2007.

Criteria (3)(a) states that “[c]ommercial marketing or promotion [sic] of unhealthy food shall not be advertised [sic] on radio or television, between 6.00 to 21.00.” The implication of this provision, if the peculiar sentence structure is ignored, is that no foods and beverages which do not meet the three requirements of criteria (2) may be advertised on any radio or television station for the 15 hours during the day as indicated, irrespective of whether or not the programming is directed at children or not. Despite the fairly clear wording and effect of criteria (3)(a) and regulation 65, criteria (3)(b) in addition states that “[n]o commercial marketing activities to children shall be permitted between 6.00 to 21.00”. Another peculiar worded part of criteria (3) is that of (3)(c) which states that “[p]rinciples described in this Guideline shall also apply to commercial communications for those products directed at children outside of children's programmes.”

Criteria (4) explains that “[f]ood business operators shall not abuse positive family values such as portraying any happy, caring family scenario, in order to advertise unhealthy foods.” This provision presumably refers to advertisements that are broadcasted during the hours of 21:00 to 06:00. Such advertisements are also not allowed to encourage or condone excess consumption. These advertisements must show appropriate portion sizes appropriate to the setting portrayed,¹²¹² and when foods are presented in the context of a meal, advertisements must show a reasonable variety of foods to reflect generally-accepted good dietary practice.¹²¹³ The rest of criteria (6) explains how advertisements shall not undermine the promotion of healthy, balanced diets and healthy active lifestyles. It may furthermore not encourage or promote an inactive lifestyle; encourage or promote unhealthy eating or drinking habits (which can include immoderate consumption, excessive or compulsive eating) and shall not omit undesirable aspects of a food's nutritional profile, or contain any misleading or incorrect information about the nutritional value of the product.¹²¹⁴

¹²¹² Criteria (6)(a).

¹²¹³ Criteria (6)(b).

¹²¹⁴ Criteria (6)(c), (d) and (e).

Criteria (7) contains a somewhat confusing statement in that it provides that “[f]ood products not intended to be substitutes for meals shall not be represented as such.” Presumably this refers to meal supplements such as protein milkshakes or other complementary nutritional supplement products. Should these products pass the three requirements of criteria (2), criteria (7) furthermore states that the advertisements of such products to children must clearly and adequately depict the role of the product within the framework of a balanced diet.¹²¹⁵

Criteria (8) to (13) contain very broad guidelines as to advertising to children, seemingly in instances where food and beverage products have met the necessary criteria. Many of the provisions are similar to those contained in the South African ASA Code and The ICC Consolidated Code of Advertising and Marketing Communications Practice.¹²¹⁶ These guidelines read as follows:

“(8) The same principles which are applicable to general advertising also apply to advertising directed to children. Advertising is a valuable source of information to them as well, but advertisers must take into account the abilities and judgment that children at various stages of development can be expected to bring to the understanding of communications.

(9) Advertisements shall not mislead about potential benefits from the consumption of a food product.

(10) Food product advertisements shall not undermine the role of parents and other appropriate adult role models in providing valuable dietary guidance.

(11) Advertisements shall not include any direct appeal to children to persuade their parents or other adults to buy advertised products for them. Avoid any direct appeal to children to persuade parents or other adults to buy food products for them or to do anything else that goes expressly against the wishes or authority of a parent, guardian or educator.

(12) Commercial marketing in any form directed toward children shall not create a sense of urgency.

(13) Care should be taken in communication with younger as well as older children, not to exploit a child's imagination in a way that can encourage poor dietary habits.”

Criteria (14) in turn reflects the wording and notion which is expressed in the regulations of several other jurisdictions, including that of the UK, the USA and Canada.¹²¹⁷ In terms of the proposed guideline to draft regulations R429,

¹²¹⁵ However, in terms of an alternative interpretation, the clause may refer to products such as “Snickers” chocolate bars which have been marketed as a meal replacement (eg “Hungry? – grab a Snickers”). In this case, the meaning and the intention of this clause is also unclear. These types of practices should be prohibited in terms of the general restriction.

¹²¹⁶ See ch 5 at 4 1.

¹²¹⁷ This part of the guideline even uses the American spelling of the word “program”.

advertisements featuring characters or media personalities from programs or publications primarily directed to children shall not be used adjacent to television programmes or articles in which the same personality or character appears. Consequently, these live or animated characters may not be used to sell food products, premiums or services in a way that obscures the distinction between program or editorial content and commercial promotion.

3 3 Product placement

In chapter 6 it was explained that there are very few jurisdictions in the world which regulate product placement. This is also true of South Africa. There are currently no clear guidelines as to the use of this marketing technique and only the very general guiding principles of the ASA Code could be interpreted as being applicable. If the current definition of “advertisement”¹²¹⁸ is interpreted broadly enough so as to also include product placement, it follows that the use of branded products with the brand name clearly displayed in television programming and films or games should also be covered by this code. In terms of this code, food and beverage advertising may not endorse an unhealthy lifestyle and excessive consumption, and clause 8 states that celebrities or third-party licenced characters may not promote unhealthy dietary choices.

In terms of the proposed regulations R429, product placement of unhealthy food products will be prohibited. In clause 5 of guideline 14, read in conjunction with regulation 65, product placement is included in the list of commercial marketing practices that will not be permitted to be aimed at children.¹²¹⁹

3 4 Schools and places where children gather

In terms of the National School Nutrition Programme, meals provided to children in qualifying schools have to be tasty and adequate. The meals have to fulfil at least 30

¹²¹⁸ As referred to above in this chapter at 3 2 1, the ASA Code defines “advertisement” as any visual or aural communication, representation, reference or notification of any kind which is intended to promote the sale, leasing or use of any goods or services; or which appeals for or promotes the support of any cause.

¹²¹⁹ The definition of commercial marketing, as provided above at 3 2 3, includes “cross promotions (eg linking foods with popular children’s movies and television characters), product placement, sales promotion, promotional activities such as redemptions, under-the-cap offerings, advergaming, text message/SMS contests, etc offering prizes or rewards, cross-promotions using celebrities including sport stars, brand mascots or characters popular with children.”

percent of the daily nutritional needs of learners and must comprise of a) protein: either vegetable protein such as soya products, dried beans, lentils, nuts and dried peas; or animal protein such as meat, milk, eggs and fish (depending on affordability); b) starch: for example, maize meal, samp, mealie rice, rice, bread, or potatoes; and c) vegetables: at least one green and one red or yellow or orange vegetable per meal. The guidelines state that fats and oils, as well as iodated/iodized salt and seasoning must be used in moderation.¹²²⁰

The only other current guidance as to the regulation of food marketing in schools in South Africa is to be found in the voluntary Food and Beverage Code (Appendix J of the Advertising Standards Authority of South Africa Advertising Code). In terms of this code, companies are to not advertise or use any form of promotional activity of food and beverage products that do not represent healthy dietary choices and a healthy lifestyle, on, or in close proximity to, pre-school and primary school premises.¹²²¹ Once again, as is the case with the television advertising of healthy dietary choices, the ASA Code does not actually explain what standard should be used in order to establish whether a product is healthy or not.¹²²² Despite the fact that the WHO and IASO call for settings where children gather,¹²²³ which clearly include schools, to be free of any type of marketing, there are no rules or guidelines which prohibit such activities in South African schools.

The South African Department of Health, however, has proposed a legislative amendment to this unregulated situation in the form of Regulations R429.¹²²⁴ In line with the WHO's Global Strategy on Diet, Physical Activity and Health and recommendation 5 of the WHO's Set of Recommendations on the Marketing of Foods and Non-alcoholic Beverages,¹²²⁵ guideline 14, read in conjunction with regulation 65, expressly proposes to prohibit all forms of marketing of unhealthy foods in or near settings such as nurseries, school premises, pre-school centres, playgrounds, family and child clinics and paediatric services or during any sporting and cultural activities

¹²²⁰ The South African Department of Basic Education 2009 *National School Nutrition Programme: A Guide for Secondary Schools* Department of Education .

¹²²¹ Advertising Standards Authority of South Africa *Appendix J - Food and Beverage Code* cla 14.

¹²²² See 3 2 1 of this chapter above.

¹²²³ As explained in chap 5 at 2 1 2 and 2 2 1 respectively.

¹²²⁴ Published in Government Gazette No 37695 of 29 May 2014 (Regulation Gazette no 10203) and in terms of s 15(1) of the Foodstuffs Act. See 3 2 3 above.

¹²²⁵ As discussed in chap 5 at 2 1 1 and 2 1 2 respectively.

that are held on these premises.¹²²⁶ All food business operators shall have to respect the commercial-free character of schools by providing, *inter alia*, unbranded vending machines, preferably including educational images and messages promoting balanced diets and healthy and active lifestyles.¹²²⁷ In addition, criteria (5) provides that “food operators shall not engage in any direct commercial activity in both pre-school, primary and secondary schools” and will also not be able to sell any unhealthy foods. The definition of “food business operator” is found in the draft regulations and includes “a food manufacturer, seller or importer as defined by the Act”. The Foodstuffs, Cosmetics and Disinfectants Act defines an “importer” as “any person who, whether as owner, consignor, consignee, agent or broker, is in possession of or in any way entitled to the custody or control of any foodstuff, cosmetic or disinfectant imported”.¹²²⁸ Beverages such as pure water, 100 percent fruit juices and milk may be made available in appropriate container sizes that allow for portion control.¹²²⁹ This is apparently allowed despite the fact that 100 percent fruit juices and milk would not pass the requirements set by criteria (2)(c).¹²³⁰

3.5 Sponsorship

The current Sponsorship Code forms part of the Advertising Standards Authority’s Codes of Conduct. As is the case with the ICC Sponsorship Code, the ASA Code also emphasises the importance of self-determination and *bona fides* in the sponsorship agreement. Furthermore, in terms of the ASA Code sponsorships in this country should also not be misleading, untruthful or indecent.¹²³¹ Unlike the ICC Code,

¹²²⁶ Criteria (5). The peculiar wording of criteria (1) appears to have the same intention: “Any unhealthy food offered for sale, whether prepacked, non-prepacked or ready-to-eat, shall not be permitted to market it commercially in any manner, directly or indirectly a) to children during their entire school-going years from grade 0 to 12, including nursery and pre-school ages, using a child actor 18 years or younger; or using any celebrities, sport stars, cartoon-type character, puppet, computer animation or similar strategy; or b) using, a competition or a token, gift, or collectable items which appeal to children, in order to encourage the use of such unhealthy foodstuffs.”

¹²²⁷ Criteria (5).

¹²²⁸ S 1 of the Foodstuffs, Cosmetics and Disinfectants Act.

¹²²⁹ Criteria (5). These appropriate serving sizes for non-alcoholic beverages are suggested to be 250 to 1000 ml for pure packaged water (still or carbonated) and as defined in terms of the Regulations Relating to all Packaged Water, R 718/2006; and 200 to 250ml for 100% fruit juices and unflavoured unsweetened milk.

¹²³⁰ See the description above at 3.2.3 and further comments regarding the practical implications of the requirements set by criteria 2(c) in ch 8 at 2.1.3 below.

¹²³¹ Advertising Standards Authority of South Africa "Sponsorship Code - General Principles" (2016) *Advertising Standards Authority of South Africa* <<http://www.asasa.org.za/codes/sponsorship-code/general-principles>> (accessed 10-07-2016).

however, the ASA Code contains a clause on children and young people: it provides that sponsorship which is addressed to or likely to influence children and young people should not take advantage of their natural credulity and lack of experience. Such sponsorships should not harm children and young people mentally, morally or physically or strain their sense of loyalty toward parents or guardians.¹²³²

In terms of clause 5 of guideline 14 to proposed Regulations R429 sponsorship of television and radio programmes, music videos, celebrity product endorsement, sponsorship of community and school events and contests, corporate gifts of educational materials and equipment, corporate support of health campaigns, sports clubs, and school meals are also included in the list of commercial marketing practices which will be prohibited.

3.6 Sales promotions, branding and packaging

Apart from the general measures of consumer protection found in the CPA,¹²³³ and the endorsement by the ASA Code of the inclusion of free gifts as part of a promotion,¹²³⁴ the only statutory regulatory measures which are relevant to the issue of sales promotions aimed at children, are the Regulations Relating to Objects Packed in Foodstuffs Intended for Children.¹²³⁵ These regulations set out the specifications of mainly toys¹²³⁶ and other gifts that may be included in children's meals. It provides for the toys to be properly and safely wrapped, bearing in mind the normal behaviour of children under the age of three years, and not jeopardising the safety or health of the user or any third party.¹²³⁷ The packaging of such foodstuffs has to indicate clearly that there are toys included in the package.¹²³⁸ When toys are designed to be disassembled or pieces of which may break off during normal use or during reasonably foreseeable abuse, they may not be of a size that create a hazard if they are swallowed

¹²³² Advertising Standards Authority of South Africa "Sponsorship Code - Sponsorship Rules and Provisions – Art 6" (2016) *Advertising Standards Authority of South Africa* <<http://www.asasa.org.za/codes/sponsorship-code/sponsorship-rules-and-provisions>> (accessed 10-07-2016).

¹²³³ Ss 34 – 36 in particular, as discussed in this chapter at 3.1 above.

¹²³⁴ Advertising Standards Authority of South Africa "Advertising Code of Practice" (2016) *Advertising Standards Authority of South Africa* S ii – General: cl 14.2.2, as discussed above at 3.2.1.

¹²³⁵ No R1090. Published in the Government Gazette No 28196 (5 November 2005).

¹²³⁶ "Toy" is defined in terms of the regulations as "any object, product, material or part thereof designed or clearly intended for use in play or any activity by children under the age of three years, which is packaged in foodstuffs, and shall also include promotional articles intended for children."

¹²³⁷ Regs 2(1) and (2).

¹²³⁸ Reg 2(3).

or inhaled, or come into contact with the skin, mucous tissues or eyes.¹²³⁹ The regulations furthermore specify the safety tests and technical requirements that these toys must adhere to.¹²⁴⁰

In terms of clause 8 of the ASA Food and Beverage Code, marketers should not use celebrities or characters licensed from third-parties, including cartoon characters, in television advertisements targeted at children of twelve years old and under.¹²⁴¹ However, it is submitted, that by including such a cartoon character as a toy in a meal, a third-party character is promoting unhealthy foods. It is therefore clear that in contradistinction to the new regulatory efforts in some states of the USA,¹²⁴² the South African government has to date encouraged the use of toys to promote food.

In respect of product labelling Regulations R146 which came into force on 1 March 2012,¹²⁴³ prescribe that all perishable pre-packaged food must provide a “use by” date and prohibits the sale thereof after the date has expired.¹²⁴⁴ Other mandatory information to be included on labels of pre-packaged food is that of the batch number and physical address of the manufacturer to ensure traceability; a declaration of common food related allergens; a list of ingredients declaration which contains vital information about the contents of the foodstuff such as colourants and preservatives; correct nutritional information, only in order to support the validity of nutrient content claims, for example when it is claimed that a food is “high in fibre” or “trans-fat free”; and Quantitative Ingredient Declarations (QUIDs) to place special emphasis on the presence of a specific ingredient such as the percentage of olive oil in margarine.¹²⁴⁵ As was mentioned above, the use of the terms such as “health” or “healthy”, or “wholesome or nutritious”, “rich in”, “excellent source”, “good source”, “enriched X”, “with added Y”, or “contains Z” is prohibited, as is “no added sugar” if the food or beverage contains any sugar, honey, molasses, sucrose, coloured sugar, fruit juice concentrate, de flavoured and/or deionised fruit juice and concentrates, high-fructose

¹²³⁹ Reg 3(1).

¹²⁴⁰ Regs 3(2) – (5) and 4.

¹²⁴¹ Advertising Standards Authority of South Africa *Appendix J - Food and Beverage Code* cl 8.

¹²⁴² As was introduced in Santa Clara County, San Francisco and New York, and discussed in ch 6 above.

¹²⁴³ See 3 2 2 above.

¹²⁴⁴ A “best before” date is mandatory for non-perishables but there is no prohibition placed on the sale thereof after the date has expired since in these cases only the optimum freshness of the products is applicable, thus quality aspects, and does not relate to the safety aspects of the foods.

¹²⁴⁵ The South African National Department of Health “Health Department publishes new Regulations Relating to the Labelling and Advertising of Foodstuffs” (2010) *The South African National Department of Health* <<<http://www.doh.gov.za/docs/pr/2010/pr0309.html>> (accessed 12-05-2011).

corn syrup and malt, or any other syrup of various origins.¹²⁴⁶ The regulations also provide precise guidelines for determining which descriptive term may be used in each nutrient category, such as “high in energy” if it provides 950 kJ per 100g (solids) or 250 kJ per 100 ml (liquids).¹²⁴⁷

The proposed regulations R429 contain several amendments to the current requirements set by R146, including the obligation to provide nutritional information on pre-packaged foods in all instances, also where no health or nutrient claim is being made. In terms of regulation 52, the minimum mandatory nutritional information which must be provided per single serving size and per 100 grams for solid foods or 100 millilitres for liquid foods are energy, protein, glycaemic carbohydrate, total sugar, dietary fibre, fat, saturated fat, and total sodium. Food products produced for sale by a food home industry are exempt from this provision. Once again, this information needs to be provided in tabular form.¹²⁴⁸ In instances where the main panel of the product label exceeds 12 000 millimetres², the x-height of the letters should be at least 1,2 millimetres in size, whereas when the label is smaller than 12 000 millimetres², the x-height may be no less than 0,9 millimetres. This means that the letters to be used are slightly bigger than what is currently the requirement in terms of R146.

Some other provisions of Regulations R429 which do not explicitly relate to food marketing to children but, if enacted, will also have an impact on information which food labels may provide, are found in regulations 4, 16 and 62. In terms of regulation 4 no one will be allowed to promote or advertise a food in by means of any information, claim, reference or declaration not explicitly permitted on the label by the regulations. Food manufacturers will also not be allowed to include any information on the label of their products, other than what is required by the regulations. Regulations 16(2) and (3) and 62(2) and (3) all intend to impose far-reaching limitations upon brand names: brand or trade names will not be allowed to claim to contain certain beneficial nutrients and/or ingredients with health benefits, or to contain the words “diet” or “zero” or similar words as descriptors in the name. The implications of these proposed regulations and

¹²⁴⁶ Health 24 “Food labelling legislation - will it help consumers?” <http://www.health24.com/dietnfood/DietDocs_articles/15-1871,62728.asp> (accessed 13-05-2011).

¹²⁴⁷ Health 24 “Food labelling legislation - will it help consumers?” available at <http://www.health24.com/dietnfood/DietDocs_articles/15-1871,62728.asp> (accessed 13-05-2011).

¹²⁴⁸ Reg 52(2)(a). In instances where the size of the label is restricted by the physical size of the product and less than 900 mm² remains after the minimum requirements in terms of these regulations have been met, the nutritional information may be indicated in a linear format.

the limitation that it will impose upon commercial speech and intellectual property, will be discussed below.

Although there is no explicit mention of the inclusion of toys as part of the sale of food products, this type of marketing technique is also included in the prohibited practices mentioned in clause 5 of guideline 14 to regulations R429. The definition of “commercial marketing” includes “cross promotions (e.g. linking foods with popular children’s movies and television characters), product placement, sales promotion, promotional activities such as redemptions, under-the-cap offerings, advergames, text message/SMS contests, etc offering prizes or rewards, cross-promotions using celebrities including sport stars, brand mascots or characters popular with children.” Criteria (14) furthermore also prohibits the use of broadcast or print media personalities (live or animated) to sell food products, premiums or services. However, this is qualified by the explanation that this should not occur in a way that obscures the distinction between program or editorial content and commercial promotion.

3.7 “New” media

Aside from the general guidelines set by the ASA Code there are currently no regulatory efforts to govern online food marketing, including advergames, viral marketing and social media websites.

The new proposed regulations R429, however, contain the criteria (3)(b) which provides that “[n]o commercial marketing activities to children shall be permitted between 6.00 to 21.00, especially using new media (such as, but not limited to websites, social networking sites and text messaging).”¹²⁴⁹

¹²⁴⁹ In an apparent recognition of the fact that online marketing is a challenging domain to regulate, criteria (15) of R429 repeats the general guidance offered by the ICC International Code of advertising and provides that these guidelines should be respected and observed. Electronic media should therefore not exploit the inexperience or credulity of children or strain their sense of loyalty towards their parents and guardians; refrain from using content which might result in harm to children; collect only the information reasonably required to allow the child to engage in the activity; encourage parents and/or guardians to participate in and/or supervise their children’s interactive activities; encourage children to obtain their parent’s and/or guardian’s permission before they provide information via electronic media, and make reasonable efforts to ensure that parental consent is given; refrain from using the data collected from children to advertise and promote products or services other than those designed for/appropriate for children; not collect from children data related to the financial situation or to the privacy of other members of the family; only disclose identifiable personal information of children to third parties after obtaining parental support for operational purposes of the web site and who do not use or disclose a child’s personal information for any other purpose. In addition, criteria (15) states that advertisers and marketers are expected to make information available to parents and guardians about possible ways to protect children’s privacy when they are using electronic media. See also ch 5 at 4.1.

4 Conclusion

The discussion in chapter 7 confirms that the best interests of the child has been incorporated and firmly entrenched in South African law. The courts have heeded the constitutional and legislative imperatives to consider the best interests of the child as a matter of paramount importance and, as a result, have developed the common law and South African jurisprudence to reflect this approach to children's rights on several occasions. In fact, some of the Constitutional Court case law in this regard may be said to have contributed valuable interpretations to the concept of the best interests of the child, to such an extent that some of the court's pronouncements can be used as exemplary clarification of the standard and right in a global arena.

However, the description at 3 1 – 3 7 above makes it clear that the same cannot be said of the current legislative position in respect of food marketing to children in South Africa. At this point, it is already evident that the present legal framework provides very limited and inadequate protection to the child consumer. Many of the current regulatory efforts are to be found in self-regulatory codes and pledges. Some attempts have been made in protecting the child consumer's rights by the enactment of the CPA but it is submitted that these few provisions offer inadequate implementation to the imperative that the best interests of the child must be a paramount consideration. The next chapter will show that these very general and sometimes inexplicit provisions do not sufficiently address the concerns in respect of the violation of children's rights to protection and participation. The only other legislative provisions which are of use in this context, in the form of regulations R146, provide some assistance but in a format, which will be shown, is inaccessible to children. Furthermore, due to the very general and vague nature of the self-regulatory provisions of the Advertising Standards Authority's Code of Advertising Practice, and the ineffective Marketing to Children Pledge, it cannot be said that the private sector, and the marketing industry in particular, have assessed the impact which their marketing practices have on children. However, in 2014 there has been an attempt in addressing the current lack of regulation with the introduction of regulations R429. These regulations, however, can also be criticised for a number of reasons. The next chapter will show that these proposals may appear to provide some solution to the challenge but cannot be said to promote the best interests of children either.

CHAPTER 8: ANALYSIS AND ASSESSMENT

1 Introduction

In chapter 7 the current and proposed measures of regulatory intervention pertaining to food marketing to children were described. It was shown that South Africa has implemented the concept of the best interests of the child as a matter of paramount importance in some respects, but that in a matter which definitely affects children – namely the food that are being marketed to them – there appears to be very little concern for the best interests of the child. In what follows, the ability of the current and proposed measures of regulation pertaining to food marketing, to fulfil South Africa's international and constitutional obligations will be assessed. The current provisions will be analysed and evaluated in terms of their efficacy merely as regulatory measures but more importantly, also as measures which promote the best interests of the child. The chapter will furthermore analyse the proposed measures of regulations R429 in that the practical effects of the possible implementation thereof will be assessed. Thereafter these proposed regulations too will be appraised in light of their ability to promote the best interests of the child. Moreover, the possible impact that these proposals may have upon parental responsibilities and rights, the freedom of commercial speech and the right to intellectual property will be discussed. At the same time, some suggestions will be made as to the possible improvement of these proposed regulations. Many of these comments will be formatted in a more structured manner by means of recommendations offered in the final chapter.

2 Analysis

2 1 Television advertising

2 1 1 Current self-regulatory measures

In chapter 6 of this thesis, it was explained that the advantages of self-regulatory measures are often emphasised by the industry in which it operates in order to justify resistance to statutory regulation. Self-regulation is said to be a quick, relatively cheap and flexible alternative to legislation and the complaint procedure is normally a simple process. Overall, self-regulatory marketing rules can be very efficient in setting general standards and guidelines and if it functions well, it can be used to control the most

irresponsible advertisements.¹²⁵⁰ Chapter 5 explained how the World Health Organisation's Global Strategy on Diet, Physical Activity and Health encourages co-operation between governments, consumer groups and the private sector in developing multi-sectorial approaches to food-marketing practices. Since it will require a combined effort by many stakeholders to change the public's attitude towards healthy eating, a number of sound and global multi-sectorial efforts at a number of levels must be implemented and monitored.

While self-regulation has a very important role to play and can effectively assist in promoting responsible advertising to children, it does not sufficiently address the aim of reducing the exposure and impact of food marketing to children, set by, *inter alia*, the United Nations Committee on the Rights of the Child and the WHO.¹²⁵¹ Although the WHO recognises the important role which the private sector plays in the successful implementation of its Global Strategy on Diet, Physical Activity and Health adopted in 2004, the WHO in the first place stresses the crucial role that the state has in ensuring public health.¹²⁵² The WHO Set of Recommendations on the Marketing of Foods and Non-alcoholic Beverages to Children explicitly recommends that governments are to be the key stakeholders in developing the policies proposed by the Set of Recommendations. Once again the WHO acknowledges that different approaches involving all role-players should be used but the state has to implement an effective policy that can be properly monitored.¹²⁵³ Furthermore, the United Nations Guidelines for Consumer Protection, as well as the Guidelines for Consumer Organisations to Promote National Food Safety Systems also support the idea of self-regulation but emphasises that the state has the important role of oversight and ensuring compliance. Legislative measures of enforcement must therefore be employed. The IOTF also explicitly proposes in the Sydney Principles that the actions to reduce marketing to children should be statutory in nature.¹²⁵⁴

In view of the above, the following section will discuss some of the reasons as to why self-regulatory measures alone fail to promote the best interests of the child in

¹²⁵⁰ C Hawkes "Marketing Food to Children: Changes in the Global Regulatory Environment 2004-2006" (2007) 52-53.

¹²⁵¹ As discussed in chs 3 and 5 respectively. Thus, for example, Recommendations 1 and 2 of the WHO's Set of Recommendations on the Marketing of Foods and Non-alcoholic Beverages to Children are to reduce the impact on children of marketing foods which are nutritionally poor as well as reducing the exposure and power which these marketing messages have on children.

¹²⁵² See chp 5 at 2 1 1.

¹²⁵³ See chp 5 at 2 1 2.

¹²⁵⁴ See chp 5 at 2 2 1.

this particular situation adequately. The discussion will use many of the arguments that may be levied against self-regulation as a general method of regulation. However, it will apply such arguments to the context of food marketing to children in South Africa and argue why the approach, which is currently employed with regard to television advertising in particular, is failing children.

(a) *A conflict of interests*

Self-regulatory measures will not reduce the exposure and effect of food marketing on children due to a number of reasons, the most obvious being that the main purpose of the marketing industry is to increase consumption and in this way generate profits for its shareholders. If this industry has the task of reducing the exposure and impact which food marketing have on children, in other words reduce children's consumption of HFSS foods, there will be an inherent conflict of interests.¹²⁵⁵

Self-regulatory codes, including the South African ASA Food and Beverage Code in particular, seek to protect both the industry and the consumer from misleading and deceptive advertising. This fact is evident from the provisions typically found in such codes, seeking to ensure that the content of marketing messages is truthful and ethically responsible. Advertisements should therefore not exploit the natural credulity of children or be harmful to them. As was mentioned above, this is a necessary and laudable goal and self-regulation should not simply be dismissed as being a futile exercise. In fact, it can be said that this approach is rooted in Article 17 of the CRC in that it can be considered to be a manifestation of "guidelines for the protection of the child from information and material injurious to his or her well-being."

However, this line of attack alone is insufficient when trying to solve a health problem in the form of the obesity epidemic. The cumulative effect of various marketing campaigns, appearing in many forms, in copious amounts and in numerous environments is what should be addressed: these are the methods that are alluring to children and constantly indoctrinating both older and younger consumers into consuming foods which are not beneficial to their health. These advertisements may all be perfectly truthful in that they do not mislead children into believing that they may attain "unattainable product benefits" or they may not "create a sense of urgency" but

¹²⁵⁵ See also O Bartlett and A Garde "Time to Seize the (Red) Bull by the Horns: The European Union's Failure to Protect Children from Alcohol and Unhealthy Food Marketing" (2013) 4 *European Law Review* 498 509.

they still portray the advertised product as being popular, cool and fun.¹²⁵⁶ The aim of any advertisement will always be to make a product attractive and appealing, and even more so when it promises a free gift to the potential consumer. For this reason, self-regulation alone will never be able to “prevent marketing that works.”¹²⁵⁷ It is therefore doubtful that the marketing industry will be able to promote the best interests of children as their first concern.

(b) *A voluntary system*

A second reason why self-regulation is inadequate in its approach lies in the voluntary nature thereof. Self-regulation cannot guarantee that all members of the industry will agree to be governed by their competitors and abide by their rulings. Some companies may sign a voluntary pledge and by doing so, invite media attention in an effort to raise its public profile. This exercise may be used as a marketing ploy in itself, while the food manufacturer is not all that concerned with the practical implications of its promise. If there are no real consequences to a failure to comply, there is very little incentive to deliver on commitments made several years ago.¹²⁵⁸ Conversely, even fewer companies will agree to a voluntary system that may impose heavy fines or other severe penalties.

The limitations of such a voluntary system were made abundantly clear in recent judgments of the Gauteng Division (Johannesburg) of the High Court. In May 2016 the Gauteng Local Division (Johannesburg) of the High Court held that all of the rulings which the ASA had issued against an advertiser, Herbex (Pty) Ltd, were void and directed the ASA to remove such rulings from its website and other official publications.¹²⁵⁹ It furthermore found that the industry regulator had no jurisdiction over Herbex and interdicted the ASA from issuing any further rulings, in response to complaints received, against the advertiser.¹²⁶⁰ This order followed a similar one, albeit an order for interim interdictory relief, which was granted in September 2015 by the same division of the High Court in *Medical Nutritional Institute (Pty) Limited v*

¹²⁵⁶ These actions are, for example, prohibited by cls 7.1, 9.1 and 9.3 of the Advertising Standards Authority of South Africa *Appendix J - Food and Beverage Code*

¹²⁵⁷ Hawkes (2005) *Nutrition Bulletin* 380.

¹²⁵⁸ The South African Marketing to Children Pledge, initiated by the Consumer Goods Council, was originally signed on 11 June 2009. In the period since, there has been very little attention paid to the Pledge and in confirming and strengthening the individual companies' commitments.

¹²⁵⁹ *Herbex (Pty) Ltd v The Advertising Standards Authority* Case no 14/45714 ZAGPJHC, judgment delivered by Du Plessis AJ on 5 May 2016, as yet unreported, hereafter the *Herbex* decision.

¹²⁶⁰ The ASA were, *inter alia*, also ordered to pay the costs of the application (at [90.8]).

Advertising Standards Authority.¹²⁶¹ In both matters, the court ruled that the ASA did not have any jurisdiction over a person or an entity that was not a member of the ASA. Herbex and MNI had never submitted to the jurisdiction of the self-regulatory body. The court confirmed that none of the sanctions of the ASA had the force of law and were not enforceable except to the extent that its members agreed to enforce them.¹²⁶² The only remedies available to the ASA and its members were to make use of the provisions of the Medicines and Related Substances Act 101 of 1965 and the CPA since these two pieces of legislation prohibit false or misleading advertising.¹²⁶³ The court also held that, since the right to freedom of expression included the right not to publish something, members of the ASA were free to publish advertisements in terms of standard terms of agreements, but also reserved the right to refuse to publish.¹²⁶⁴ The ASA was ordered to remove all previous rulings against Herbex and MNI from its website and other official publications, and interdicted from issuing any further rulings or adjudicating any other complaints received in respect of the respondent's advertisements.¹²⁶⁵

(c) *Limited sanctions available*

Voluntary codes of conduct, such as the ASA Code of Advertising Practice, have a limited amount of sanctions at its disposal to use against its members in instances of non-compliance. In terms of the ASA Code, a non-compliant respondent in a complaint may be directed to withdraw the advertisement found to be in breach of the Code or requested to submit an amended version of the advertisement. In the last-mentioned instance, the ASA Advisory Service may be contacted for pre-publication advice.¹²⁶⁶ Advertisements must be withdrawn immediately or as deadlines permit, in the context

¹²⁶¹ Case no 15/30142 ZAGPJHC, judgment delivered by Dippenaar AJ on 18 September 2015, as yet unreported, hereafter the *MNI* decision.

¹²⁶² At [15], [41] and [90] of the *Herbex* matter. The Court also confirmed at [26] to [30] that the relationship between the ASA and its members were purely a contractual one and that, due to the principle of privity of contract, entities or persons who are not parties to that contract, could not sue or be sued on it.

¹²⁶³ At [45]-[47].

¹²⁶⁴ At [65].

¹²⁶⁵ At [90.4]. The ASA was furthermore at [90.5] ordered to in future include "in its standard letters of complaint to non-members a reference to the fact that, in the absence of a submission to its jurisdiction, it has no jurisdiction to adjudicate the complaint and that such non-member is not bound to participate in its processes."

¹²⁶⁶ Advertising Standards Authority of South Africa "Advertising Code of Practice" (2016) *Advertising Standards Authority of South Africa Procedural Guide - Procedures and Remedies*: cl 14.

of television, radio, newspapers, and magazine advertisements; within two weeks, or as determined otherwise by the ASA, in cases of advertisements published on pamphlets, posters, billboards, leaflets and the Internet; and within three months, or as determined otherwise by the ASA, if the advertisement was included on the packaging of a product.¹²⁶⁷

Where it has been found that more than one adverse ruling has been made against the respondent by the ASA in the last 12 months, the ASA may direct the respondent to submit all future advertising, prior to the publication thereof, to the ASA Advisory Service. This sanction is normally imposed for a period of six months.¹²⁶⁸ In some cases the ASA Directorate may also require the respondent to publish extracts from the ASA ruling or the ASA may publish the name of defaulters.¹²⁶⁹ Even in instances where the non-compliant respondent fails to adhere to any of these sanctions, the Advertising Standards Committee, the Advertising Industry Tribunal, or the Final Appeal Committee may only impose the above-mentioned sanctions, either in addition to, or as a substitute of the sanction already imposed.¹²⁷⁰ The most severe penalty is that of a disciplinary hearing, the consequences of which are not stated in the ASA Code.¹²⁷¹

Moreover, the enforcement mechanism of the sanctions imposed by the ASA is also problematic: clause 15.2 of the ASA Code provides that it is the responsibility of the complainant to monitor whether or not an ASA ruling is adhered to. Bearing in mind that private individuals lodge the overwhelming majority of complaints submitted to the ASA, it is rather impractical and unreasonable to impose this burden on members of the public.¹²⁷² Clause 15.1 of the ASA Code furthermore states that the responsibility for adherence to a ruling made by the Directorate or ASA Committees lies with the person against whom such ruling has been made. This procedure clearly disregards

¹²⁶⁷ Advertising Standards Authority of South Africa "Advertising Code of Practice" (2016) *Advertising Standards Authority of South Africa Procedural Guide - Procedures and Remedies*: cl 15.3.

¹²⁶⁸ Advertising Standards Authority of South Africa "Advertising Code of Practice" (2016) *Advertising Standards Authority of South Africa Procedural Guide - Procedures and Remedies*: cl 14.3.

¹²⁶⁹ Advertising Standards Authority of South Africa "Advertising Code of Practice" (2016) *Advertising Standards Authority of South Africa Procedural Guide - Procedures and Remedies*: cls 14.4 and 14.5.

¹²⁷⁰ Advertising Standards Authority of South Africa "Advertising Code of Practice" (2016) *Advertising Standards Authority of South Africa Procedural Guide - Procedures and Remedies*: cls 14.6 and 14.7.

¹²⁷¹ Advertising Standards Authority of South Africa "Advertising Code of Practice" (2016) *Advertising Standards Authority of South Africa Procedural Guide - Procedures and Remedies*: cl 14.8.

¹²⁷² According to the ASA, 94% of complaints received during 2014 were submitted by consumers. Personal communication received from Mr Leon Grobler, Manager: Dispute Resolution Advertising Standards Authority of South Africa, on 07/07/2015.

Recommendations 6 and 9 of the WHO's Set of Recommendations on the Marketing of Foods and Non-alcoholic Beverages to Children that provide that Governments should be the key stakeholders and leaders in providing a policy which can be implemented, monitored and evaluated. The state may choose to allocate defined roles to other stakeholders, but must still protect the public interest and avoid a conflict of interest. It is furthermore essential that the Government's policy framework must specify enforcement mechanisms and establish systems for their implementation.¹²⁷³

(d) *Complaint process*

The process to lodge a complaint with the ASA highlights another shortcoming of self-regulation. A complaint must be lodged in writing and may be submitted by a consumer or by a competitor complainant. The ASA will not act on its own accord: a complaint must be lodged.¹²⁷⁴ After the ASA has received and considered the complaint, it will notify the advertiser who will have five days to respond in the instance of a consumer complaint, and three days to do so where a competitor has lodged a complaint. Thereafter the ASA may request substantiation by the respondent. The respondent will generally be given 48 hours to provide substantiation but may apply for an extension of this period should appropriate circumstances warrant such an extension. Upon receipt of the written representations by the parties and depending on the urgency, complexity, and novelty of the subject matter of the complaint, the ASA will, at its discretion, either rule on the matter or refer it to another committee for further consideration. If a respondent volunteers to withdraw or amend the advertisement complained of, or notwithstanding the fact that the advertising has run its course, the ASA may also, at its own discretion, either record the voluntary undertaking as a ruling.¹²⁷⁵

Bearing in mind that the ASA serves the whole advertising industry in South Africa, and receives roughly 150 to 200 new complaints a month,¹²⁷⁶ this process will on

¹²⁷³ The World Health Organisation "Set of Recommendations on the Marketing of Foods and Non-alcoholic Beverages to Children" (2010) WHO.

¹²⁷⁴ Advertising Standards Authority of South Africa "Advertising Code of Practice" (2016) *Advertising Standards Authority of South Africa Procedural Guide - Procedures and Remedies*: cl 1.2.2.

¹²⁷⁵ Advertising Standards Authority of South Africa "Advertising Code of Practice" (2016) *Advertising Standards Authority of South Africa Procedural Guide - Procedures and Remedies*: cl 8.

¹²⁷⁶ Personal communication received from the Advertising Standards Authority of South Africa (Reception@asasa.org.za) on 20-05-2014.

average require a period of six to eight weeks to complete.¹²⁷⁷ Very often a respondent will not have to withdraw its non-compliant advertisement since, by that point, it would have already run its scheduled course in any event. The advertisement would still have been published or broadcasted during the time that the complaint procedure was followed and the advertisement would have served its marketing purpose. The ASA will not always record this withdrawal and in many instances where the advertisement has already completed its scheduled run, bearing in mind the amounts of complaints received, the ASA is not obliged to consider the complaint.

It is submitted that this reality of the complaint process renders much of the purpose of the regulatory system to a nullity. During the period of time which the ASA uses to assess a complaint, many children will be exposed to the possibly non-compliant advertisement and as a result, will be subjected to the power and effect of this commercial. Furthermore, it must be borne in mind that, while competitors lodge a small percentage of complaints, consumers lodge the majority of complaints.¹²⁷⁸ In the context of food marketing to children, it can be presumed that often parents may have to complain about an advertisement that they may have noticed during the time their children spent in front of the television. In its current format, the process requires the parent to write a formal complaint, providing as much information as possible to the ASA, but thereafter the complainant do not have much of a role to play in the process. The complainant will be notified of the outcome of the ASA's decision and has the right to appeal any decision. However, this process may, once again, be a lengthy one and a route which not too many private individuals may choose to follow. It is submitted that the fact that there is no watchdog body which will act on the consumer's behalf, or which performs a monitoring duty, as well as the time-consuming nature of the process, has the effect that this complaints procedure may not be all that rewarding and consumer friendly to a concerned but busy parent.

¹²⁷⁷ I have submitted various complaints to the ASA. In one instance the complaint was submitted on 19 May 2014, the respondents were notified of the complaint on 29 May and the Directorate ruled on the matter on 14 July 2014.

¹²⁷⁸ Personal communication received from the Advertising Standards Authority of South Africa (Reception@asasa.org.za) on 20/05/2014. During 2014 the ASA received 1458 complaints, of which 1378 were submitted by consumers and 80 by competitors. During the period January to June of 2015 843 had been received of which 814 had been lodged by consumers. Personal communication received from Mr Leon Grobler, Manager: Dispute Resolution Advertising Standards Authority of South Africa, on 07/07/2015.

(e) *Broad and vague terminology*

Another weakness of self-regulatory rules is that they are couched in fairly broad and vague terminology that is open to various interpretations. In the context of food marketing to children, most self-regulatory guidelines discourage over-indulgence and the exploitation of children's credulity in very broad terms. This is also true of the South African ASA Code of Conduct. One such example is found in clause 14 of the ASA Code which states that advertisements "should not exploit the natural credulity of children or their lack of experience and should not strain their sense of loyalty".¹²⁷⁹ Although the ASA Code provides some examples as to how this may occur, it is submitted that these terms are so broad that they practically serve no purpose. Similarly, clause 4.1 of the Food and Beverage Code provides that "advertising should not be so framed as to abuse the trust of consumers at whom it is directed or who are likely to be exposed to it, or exploit their lack of experience or knowledge or their credulity." These terms are open to various interpretations, so much so that it will be rather difficult to base any complaint solely on the transgression of these provisions.

Moreover, five of the clauses in the Food and Beverage Code refer to "established scientific standards acceptable in terms of Section II, Clause 4.1 of the Code of Advertising".¹²⁸⁰ Thus, for example, clause 13.1 explains that

"[f]ood and beverage products that do not represent healthy dietary choices and a healthy lifestyle, consistent with established scientific standards acceptable in terms of Section II, Clause 4.1 should not use promotional activity in television advertisements primarily targeted at children of twelve years old and under."

Clause 4.1 of Section II does not explain what standards will be used to determine if a food or beverage will be considered healthy or not. The clause refers to "substantiation of claims" which should be "confirmed by an entity approved by, or acceptable to, the Southern African Market Research Association", but does not provide any further clarification as to what nutritional values would be used to objectively determine whether a product may be advertised or not. As will be explained below at 2 1 3 in this chapter, it is crucial to establish a reliable and realistic nutritional profiling model in order to decide which products may be advertised to children. Such a set of standards for this purpose have not yet been created in South Africa.

¹²⁷⁹ Advertising Standards Authority of South Africa "Advertising Code of Practice" (2016) *Advertising Standards Authority of South Africa* S ii – General: cl 14.2.1.

¹²⁸⁰ This reference is used in cls 8.1, 10.3, 13.1, 14.1, 14.2. In each of these instances it is stated that foods which do not represent healthy dietary choices may not be advertised in certain circumstances if the foods do not meet the established scientific standards.

(f) *Certain children excluded from protection*

It is certainly true that the ASA Code, and specifically Appendix J thereof, acknowledges children's particular vulnerabilities and seeks to protect children against advertising techniques. Nonetheless, the fact that the ASA Code appears to be especially concerned about certain methods aimed at children younger than twelve may be both commendable but also of concern. Clause 8 of the Food and Beverage Code, for example, prohibits the use of celebrities and third-party characters in advertisements for foods that do not represent healthy dietary choices and a healthy lifestyle, to children under the age of twelve. This is also the case with the South African Marketing to Children Pledge, in which companies have undertaken to not advertise unhealthy dietary foods where more than 50 percent of the audience consists of children twelve years old and under.

Although the different stages of physical and mental development of children must always be borne in mind, it is objectionable to exclude specific age groups of children from certain measures of protection without a clear justification to do so. Children of all ages must be protected against exploitation and all of their interests must be promoted. It was explained in chapter 2 of this thesis how many marketing methods, including advertising, make use of persuasive techniques against which even older children are unable to defend themselves. In chapter 3¹²⁸¹ it was explained that adolescents are a particularly vulnerable group of children. At the ages between 12 and 18 children are, in particular, susceptible to peer pressure, external influences, and risky behaviour.¹²⁸² The Special Rapporteur in the Field of Cultural Rights also recommended that States should preferably consider such a ban of marketing practices to children under the age of sixteen, since teenagers are susceptible to peer pressure and commercial messages.¹²⁸³ Teenagers are preoccupied with issues such as their body image and have many concerns relating to their individual identity.¹²⁸⁴ In

¹²⁸¹ See section 4 2.

¹²⁸² General Comment No 4 (2003) 1. accessed 17-03-2013). See also Office of the United Nations High Commissioner for Human Rights "The Right to Health" (13-06-2008) *OHCHR* 14-15.

¹²⁸³ Shaheed *Report of the Special Rapporteur in the Field of Cultural Rights* 23. See chap 3 at 4 6.

¹²⁸⁴ See for example also Giordano "Anorexia Nervosa and its Moral Foundation" in *Children's Health and Children's Rights* citing studies which found that eating disorders occur "most commonly in adolescent girls and young women, but adolescent boys and young men may also be affected, as may children approaching puberty". The author argues here that, despite the suggestions that advertising play a contributory role in the incidence and prevalence of *anorexia nervosa*, "fashion and the media

addition, many forms of bullying – both physical and emotional – seem to dominate the lives of children of all ages, but in particular those of adolescents.¹²⁸⁵ Moreover, the Committee on the Rights of the Child has expressed concern over the suicide rates among children that are very often related to eating disorders and other self-destructive behaviours.¹²⁸⁶ Chapter 3¹²⁸⁷ furthermore described how the American Medical Association and the American Academy of Child and Adolescent Psychiatry have explained that adolescents are still less capable than adults of accurately assessing risks and rewards. Although their levels of judgement and control are higher than those of younger children, their abilities still remain limited and unreliable in comparison to those which adults are expected to have.

It is therefore essential that the information and messages which children, and adolescents in particular, receive regarding the relationship between food intake and nutrition, weight control and the prevention of non-communicable diseases are accurate and not misleading at any level. If, for example, a popular performer such as Beyonce, promotes a sugary soda, adolescents will most probably be attracted to the product and inclined to consume it. This may be the case even more so in respect of teenage girls who aspire to be as successful, beautiful and as slender as they perceive this singer to be. It is doubtful that the average 13 or 14-year-old girl will realise that, in order to maintain her willowy figure, the singer will not consume a sugar-laden drink on a regular basis, despite any claims to the contrary in the advertisements.

It is therefore submitted that the exclusion of certain age groups of children from protection measures against powerful marketing practices cannot be justified. The group of people which, in terms of the current self-regulatory measures, are allowed to be exposed to food marketing techniques, is particularly susceptible to the messages, some of which are subliminal, and very often harmful. Instead, it is vital

are not a *cause* but an *effect*.” The real causes for eating disorders, ..., are found in *morality*.”(Emphasis in original).

¹²⁸⁵ See for example DeSmet *et al* (2014) *BMC Public Health*; J Stevelos “Bullying, Bullycide and Childhood Obesity” (latest update 2016) *Obesity Action Coalition* citing a 2004 study of bullying behaviour in 5 749 boys and girls (eleven to sixteen years old). This study showed that overweight and obese school-aged children were more likely to be the victims and perpetrators of bullying behaviour than their normal-weight peers. See furthermore one of many disturbing stories such as that of overweight Ashlynn Conner: L Matthews “Ashlynn Conner, 10, Allegedly Commits Suicide Because of Bullying” (14-11-2011) *International Business Times*. At the other end of the scale children may also be bullied into developing eating disorders such as *anorexia* or *bulimia*: see Gowers & Shore (2001) *Br J Psychiatry* 236-242.

¹²⁸⁶ General Comment No 4 (2003) 6.

¹²⁸⁷ See the text to section 4 7 in that chapter.

that these children specifically should be provided with truthful and unbiased information in this regard. This argument will again be explored at 3.1 below.

(g) *Other concerns*

Another provision that appears to be rather popular in self-regulatory codes, is that certain practices will be prohibited but only in certain instances where more than a certain percentage of the audience consists of children. Such a clause does not appear in the ASA Code but the companies who signed the South African Marketing to Children Pledge have committed themselves to not advertise unhealthy dietary choices if more than 50 percent of the audience consists of children twelve years old and under. In effect, this type of provision is of no effect at all. If, for example, at 19:00 one million viewers are watching a television programme which is popular with both adults and children, such as any sporting or entertainment event like the Idols or X-factor series, and 50 percent of the audience is younger than twelve, food manufacturers may still market unhealthy foods to children. This means that 500 000 young children will still be exposed to unhealthy dietary choices. Moreover, many other children over the age of twelve will also be exposed to the promotion of nutritionally poor foods and beverages. It is submitted that such an approach does not promote the best interests of children since it disregards and violates their rights to health, life, survival and development and the right to not be exploited. In this regard it is also important to note that the ASA Code proposes the general rule of interpretation whenever the impact of advertising is considered: the question that should be asked is not only what impact it has upon the target audience but also what the impact will be on those who are likely to see it.¹²⁸⁸

It is submitted that one of the marketing methods which in particular exploits the rights of the child, is that of the inclusion of a toy or gift with a nutritionally poor meal. As was explained above, at present the ASA Codes openly sanction the use of this technique by allowing the advertisement of the offer.¹²⁸⁹ It is submitted that by using this marketing ploy, marketers are manipulating and deceiving children into believing that they want them to have fun and to play. Even though there may be some

¹²⁸⁸ Advertising Standards Authority of South Africa “Advertising Code of Practice” (2016) *Advertising Standards Authority of South Africa* S 1 – Introduction: cl 3.2.

¹²⁸⁹ See Advertising Standards Authority of South Africa “Advertising Code of Practice” (2016) *Advertising Standards Authority of South Africa* S ii – General: cl 14.2.2 as explained above.

marketing executives who merely want to make children happy,¹²⁹⁰ the main purpose of including such toys with food is to keep shareholders happy by raising profits. It is argued that it is highly improbable that food companies would spend enormous amounts of money in obtaining cross-promotional licensing fees and the toys themselves if this type of promotional activity was ineffective.¹²⁹¹ It is submitted that this method exploits children's credulity and commercialises their right to free play. It is unfair and exploitative to entice children to eat food on a regular basis in order to collect a full set of toys, especially if such consumption is detrimental to children's health. The main purpose of food is sustenance in order to ensure life, survival and development. It is therefore contrary to children's interests to allow advertisers to proclaim and impose associations between fun and food if the purpose of thereof is to increase sales of foods saturated in sugar, fat and salt – foods which serve no nutritional purpose other than tasting nice and increase a person's weight.

2 1 2 Current legislative measures

It can be said that the general aim of regulations R146 is to protect the consumer against false or misleading claims made in food advertising. This will include, for example, an advertisement in which it is claimed that a particular brand of potato wedges is healthy.¹²⁹² However, there are no other provisions contained in the regulations which explicitly protect the interests of a child against the advertisement and promotion of nutritionally poor foods. As a result, there are currently no legislative limitations upon the food advertisements, apart from the few restrictions contained in the regulations described in chapter 7 at 3 2 2.

A further major weakness of the regulations relates to the enforcement thereof:¹²⁹³ In terms of section 23 of the Foodstuffs, Cosmetics and Disinfectants Act, the

¹²⁹⁰ See ch 1 and the explanation by The Kansas City advertising executive, Bob Bernstein, who stated that “[t]o make a child happy and to not cost Mom any additional money - that was the original idea. The toy was not the reigning reason for the child to order the Happy Meal.” CBS News Healthwatch “Happy Meal Toy Ban Faces Vote in Calif. County” (27-04-2010) *CBS News Healthwatch*.

¹²⁹¹ See ch 2 at 2 1 5.

¹²⁹² Such an example appeared in an advertisement which was broadcasted on a number of television stations in June 2014. In it two young boys announce to their mother that they will not be eating any “healthy” foods that evening. Upon arrival of a big bowl of potato chips, however, they change their minds. The mother then explains that “if you thought that potato chips cannot be healthy, think again, think McCain.”

¹²⁹³ See in this regard also the challenges in enforcement of the self-regulatory measures of the ASA Code, discussed in the text to 2 1 1 above.

monitoring and enforcement of any of the regulations published in terms of the Act has been delegated to the local authority, being the Municipal Health Services in each of the 52 metro and district municipalities in South Africa.¹²⁹⁴ In instances where a non-compliant television advertisement is broadcasted nationally, it is unclear as to which body would be able to receive the complaint. Since the ASA is guided by its own Codes, and not that of legislation such as the Foodstuffs, Cosmetics and Disinfectants Act or any of the regulations published in terms of it, the ASA will only consider the matter if the complainant avers that the advertisement is also in contravention of the provisions of the ASA Code. It is also unclear as to which government department is monitoring the content of advertisements for compliance with regulations R146 and if the National Department of Health will only respond when a consumer or competitor submits a complaint. It is evident from the discussion above that the current format of regulation fails to meet the proposals by the WHO and other international standards.

2 1 3 Proposed legislative measures

Before commenting on the effect of regulation 65 of R429 and the criteria in detail, some general observations regarding guideline 14 seem apposite. Despite the concerns expressed below, the Directorate of Food Control should be commended for attempting to align its policy aim with that of the World Health Organisation's Set of Recommendations on the Marketing of Foods and Non-Alcoholic Beverages to Children. Regulations R429 can certainly be regarded as an endeavour to promote the best interests of the child. However, it should be noted that clause 2¹²⁹⁵ of guideline 14 states that one of the aims of guideline 14 is to provide "education and public information in promoting a healthy diet, in response to a resolution WHA63.14". It is submitted that this aim is not achieved through this particular guideline that prohibits certain practices.

Furthermore, although it is also sensible to explain the rationale for the prohibition of marketing of certain foods to children, it is my view that the guidelines to the regulations do not provide the appropriate forum to do so. As was mentioned above,

¹²⁹⁴ This aspect was also confirmed by personal communication received from Ms Antoinette Booysen, Directorate: Food Control, Department of Health, on 02-07-2013.

¹²⁹⁵ Entitled "Principle".

such types of clarification are perhaps better suited to be included in a policy document.¹²⁹⁶ In 2015, the South African Department of Health published a Strategy for the Prevention and Control of Obesity.¹²⁹⁷ Although the Strategy acknowledges the problem of childhood obesity, many of the methods of intervention appear to focus on an increase in the levels of physical activity amongst children. Of particular concern is the fact that the Strategy seemingly supports self-regulation as the method of limiting marketing practices: the Strategy proposes as one of its goals that “a code and pledge of advertising are developed and adhered to”. No mention is made of any legislative intervention in this regard, despite recognising that “restrictions on advertising considerably reduce obesity in young people”.¹²⁹⁸ More importantly, no mention is made of the best interests of the child in the Strategy.

Another concern that should be addressed by the Department of Health, but which is beyond the scope of this thesis, is the question as to the status and authority of the guidelines published in conjunction with the regulations. There is no empowering provision either in the Foodstuffs, Cosmetics and Disinfectants Act, and in particular section 15 thereof, or in Regulations R429 themselves which legally empowers the Department to regulate these particular aspects by means of guidelines. There is no clarity as to what authority such guiding documents have in South African law but, from decisions such as that of the Constitutional Court in *Minister of Education v Harris*,¹²⁹⁹ it is evident that this type of measure in a regulatory or statutory regime does not enjoy legislative status. These guidelines have not been published in a Government Gazette but appeared only briefly on the Department of Health’s website.

¹²⁹⁶ Policy or strategic documents such as the *Integrated School Health Policy*, a joint publication by the Departments of Health and Basic Education; *The Strategic Plan for Maternal, Newborn, Child and Women’s Health (MNCWH) and Nutrition in South Africa*, published in 2012; the *South African National Oral Health Strategy* published in 2005; and *The National Health Promotion Policy and Strategy* of 2015 published on the National Department of Health’s website (www.doh.gov.za) do not contain any reference to the Department’s concern regarding the marketing of nutritionally poor foods to children. However, one of the outcomes proposed by the last- mentioned document is that during 2015-2019 a strategy be developed to prevent and manage obesity in SA. The *National Health Promotion Policy* furthermore mentions that the youth will be targeted in the promotion of healthy lifestyle practices including healthy nutrition and physical activity to prevent obesity and abstinence from tobacco, alcohol and other substance abuse. See Department of Health “The National Health Promotion Policy and Strategy” (2015) *Department of Health* <<http://www.health-e.org.za/wp-content/uploads/2015/09/The-National-Health-Promotion-Policy-and-Strategy.pdf>> 18 (accessed 09-04-2016).

¹²⁹⁷ Department of Health “Strategy for the Prevention and Control of Obesity” (2015) *Department of Health* <<https://www.health-e.org.za/wp-content/uploads/2015/12/National-Strategy-for-prevention-and-Control-of-Obesity-4-August-latest.pdf>> (accessed 06-04-2016).

¹²⁹⁸ Department of Health “Strategy for the Prevention and Control of Obesity” 2015) *Department of Health* 28.

¹²⁹⁹ *Minister of Education v Harris* 2001 4 SA 1297 (CC).

It is submitted that, in the event that the Regulations are enacted, the same process cannot be followed again.

In addition, from an administrative law point of view it must be borne in mind that the vagueness rule prescribes that laws must be written in a clear and accessible manner.¹³⁰⁰ In many instances, the guidelines are couched in vague, confusing and uncertain terms. It is submitted that these guidelines do not provide certainty and in fact cause more confusion than clarity.¹³⁰¹ One such example is found in criteria (13) of guideline 14 which provides that “[c]are should be taken in communication with younger as well as older children, not to exploit a child's imagination in a way that can encourage poor dietary habits.” Apart from the fact that it is submitted that this statement is superfluous, it is wrought with uncertainty and uses many vague or indeterminable terms. It is my argument that most of the information contained in guideline 14, and especially clause 6 thereof, may also prove to be unnecessary, especially if a comprehensive prohibition of all promotional activities aimed at children is prescribed by the regulations itself.¹³⁰² It furthermore appears to consist of a number of provisions which have been taken directly from other documents without first adapting and incorporating these guidelines into this document.¹³⁰³ This also creates many of the criteria to be repetitive and, on occasion, contradictory.¹³⁰⁴

The biggest concern in respect of regulation 65 is the criteria that are proposed in order to determine whether a product is considered healthy or not, and as a result, will or will not be allowed to be marketed to children. On a positive note, it is submitted that the use of a Nutrient Profiling Model Calculator, proposed in criteria (2)(a) and

¹³⁰⁰ See for example also *Affordable Medicines Trust v Minister of Health* 2006 3 SA 247 (CC) [108] – [109] where the Court explains that the ultimate question is whether the regulation indicates “with reasonable certainty to those who are bound by it what is required of them”.

¹³⁰¹ See for example the comments by the Public Protector in *The Office of the Public Protector Report on an investigation into the alleged improper procurement of communication services by the Department of the Premier of the Western Cape Provincial Government Report no 1 of 2012/13* (2012) 88-92.

¹³⁰² It is submitted that the guideline and its accompanying criteria are filled with grammatical errors and a number of perplexing statements which are open to various interpretations. Criteria (1), for example, states that “[a]ny unhealthy food offered for sale ... shall not be permitted to market it commercially in any manner”. The first sentence of criteria (11) provides that advertisements should not include any direct appeal to children to persuade their parents or other adults to buy advertised products for them but the next sentence reads as an instruction or an order: “Avoid any direct appeal to children to persuade parents or other adults to buy food products for them or to do anything else that goes expressly against the wishes or authority of a parent, guardian or educator.” See also criteria (8)-(13) described above in ch 7 and Addendum C to this thesis.

¹³⁰³ This seems evident from, *inter alia*, the spelling of words which differs throughout the criteria.

¹³⁰⁴ See, for example, criteria (11) as described in n 1302 above, and Addendum C to this thesis.

which was reportedly designed by researchers from the North-West University,¹³⁰⁵ adequately provides for a number of relevant factors to be taken into account. It takes account of what type of food a particular product is, whether it includes fruits or vegetables or any other redeeming factor or nutrient that would counter-balance any negative nutritional characteristics. This model appears to consider the same nutritional aspects and use the same methods to calculate the nutritional value and benefits of foods as the one used in the UK in terms of the Ofcom content rules for television advertising.¹³⁰⁶ This calculator also provides the only criteria that are to be passed in the UK. If a product scores the required amount of points, the product may be marketed.

However, guideline 14 requires a product to pass more scrutiny than merely passing a nutrient test. Criteria (2)(b) provides that products may also not contain added fructose, added non-nutritive sweeteners, added fluoride or added aluminium through an additive or ingredient. The reason for this requirement is unclear. The stated aim of the WHO and of guideline 14 itself is “to reduce the impact on children of the marketing of unhealthy foods and non-alcoholic beverages, which are high in fat, saturated fats, trans-fatty acids, free sugars, and sodium (salt).” It therefore seems peculiar to also disqualify products which contain other ingredients which are not mentioned in the stated aim of the guideline or the WHO.

It is furthermore necessary to stress that the Department of Health should be cautious not to prohibit the marketing of foods or products which have not shown to be harmful to the public health and in this particular case, contribute to the rise in non-communicable diseases. Any restriction placed upon the right to freedom of commercial speech which is not proportional, necessary, or efficient to achieving the required end will be unconstitutional. This argument will be fully explored below.

In addition, the nutritional values prescribed by criteria (2)(c) per 100 grams or millilitres are so low that it excludes foods commonly considered as healthy and promoted by the Food Based Dietary Guidelines of South Africa.¹³⁰⁷ This means that

¹³⁰⁵ This calculator and details thereof is, unfortunately, also no longer available from the DOH website.

¹³⁰⁶ See, for example, Food Standards Agency “Guide to using the nutrient profiling model” (27-09-2010) *Food Standards Agency*. See also, as discussed above in ch 6 at 2 1 2.

¹³⁰⁷ The Nutrition Information Centre of the University of Stellenbosch (NICUS) “The South African Food Based Dietary Guidelines” (2012) *NICUS* <<http://www.sun.ac.za/english/faculty/healthsciences/nicus/Pages/Summarised-choices-on-healthy-eating.aspx>> (accessed 07-07-2015).

foods such as the following will not be allowed to be marketed to children or sold to children in schools:¹³⁰⁸

- Unsweetened low fat yoghurt;
- Low or even fat free milk;
- Fruits such as apples; bananas, oranges, and grapes;
- 100 percent fruit juices;
- Peanut butter;
- A whole-wheat sandwich made with toppings such as margarine, low fat mayonnaise, tuna and tomato;
- Eggs;
- Unsalted cashew nuts and almonds.

The use of the nutritional levels proposed by these criteria will lead to absurd results. In fact, the only products which will pass all of the requirements set by criteria (2) will be dried beans, water and unsalted popcorn.¹³⁰⁹ It appears that the nutrient levels proposed in this guideline and its table are used as the levels for which the so-called “green light” for the UK “Traffic Light” front of pack labelling system may be given.¹³¹⁰ It is used as a completely different measure in the UK – certainly not at a level which automatically classifies the foods with higher sugar, salt or saturated fat levels (that is the so-called “orange light” or even foods with certain “red light” levels) as unhealthy.

Furthermore, the low levels of sodium, which are to be allowed in terms of guideline 14, are much lower than the levels which are prescribed by the Regulations Relating to the Reduction of Sodium in Certain Foodstuffs and which have come into effect in 2016.¹³¹¹ Even if it is taken into account that the purpose of R214 are to reduce the very high levels of sodium found in the biggest contributors of salt in the South African diet and that even in their “reduced salt form”, these products would still contain fairly

¹³⁰⁸ This aspect will be discussed below in section 3 4.

¹³⁰⁹ Personal communication with C Crickmore, Development Manager: Science and Programme, Heart and Stroke Foundation of South Africa, 14-08-2014.

¹³¹⁰ Published in November 2007 by the UK Food Standards Agency, and not January 2007 as stated in guideline 14. United Kingdom Food Standards Agency “Food: using traffic lights to make healthier choices” (2007) *United Kingdom Food Standards Agency* <<http://tna.europarchive.org/20120419000433/http://www.food.gov.uk/multimedia/pdfs/publication/foodtrafficlight1107.pdf>> (accessed 12-08-2014).

¹³¹¹ R214 published on 20 March 2013; the first levels of reduction took take effect from 30 June 2016, as discussed in ch 6 at 3 1. *Regulations Relating to the Reduction of Sodium in Certain Foodstuffs and Related Matters* GN R 214 in GG 36274 of 20-03-2013.

high levels of salt, it is submitted that 120 milligrams of sodium per 100 grams is an unrealistic requirement, considering that by 2019 bread should contain no more than 380 milligrams per 100 grams.¹³¹²

Some technical aspects which should be highlighted include the wording of criteria (1)(a) in guideline 14. It prohibits marketing of unhealthy food offered for sale “to children during their entire school-going years from grade 0 to 12, including nursery and pre-school ages, using a child actor 18 years or younger; or using any celebrities, sport stars, cartoon-type character, puppet, computer animation or similar strategy”. It is submitted that the term “child” should rather be defined in the definitions clause of the regulations itself as a person younger than 18. However, some learners in school may be 18 years and older and hence are no longer regarded as children. Although it is true that school premises should remain free from marketing practices, the wording used in criteria (1)(a) is confusing and contradictory and needs to be clarified.

Another word which may be regarded as problematic, is the use of the word “commercial” as part of the term used to describe marketing practices which will be prohibited. The title of regulation 65 refers to “commercial marketing” whilst the provision itself refers to marketing without any reference to the term “commercial”. Neither the draft regulations, nor the Foodstuffs, Cosmetics and Disinfectants Act 54 of 1972 provide any definition or clarification of the meaning of “marketing”. As was explained in chapter 2, marketing refers to all measures which are employed in order to increase the consumption of products.¹³¹³ It is therefore unclear why the word “commercial” is required. The commercial element to these types of actions is therefore already incorporated into the definition of “marketing”.¹³¹⁴

When it is furthermore taken into consideration that the ASA Advertising Code of Practice distinguishes between “commercial” and “non-commercial” advertising, this technical issue raises more concern. The ASA Code applies to both “commercial” and “non-commercial advertising”, with the effect that advertisements by government departments and agencies, as well as other non-commercial organisations and

¹³¹² In terms of reg R214.

¹³¹³ See the text to 2 1 of ch 2. Hawkes *Marketing Food to Children* 1. Coca-Cola Company agrees by stating that “[w]e define marketing as anything we do to create consumer demand for our brands.” Coca-Cola *Annual Report* 1995 as quoted by Hawkes *Nutrition Bulletin* 374.

¹³¹⁴ The Oxford English Dictionary defines “commercial” as that which pertains to commerce, ie the practice of buying and selling or exchange of merchandise. Oxford English Dictionary “*commercial, adj. and n.*”

individuals are also governed by the Code.¹³¹⁵ As a result, if by the use of the term “commercial marketing” in guideline 14, the intention is to exclude “non-commercial marketing”, as defined by the ASA Code, it is submitted that this type of distinction is unjustifiable and contrary to the best interests of the child.

It is also submitted that attention be paid to the effect which a provision such as criteria 3(b) in its current format may have. It provides that “[n]o commercial marketing activities to children shall be permitted between 6.00 to 21.00”. It is submitted that this clause is confusing and contradictory, unless the intention is to prohibit marketing of all foods, healthy and unhealthy, as well as other products such as toys and clothes. The justification for such a provision may be questionable, especially in light of the purpose of the regulations.

Moreover, although it is clear that the intention is to prohibit all forms of marketing practices, it is submitted that many of the clauses repeat which has already been defined as a prohibited practice. Thus, for example, criteria 3(c) provides that “[p]rinciples described in this Guideline shall also apply to commercial communications for those products directed at children outside of children’s programmes.” It is submitted that this clause is unnecessary, bearing in mind that the effect of regulation 65 is that all forms of marketing of unhealthy food, whether they are communicated during or outside of children’s programmes, are prohibited.¹³¹⁶ As a result, these clauses of guideline 14, in particular, appear to be clumsy, confusing and cumbersome.

In summary, it can be said that the intention of regulation 65 is clear and a laudable attempt at promoting the interests of children, especially in light of the current lack of legislative regulation of television advertising. Yet, the execution thereof by means of guideline 14 is problematic. It is submitted that much simpler language and regulatory provisions can achieve the same goal. This submission will be further explained by proposals made in chapter 9 of this thesis.

¹³¹⁵ Advertising Standards Authority of South Africa “Advertising Code of Practice” (2016) *Advertising Standards Authority of South Africa* S i – Introduction: cl 2.

¹³¹⁶ Another example is found in cls 5(a) and 5(b) of guideline 14 both prohibit marketing techniques used by all media, including radio, television, the internet, any other electronic online medium, e-mails and text messages, mobile and viral marketing, digital marketing, packaging, online sweepstakes.

2.2 Product placement

It is submitted that, for the same reasons as mentioned above with respect to television advertising, the current vague self-regulatory provisions pertaining to product placement do not promote the best interests of the child. However, in chapter 7 it was explained that the intended consequence of proposed regulations R429 is the prohibition of product placement of unhealthy food products.¹³¹⁷ It is unclear as to how such guidelines would practically be enforced since much of the content shown on South African television and found in other entertainment products hail from the USA where product placement is a regular occurrence. It is therefore submitted that, should the Department of Health choose to include product placement as one of the prohibited marketing practices, it should clearly define such methods to only refer to those instances that have their origin in South Africa. The prohibition against product placement can only be effectively enforced against South African food manufacturers who pay to have their products featured in locally produced programming. In addition, it is submitted that the example of the method used in the UK should be implemented in South Africa: the use of a P logo or any other visual aid must appear in television programmes containing product placement before and after the programme as well as after any commercial break.

2.3 Schools and places where children gather

Although the decision by the Department of Health to attempt to comply with the WHO's Strategy Set of Recommendations in respect of prohibiting marketing at places such as schools and where children normally gather, is a commendable one, a number of aspects regarding criteria (5) of guideline 14 are of concern. This paragraph of guideline 14 is especially confusing, contradictory, and some of its content superfluous. One such example is the sentence that declares that settings where children gather shall be free from all forms of commercial marketing of unhealthy foods. If the marketing of unhealthy foods to children is prohibited, schools will also by definition have to be free from promotions. It can be argued that the Department of Health wanted to emphasise that promotions in schools will be prohibited but it is submitted that the inclusion of this particular clause in its current format adds more

¹³¹⁷ See ch 7 at 3.3 above.

confusion than certainty. Over and above, the statement that food operators may not engage in any commercial activity in schools is particularly confusing.¹³¹⁸ Since neither the term “food operators” nor “commercial activity” is defined in the regulations or in the guideline, the ordinary meaning that must be attached to this sentence, is that no one will be allowed to sell, trade or market food in schools.

An aspect which is a commendable effort by the Department of Health to improve the nutritional content of foods sold at schools but which will have major consequences upon tuck shop operations, is the prohibition of the sale of unhealthy food, found in criteria (5) of guideline 14. In addition to regulation 65 and the rest of the clauses included in guideline 14 and specifically clause 6 thereof, which prohibits the marketing of unhealthy food, criteria (5) also prohibits the sale of unhealthy food. As it currently stands in terms of criteria (2)(c), school tuck shops would not be able to sell anything else except water, unsalted air-popped popcorn and dried, cooked beans. It is not clear how the distribution, as opposed to the sale, of food in terms of school-feeding schemes will be affected by this provision. Since the definition of a food business operator essentially includes anyone who cooks food and then distributes it for public consumption, school tuck shops and all catering establishments will be affected by this provision. It is probable that food home industries, defined by regulations R429 as micro businesses, “involved in the manufacturing of food products on small scale for sale and is a sole proprietor, company or close corporation with an annual turnover less than the amount determined by SARS from time to time” will also be affected by this ban. Another type of business operation defined by the regulations, namely catering establishments such as “a vehicle or a fixed or mobile stand where, in the course of business, ready-to-consume foods are prepared for direct sale to the consumer for consumption” will presumably also be subject to the prohibition described in criteria (5).

Even if the table with the rather strict requirements in criteria (2)(c) is to be removed, the practical effect of this sentence in criteria (5) is that school tuck shops will have to submit all of their products for nutritional analysis in terms of the nutrient profiling model. It is unclear whether the Department of Health considered that without the expertise or required resources to do this at every school, this exercise will be a costly

¹³¹⁸ It reads: “Food operators shall not engage in any direct commercial activity in both pre-school, primary and secondary schools.”

and perhaps even a non-achievable task. Quite often school tuck shops are run by members of the immediate geographical community who do so on a tight budget and as their only source of income. At sports events, where parents and other social clubs quite often step in to raise funds for the school by selling home-made burgers, hot-dogs, sandwiches, toffee apples, pancakes, boerewors and biltong, the sale of these products will also be prohibited. Once again, all foods will have to be subjected to nutrient profiling in order to establish whether the foods may be sold. It is submitted that the implementation of such a provision must be accompanied by practical guidance by means of either financial assistance to the school or other pragmatic solutions.

It is unclear as to why food business operators must provide unbranded products in their vending machines. Even though it is currently uncertain as to which healthy food products can be sold in vending machines,¹³¹⁹ it is not clear as to why, for example, if they can be sold, these products may not be branded. It is submitted that this provision will unjustifiably infringe upon food manufacturers' intellectual property in their brand names which have been established as trade-marks. This argument will again be explored below at 3 2 3.

2 4 Sponsorship

It is submitted that the provisions currently found in the Sponsorship Code of the South African Advertising Standards Authority's Code of Conduct are too vague and broad, and of very little practical use or impact. However, the proposal contained in regulations R429 can be said to promote the best interests of the child, complies with the international call for a limitation on marketing of unhealthy food practices to children and should indeed be included in legislative measures.

2 5 Sales promotions, branding and packaging

It is submitted that the provisions of regulations R146 which currently are in force, fail to promote the child consumer's right to information. Apart from the fact that there is no obligation upon food manufacturers to provide the nutritional content of their

¹³¹⁹ Due to the requirements set by the table in criteria (2)(c).

products, except in instances where a claim is being made, the regulations also do not impose a duty to do so in a language which is accessible to children. These obligations are explicitly imposed by section 13 of the South African Children's Act.¹³²⁰ In this respect, the comments regarding some of the provisions of the CPA, as described above,¹³²¹ are relevant. In instances where the nutritional content is provided, most children will have difficulty in understanding the terminology contained in the very small prescribed format found on the product. Moreover, even if children do understand the terminology, they must also understand which levels are considered healthy and which are not. The WHO Global Strategy on Diet, Physical Activity and Health recommends that consumers be provided with accurate, standardised and comprehensive product information on food which will enable them to make informed and healthy choices. This information must be provided whilst bearing in mind literacy levels, communication barriers and local culture.¹³²² Also, the United Nations Guidelines for Consumer Protection and the Guidelines for Consumer Organisations to Promote National Food Safety Systems noticeably call for simple, clear and consistent food labels and evidence-based health claims.¹³²³ Once again the example from the UK, many Nordic jurisdictions and South Korea may provide a solution in that a so-called "traffic light system" could also be introduced in South Africa.

It can be said that the proposed regulations are an improvement on the current position in that it provides for nutritional information to be displayed on all food products. However, once again, as far as the use of language, letter sizes and the visual presentation of this information is concerned, the current prescribed format cannot be said to be user or child friendly. As a result, it is submitted that the regulations fail to adequately promote the child's right to information. Furthermore, as has also been mentioned above, children with visual impairments must certainly find it difficult to read the nutritional information printed in 1 millimetre letters on certain products. At present there is no provision in South African law for the dissemination of product information on labels to be provided also in braille. The obligatory provision of nutritional information, also in braille, will naturally have cost implications. In this particular regard it must be borne in mind that the realisation of children's socio-

¹³²⁰ As discussed in ch 3, section 4 2.

¹³²¹ See ch 7 at 3 1 above.

¹³²² See ch 5 at 2 1 1 above.

¹³²³ See ch 5, at 3 1 and 3 2 respectively.

economic rights is not subject to the availability of resources.¹³²⁴ In addition, while section 13 of the Children's Act also prescribes that any information that may assist a child in promoting her health, must be provided in a format which is accessible to them, it furthermore also calls for the particular needs of disabled children to be considered in this respect.

It is furthermore submitted that the prohibition of the inclusion of toys sold as part of children's meals¹³²⁵ will promote the best interests of the child, despite arguments that these types of bans impose upon parental responsibilities and rights. This argument will be discussed further below. It should furthermore be noted that, should this aspect of draft regulations R429 be enacted, regulations R1090, providing for the safety measures of such promotional items, should also be repealed in order to avoid any confusion. In its current format R429 only provides for the repeal of regulations R146.¹³²⁶

2.6 "New" media

Considering how much time children are currently spending using social media platforms, online games, websites and electronic methods of communication, it is submitted that the failure to address such marketing methods results in a blatant disregard of the best interests of the child. However, the proposal contained in regulations R429 can also not be considered as a possible solution to this failure. It is submitted that this proposal is impractical to enforce for a number of reasons. Due to the nature of the worldwide web and the international domain in which it functions, it is unfeasible to regulate marketing practices in terms of particular periods of times. Furthermore, in the same way that much of product placement originates from content produced in other countries, the internet has no geographical boundaries. Once again, in any event, it is submitted that, due to the all-inclusive nature of regulation 65, online marketing by South African food manufacturers should also be governed by the prohibition contained therein.

¹³²⁴ See ch 7, at 2.2.

¹³²⁵ Implied from a reading of cl 5 of guideline 14 to regulations R429 which prohibits "cross promotions (eg linking foods with popular children's movies and television characters), product placement, sales promotion, promotional activities such as redemptions, under-the-cap offerings, advergaming, text message/SMS contests, etc offering prizes or rewards, cross-promotions using celebrities including sport stars, brand mascots or characters popular with children." See ch 7 at 3.6.

¹³²⁶ Reg 67 of R429 currently provides for the repeal of R146 of 1 March 2010, R1091 of 19 November 2010 and R45 of 19 January 2012.

3 Assessment

3.1 The best interests of the child

From the assessment provided above, it is clearly evident that the current regulatory framework pertaining to food marketing to children does not consider the best interests of the child, let alone consider it to be of paramount importance. It is abundantly clear that the South African government is failing to adhere to Article 3(1) of the CRC, as well as the numerous calls for action by organisations such as the WHO, the IASO, UNICEF and the Committee on the Rights of the Child. The current weak self-regulatory mechanisms do not protect the child from exploitative marketing practices, does not adequately provide the child with information which will enable her to participate in the consumer market by making informed choices, and ultimately does not protect her rights to health, life, survival and development, as well as to play and to participate and develop her cultural rights.

In addition, although it appears that, with the proposal of regulation 65 as part of Draft Regulations R429, the Department of Health has heeded the obligation which Member States to the CRC have to review legislation and to incorporate Article 3(1) into their policies, there is no mention of the principle of the best interests of the child in either the regulations or its accompanying guidelines. The Committee on the Rights of the Child has repeatedly stated that, as a procedural guarantee, it is crucial that any decision affecting a child must explain how the best interests of the child was explicitly considered, what criteria were used in reaching the decision and how children's interests were measured against any other considerations. The proposed regulations R429 in its current format do not provide such an explanation. There is also no mention of a child rights impact assessment (CRIA) being performed.¹³²⁷ Although the regulations itself cannot contain all of the above information, it is submitted that a policy document or an explanatory note to regulations would provide the appropriate forum to do so. Nevertheless, although it is not explicitly stated that the regulations have the aim of promoting the best interests of the child as its primary concern, it can be argued that by seeking to improve the health status of children by reducing obesity rates, the Department of Health acknowledges the best interests of children to be of importance.

¹³²⁷ See 3.3.2 in ch 3 above.

As a result, it can be said that the purpose of regulation 65 is to prevent children's health from increasingly being harmed by unfair commercial practices, although it is not explicitly stated in the regulations.

As was mentioned above, an aspect that still needs to be incorporated into regulations R429, is the state's obligation to provide children with the necessary information and assistance as to how to promote their own best interests. Children, in accordance with their evolving capacities, must be able to make decisions for themselves. Adolescents who are at a particularly vulnerable age where body image, self-esteem and peer pressure play a vital role in the development of their mental and physical health, need to be able to make healthy choices. Such children, and their parents, are to be provided with clear, easy accessible and truthful information which will enable them to make informed decisions, for themselves and also their future children. In this respect the preamble of the Children's Act reminds us that children play a vital role in the community. If children's rights are promoted, the lives of their families and the society in which they live, will correspondingly also improve. If older children are provided with the correct information, they may also provide their younger siblings with vital information and guidance.

To this end, product packaging in particular must provide the necessary truthful and relevant information in a format that is easy to understand and accessible to all. Consumers should not be expected to understand complicated nutritional tables and values which require scientific interpretation. Whereas children should be provided with information and educational programmes with respect to health and nutrition in schools in particular, this aspect should never be used as an excuse that product labelling may be onerous to understand. In this regard, and as mentioned above, the examples of the Swedish "keyhole" system or the UK "traffic light" system may prove particularly useful. Pictorial representations of key nutritional information and allergens may serve a vital purpose not only to children but also to adults who may not be able to read or for that matter read very small printed letters.

It must also be borne in mind that in terms of both the CPA¹³²⁸ and the Children's Act¹³²⁹ the needs of children with disabilities deserve special consideration. Chapter 3 of this thesis explained how section 13 of the Children's Act stipulates that children be

¹³²⁸ See s 40 as discussed in ch 7 at 3 1.

¹³²⁹ See s 13 as discussed in ch 3 at 4 2 and ch 7 at 2 3.

provided with relevant information as to the prevention, causes and treatment of ill-health in a format which is accessible to them, bearing in mind also the needs of disabled children. It is submitted that the fact that there is currently no provision in South African law for the dissemination of product information on labels to also be provided in braille, is infringing upon the rights and welfare of children with visual disabilities.

3 2 The impact of the best interests of the child upon competing rights

3 2 1 *Parental responsibilities and rights*

From the discussion above and in previous chapters it is evident that parental responsibilities and rights may only be effected with the best interests of the child as its foundation. To enable parents to perform their responsibilities in this way, parents must be educated and equipped. It is therefore encouraging to note that one of the stated aims of guideline 14 to regulation 65 of R429 is to provide education and public information in promoting a healthy diet. However, as was submitted above,¹³³⁰ by prohibiting certain marketing practices, and especially in the manner in which is proposed by R429, the public, and parents in particular, are not receiving more information. As a result, it is again submitted that there must be a deliberate attempt at requiring certain nutritional information to be included in food packaging. In addition, as mentioned above, this and other information pertaining to the product as part of a healthy diet, must be displayed in a way which is easy to understand and clearly visible.

It can perhaps be said that some parts of regulations R429 provide some indirect messages or information regarding the consumption of unhealthy food. Criteria (4) of guideline 14, for example, provides that advertisements of unhealthy foods which are aimed at adults, may not encourage or condone excess consumption. Criteria (6) also instructs that such advertisements must show appropriate portion sizes appropriate to the setting portrayed, and when foods are presented in the context of a meal, advertisements must show a reasonable variety of foods to reflect generally-accepted good dietary practice. Arguably these provisions are aimed at informing parents about appropriate nutritional intake and at preventing falsehoods regarding “family meals”. It

¹³³⁰ See the text to 2 1 3 of ch 8 above.

is submitted, however, that these provisions cannot be regarded as an adequate response to the imperative to provide guidance, assistance and information which will enable parent to perform their daily responsibility to choose nutritious food for their children. Parents need to be reminded of the fact that one of their duties is to develop their children into autonomous individuals who will be able to make their own responsible decisions.¹³³¹ To this end, as was explained above, children will need information and guidance.

The argument that is frequently raised in response to a prohibition of the promotion of any product, is that such measures are indicative of a nanny state which does not trust its citizens to make their own decisions.¹³³² In the context of the prohibition of food marketing to children, the reaction often is that it is parents' responsibility to decide what their children may or may not eat. They have the right to decide if they want to buy a child a particular food item or a meal which includes a toy and which will keep the child occupied and make her happy.

Parents must be reminded of the fact that the importance of parental rights has been replaced by a focus on parental responsibilities. Parents may perhaps still have the power to make certain decisions but only in order to carry out their duties with respect to their children. These duties must be performed in the interests of the child "and not because of an authority which is conferred on them in their own interests."¹³³³ Although the manner in which to parent is normally left to individual choice, this autonomy in deciding how to raise a child is limited by community norms and social values. Parents must first and foremost be guided by what are in their children's interests, and what will assist them in becoming healthy and well-balanced members of the community. The State must furthermore remind parents of the fact that they are to take decisions for their children only insofar as their children cannot do so

¹³³¹ See the discussion in chap 4 at 4 3 where Lord Denning was quoted as saying that the scope of parental authority "starts with a right to control and ends with little more than advice".

¹³³² See for example some of the reaction to the measures prohibiting the inclusion of toys with children's meals in the USA, as referred to in ch 6 at 2 5: CBS News Healthwatch "Happy Meal Toy Ban Faces Vote in Calif. County" (27-04-2010) *CBS News Healthwatch* <<http://www.cbsnews.com/stories/2010/04/27/health/main6436917.shtml>> (accessed 20-05-2011). See also Moran *The British Regulatory State* 8; see also Baldwin *et al Understanding Regulation: Theory, Strategy, and Practice* 2. The latest example can be found in South Africa in reaction to the announcement by Woolworths that it will be removing sweets and chocolates from their checkout isles: <<http://businessstech.co.za/news/general/97057/woolworths-takes-sweets-and-chocolates-off-checkout-shelves/>> (accessed 10-07-2016).

¹³³³ Council of Europe, Committee of Ministers, Recommendation No R (84) 4 (adopted by the Committee of Ministers on 28 February 1984 at the 367th meeting of the Ministers' Deputies), as cited in ch 4 at 4 1 above.

themselves.¹³³⁴ Once again it must be stressed that parental rights can only be exercised unless the best interests of the child “demand that they are overridden.”¹³³⁵ Parental rights do not exist for the benefit of the parent but for the child’s well-being. Parents must care for their children and this responsibility includes the duty to ensure that none of the rights which their children have, are violated. They must safeguard their children’s physical and mental health and guide them to ultimately make their own responsible decisions when they reach a level of development to be able to do so. As a result, so-called parental rights and powers are limited by the responsibility of parents to act in their children’s best interests, especially when they decide what food their children may eat.

Furthermore, in chapter 4 of this thesis it was explained how, also in terms of international law, the state should not be allowed to interfere in the everyday decisions that parents make in taking care of their children. The state, even in its capacity as *parens patriae*, cannot dictate to parents how to raise their children.¹³³⁶ However, there is a difference in instructing parents as to what they may feed their children, and protecting children from marketing practices that children do not understand and which may cause them harm. By preventing marketers from exploiting the child’s natural inclination to want to have fun, play, and to believe what others tell them, the state is not preventing parents from still providing these foods to their children, but merely providing support to parents. As is the case in other instances where children are at risk of being harmed, the state needs to intervene and assist parents in performing their parental responsibilities. The choice is not being taken away from parents but the impact and power of marketing techniques are reduced when prohibiting certain manifestations thereof. However, as has been stated on numerous occasions above, it is imperative that more guidance and advice regarding nutrition be provided to parents and children, since the mere prohibition of marketing practices cannot, on its own, achieve the goal of assisting parents in the performance of their parental responsibilities.

¹³³⁴ Human (2000) *Stell LR* 79.

¹³³⁵ Bainham *Children, Parents and State* 51.

¹³³⁶ See text at 4 4 of ch 4. Bridgeman (2007) *NILQ* 319 citing the Home Office *No more excuses: A new approach to tackling youth crime in England and Wales* 1997 para 3.2.

Lord Templeman in *Re KD (A Minor: Ward: Termination of Access)* [1988] 1 AC 806 812 explained the position rather well: “The best person to bring up a child is the natural parent. It matters not whether the parent is wise or foolish, rich or poor, educated or illiterate, provided the child’s moral and physical health are not in danger. Public authorities cannot improve on nature.”

3 2 2 *The limitation upon freedom of commercial speech*

Chapter 4 of this thesis explained how different jurisdictions use different tests in order to balance competing interests against each other. In Canada, for example, the *Oakes* test stipulates that, should a limitation be placed upon a fundamental freedom enshrined in the Canadian Charter, the limitation must be reasonable, and the objective thereof must be sufficiently important. As part of the proportionality test, the Canadian courts must assess whether the limitation is rationally connected to the objective, and whether the effects of the measures of limitation are proportionate and not overbroad. In the EU, the courts will also have to decide whether a limitation is suitable and necessary to achieve its goal. In order for these measures to be proportionate, they cannot exceed reasonable and appropriate limits and must therefore be the least onerous method which can be used to achieve the legitimate objective. In the USA too any limitation must be narrowly formulated and absolutely necessary for its purpose. In this jurisdiction, however, a specific test for the limitation upon commercial speech has been formulated. In terms of the *Central Hudson* test, provided that the commercial speech concerns lawful activity and was not false or misleading, the governmental interest must be substantial and the means to do so must be effective and the least restrictive measure.

In South Africa limitations imposed upon commercial speech must pass the proportionality test which is enshrined in section 36 of the Constitution. The courts will therefore consider the following aspects during their assessment: the nature of the right, in this case commercial speech; the importance of commercial speech; the purpose of limiting commercial speech; the importance of such a limitation; the extent of this limitation; the efficacy of the limitation; and other possible means of achieving the purpose.

Furthermore, it was established in chapter 4 that commercial speech, as a particular type of speech, is a fundamental freedom, which is crucial to the growth and development of any business, and as a result is vital in sustaining the economy. Marketing techniques such as advertising, sales promotions and sponsorship propose commercial transactions and trade. It enjoys global recognition and protection, also in South Africa, because it informs the consumer of available options while the marketer

enjoys the right to illicit commercial activity. As a result, marketing serves a societal interest.

Since it has been established that in effect the current legislative position does not effectively restrict any marketing practices, only the proposed limitations in the form of Regulations R429 will be assessed against the section 36 criteria.

The stated purpose of Regulations R429 is to reduce the impact which the marketing of foods high in fat, saturated fat, trans-fatty acids, total sugars, or total sodium has on children in order to prevent children's health from being compromised. In doing so, the Department of Health seeks to reduce the impact of communicable diseases of lifestyle on children. This aim is in line with the proposals suggested by several non-governmental and inter-governmental organisations such as UNICEF, and the FAO, the WHO, the ICC and IASO. The rationale for this recommended limitation upon the impact of and exposure to marketing practices has been explained on numerous occasions, notably also in guideline 14 to R429: the increasing rise in overweight and obesity rates, especially amongst children, is of grave concern since obesity is the leading cause for the increase in non-communicable diseases. An unhealthy diet has been shown to be a key modifiable risk factor for diseases such as cardiovascular diseases, cancers, chronic respiratory diseases and diabetes. These illnesses annually cause an estimated 35 million deaths worldwide.¹³³⁷

In the instance of tobacco products, courts appear to accept the rationale that the "extremely harmful effects of tobacco on those who consumed it and those exposed to secondary smoke" justifies the prohibition of the promotion thereof. The Canadian Supreme Court in *Canada (Attorney-General) v JTI-MacDonald Corp* considered the limitation on the right to freedom of speech to be justifiable since the promotion of tobacco products would induce "people to engage in harmful and addictive behaviour."¹³³⁸ In the *BATSA v Minister of Health* decision the South African SCA found that the Minister of Health and the Legislature were obliged to act in accordance with the South African Government's commitment in terms of the Framework Convention on Tobacco Control to limit and prevent the spread of tobacco use. As a result, South Africa also drafted a policy in response to the global concern regarding

¹³³⁷ See ch 1 and the WHO Set of Recommendations, and as mentioned above in chs 1 and 5.

¹³³⁸ *Canada (Attorney-General) v JTI-MacDonald Corp* 2007 SCC 30 [47].

the "extremely harmful effects of tobacco on those who consumed it and those exposed to secondary smoke."¹³³⁹ The court consequently found that the Minister was meeting the government's obligation to protect its citizens from the harm of smoking and established that the prohibition on the advertising and promotion of tobacco products is reasonable and justified.¹³⁴⁰

In the context of food marketing the harm which may ensue from regular consumption of nutritionally poor but calorific foods has been repeatedly established, as explained above. It is also clear that the aim of R429 is to reduce the impact which marketing has on the increased consumption of such foods and, as a result, promote the child's right to health.

The extent of the limitation proposed by regulation 65 of R429 will be that no food-marketing practices in any form will be allowed to be directed at children should the food products not pass particular criteria. Children are defined to be persons under the age of 18 and not people younger than 12 or 13 that often seems to be the age restriction applied in many self-regulatory efforts. Certain marketing practices aimed at adults will also be curtailed to some extent, as was described above in chapter 7. As a result, although the limitation proposed by regulation 65 will be fairly extensive in its reach, not all marketing of all food products will be prohibited, as is the case with tobacco products and may be the case with a proposed ban on marketing of all alcoholic beverages. The prohibition will also not extend to include purely informational advertising directed at adults.¹³⁴¹

The efficacy of a marketing prohibition of certain products has not yet been established, although some studies have found that the marketing ban that exists in Quebec, has had an impact on consumer purchasing decisions.¹³⁴² However, the effect which marketing has on consumption has been proven. Chapter 2 of this thesis referred to a number of studies, including some meta-studies, in which the relationship between the marketing and increased consumption of foods containing high levels of fat, sugar and salt, had been established.¹³⁴³ Although the blame for the increasing levels of childhood obesity cannot solely be placed upon marketing practices, research

¹³³⁹ *British American Tobacco South Africa (Pty) Limited v Minister of Health* [2012] 3 All SA 593 (SCA) [20].

¹³⁴⁰ [26].

¹³⁴¹ Nevertheless, it will be argued elsewhere in this chapter that proposed regulation 4 of R429 may have an impact on informational advertising aimed at all consumers.

¹³⁴² See ch 2 at 2 3.

¹³⁴³ See ch 2 at 2 3.

has shown that the effect which marketing has on children's food preferences, purchase behaviour and food consumption, is independent of other factors that may influence diet. In this regard, the 2003 report by Hastings, which reviewed 201 papers and concluded that marketing has an effect on children's food consumption and preferences both at brand and category level,¹³⁴⁴ appears to provide proof that there is a direct link between food marketing to children and their increased consumption of nutritionally poor and obesogenic foods. It is submitted that these studies can be used as a justification for restricting food marketing to such an extent that unhealthy foods may not be promoted to children.

It is submitted that, contrary to the SCA's approach in *BATSA v Minister of Health*, in which the SCA held that it was not necessary for the government to provide empirical research of how effective the ban of advertising of tobacco products would be, section 36 of the Constitution requires such proof.¹³⁴⁵ In the *BATSA* decision the Minister of Health's justification for the prohibition of the promotion of tobacco products was based on "strong policy considerations informed by the rampaging ill-effects of tobacco use." Bishop and Brickhill argue that this approach by the court is "exceptionally dangerous".¹³⁴⁶ The authors state that since the SCA relied quite strongly on the Framework Convention on Tobacco Control in which it is seemingly accepted that the link between advertising and consumption is incontrovertible, it can be accepted that there must be easily and accessible empirical studies which will explain and rationalise why the international community has adopted this position. In chapter 2 of this thesis, it was furthermore explained that the marketing prohibition to children in Quebec has provided its own empirical results that such a limitation may be effective. It is furthermore submitted that studies which prove that marketing of food products to children increase their consumption thereof can also be used to prove the converse.

As to the question of whether less restrictive means could be employed to limit the exposure to and the impact of food-marketing practices to children, it is submitted that there may be two options to consider. The first less restrictive measure is once again

¹³⁴⁴ See n 175 in ch 2 above.

¹³⁴⁵ This can be deducted from the relevant factors to be considered, as stated in s 36(1) and in s 36(1)(d) thereof in particular: "the relation between the limitation and its purpose." See also s 36(1)(e) which requires less restrictive means to achieve the purpose to be considered.

¹³⁴⁶ M Bishop & J Brickhill "Constitutional Law: Freedom of Speech" (April - June 2012) *Juta Quarterly Review*.

borrowed from the context of the tobacco industry. In *RJR-MacDonald, Inc v Canada* the Canadian Supreme Court held that the ban on the advertisement of tobacco products was rationally connected to the government's interest in reducing tobacco use but that less restrictive measures could also achieve this goal. Since the limitation also extended to purely informational advertising, the ban on advertising prevented customers from accessing important information such as relative tar content and price.¹³⁴⁷ The response from the Canadian Legislature was the promulgation of the Tobacco Act of 1997 which created an exception from the advertising ban for "information advertising or brand preference advertising" and only in certain publications which, *inter alia*, have an adult readership of more than 85 percent.¹³⁴⁸

In South Africa, however, the SCA in the *BATSA* decision held that it was impossible to carve out an exception in respect of consenting adult tobacco users. *BATSA* submitted that it should be allowed to share the following information with its consumers: (a) packaging changes, which communication will generally be aimed at ensuring that the consumer is aware that the changes to the package are authentic and that an illicit trade package is not being purchased; b) brand migrations when a product line is discontinued (referring the brands that are most similar in taste and other characteristics to the discontinued product); (c) product developments, which may, for example, be driven by legislative requirements (for example reductions in tar or nicotine levels) or may be made in order to ensure that the product is protected against illicit trade; (d) the launch of new products and new types of products, such as snus; (e) that a particular tobacco product is less harmful than another tobacco products; and (f) other distinguishing features of a particular tobacco product. Mthiyane DP found that this information which *BATSA* wished to communicate to consenting adult customers, sought to advertise and promote tobacco products. Farlam JA furthermore found that the prohibition in section 3 of the Tobacco Products Controls Act was against advertising and promotion and not against the manufacturer answering requests for information from the public regarding products.¹³⁴⁹ Since the right to receive information about tobacco products was only limited in respect of

¹³⁴⁷ In *RJR-MacDonald, Inc v Canada (Attorney General)* [1995] 3 SCR 199 [170].

¹³⁴⁸ Tobacco Act, SC 1997 c 13 §22(2). See also ML Berman "Commercial Speech Law and Tobacco Marketing: A Comparative Discussion of the United States and Canada" (2013) *Am JL & Med* 39 218 229. "Information advertising" was defined to mean advertising about a product's availability and/or price, while "brand-preference advertising" was defined to be advertising about a product's brand characteristics. See ch 4 above.

¹³⁴⁹ Paras 35-36.

information sent on the initiative of BATSA and not that which is requested by a consumer, Farlam JA concluded that the requirements for justification in section 36 of the Constitution were met.¹³⁵⁰ It therefore can be deduced that the South African courts seems to be more likely to uphold a marketing ban in the name of public health than that of their Canadian colleagues, and certainly of their North American counterparts.¹³⁵¹

It is submitted that within the context of food marketing to children, such an exception for informational advertising would be of very little value to the marketing industry. From the description provided in chapter 2 of this study it is clear that the type of marketing techniques which are used to promote HFSS foods to children cannot be classified as purely conveying information regarding price and availability. The advertisements, for example, also do not provide information regarding the nutritional content of products. Chapter 3 explained that in this context the American Psychological Association concluded that there is no appeal to the rational or the transfer of knowledge in marketing methods aimed at children.¹³⁵² Instead, marketing strategies to children seek to create a connection between the food product and brand by using such themes as fun, happiness, adventure and other imagery that has little to do with the product's qualities. As a result, the popular characters most often used to convey this message in general do not provide any product information but rather appeals to children's sense for adventure and fun.¹³⁵³ Nevertheless, it is submitted that marketing practices aimed at children which provide mere information regarding the price and availability of a product, for example the use of a school noticeboard merely displaying the price of a hamburger, cannot be permitted in any event. This group of vulnerable consumers who do not understand the persuasive intent of even the most inconspicuous examples of promotion, must be protected from consuming foods which may be detrimental to their health. Furthermore, even in the example where the Canadian courts and Legislature have provided for an exception for informational advertising of tobacco products, this is not allowed to be aimed at children.

¹³⁵⁰ Paras 39-40.

¹³⁵¹ See in this regard ch 4 at 2 3 where it was explained that the approach in the USA seems to be that "if you can buy it, you may advertise it."

¹³⁵² Wilcox *et al* "Report of the APA Task Force on Advertising and Children" (20-02-2004) *American Psychological Association* 23.

¹³⁵³ Wilcox *et al* "Report of the APA Task Force on Advertising and Children" (20-02-2004) *American Psychological Association* 23-24.

The second possibility for less restrictive limitations to be placed on food-marketing practices is to limit the extent of the prohibition to only apply to marketing directed at children younger than a certain age. In *Irwin Toy v Quebec (Attorney General)*¹³⁵⁴ the Canadian Supreme Court accepted evidence that children up to the age of 13 are manipulated by advertising and that children are not as equipped as adults to evaluate the persuasive force of advertising.¹³⁵⁵ Since the limitation upon commercial speech was aimed only at those persons who were unable to understand its persuasive content and not a complete ban of advertising to children, the court found that the effect of the ban was not overbroad. As a result, it could be argued that regulation 65 of R429, prohibiting food marketing to all persons under the age of 18, is too extensive to fit the purpose of reducing the impact and exposure of such practices.

I have argued above that it is objectionable and arbitrary to exclude specific ages of children from certain measures of protection.¹³⁵⁶ Although it may be true that there are examples of age limits lower than 18 being used as restrictions in law,¹³⁵⁷ and that in this way the law excludes certain measures of protection to certain age categories of children, it is submitted that this should not be permitted in the context of marketing to children. In many of the other examples where age limits are set at a younger age, the legislative measures enable children to perform certain acts, empowering children to act in accordance with their evolving capacities. Children of all ages need to be protected against clever marketing tactics used to persuade children to persistently consume food that may be harmful to their health. This is especially true in the instance of a group of children who are at a particularly vulnerable age where body image, self-esteem, and peer pressure play a more important role than probably at any stage of life. Chapter 1 provided some statistics regarding the prevalence of obesity amongst adolescents in South Africa: in 2012, 23 percent of girls and 10 percent of boys aged 10 to 14 were overweight or obese, while 27 percent of girls and 9 percent of boys aged 15 to 17 were overweight or obese. Adolescents are also one of the groups of people who are especially prone to weight gain.¹³⁵⁸

¹³⁵⁴ *Irwin Toy Ltd v Quebec (Attorney General)* [1989] 1 SCR 927; 1989 CanLII 87 (SCC).

¹³⁵⁵ Per Dickson CJ, Lamer and Wilson JJ.

¹³⁵⁶ In ch 8 at 2 1 1 (f).

¹³⁵⁷ Thus, for example, the age for consent to sexual acts is set at 16 in terms of ss 15 and 16, read with s 1, of the Sexual Offences Amendment Act 32 of 2007, and in terms of s 129 a child who is above the age of twelve and is of sufficient maturity and who has the mental capacity to understand the implications of the treatment or surgery may consent to such procedures.

¹³⁵⁸ See ch 1 at 2.

Since adolescents are still less capable than adults of accurately assessing risks and rewards, it is exploitative to use marketing techniques which tap into these particular vulnerabilities. Adolescents need to be empowered in line with their evolving capacities but still should be protected against embedded techniques which aim to convince teenagers that there are only rewards and no consequences from consuming popular but unhealthy foods. Moreover, it is submitted that it is in any event impractical to impose a marketing restriction that only applies to a certain group of adolescents but not to others. Furthermore, in chapter 2 it was explained that even in instances where marketing campaigns were not aimed at children, children were able to associate certain characters with particular brands of products.¹³⁵⁹

Two aspects of Regulations R429 which arguably constitute a disproportional and overbroad limitation upon freedom of commercial speech, should be highlighted. The first hereof is the criteria found in guideline 14 to regulation 65 which prohibits the marketing of products which contain added fructose, added non-nutritive sweeteners, added fluoride or added aluminium through an additive or ingredient. As was explained above, the rationale for this prohibition is unclear since the purpose of the regulations is to reduce the impact that the marketing of unhealthy foods and non-alcoholic beverages have on children. Such unhealthy foods are stated to be those products that contain high levels of fat, saturated fats, trans-fatty acids, free sugars, and sodium. It therefore seems peculiar to also disqualify products that contain other ingredients but which are not mentioned in the stated aim of the guideline or the WHO Set of Recommendations on the Marketing of Foods and Non-alcoholic Beverages to Children. It is unclear as to whether or not the Department of Health also considers products that contain added fluoride, aluminium, fructose, and non-nutritive sweeteners to be detrimental to children's health since it is not presented as such in the explanatory notes to guideline 14. The WHO does not mention these additives in its general discussion documents that calls for action against non-communicable diseases or a restriction on food marketing either. It is therefore submitted that the use of this criteria as a requirement for food to be regarded as healthy cannot be justified as serving the stated purpose.

¹³⁵⁹ See the discussion of the effects of marketing in ch 2 at 2 3.

The other restriction that can be said to be an unjustifiable limitation upon commercial speech, is found in regulation 4. As was explained above,¹³⁶⁰ this proposed regulation intends to prohibit any food manufacturer from including any information on the label of their products, other than what is explicitly permitted in terms of the regulations. The implication of this provision is that labels on all food products will no longer be able to explain, for example, the history of the particular product or its unique character and production process. There are currently numerous examples of product labelling, including that of fruit juices and olive oils, which explain that a company may have had a rich or interesting history which is unique to its brand and which is used as a selling point. In other instances, the particular manufacturer may be concerned about a particular aspect such as sustainability and for this reason explains on the label that it has adopted certain procedures during its manufacturing process. Arguably, the proposed regulation 4 will also prohibit certain statements such as the claim that a certain energy drink “gives you wings” or that a chocolate bar is “for a 25 hour day”. It is submitted that if the information is not false or misleading,¹³⁶¹ a manufacturer may not be precluded from including this information on its products. It is highly improbable that the reasonable consumer, including the child consumer who is able to read, will believe that one will grow wings when consuming a drink. It is submitted that in other instances where the information provided on the packaging may sound more realistic, the present provisions of Regulations R146 provide adequate protection. As was explained above, a number of regulations prohibit manufacturers from making unsubstantiated claims.¹³⁶² Food manufacturers are also not allowed to claim that a food is “wholesome” or “nutritious” or possibly “good for you”. The effect of this regulation would be that manufacturers will not be allowed to promote their products on their packaging at all and adult consumers will never be given the opportunity to receive such information. As a result, it can be argued that the proposed regulation 4 will be overbroad and not effectively related to the purpose of protecting consumers against false and misleading claims.

¹³⁶⁰ Chapter 7 at 3 6.

¹³⁶¹ Which is prohibited in terms of, *inter alia*, ss 29 and 41 of the CPA, as discussed at 3 1 of ch 7 above.

¹³⁶² See for example regs 13, 51, 52 and 53 as discussed in ch 7 at 3 2 2.

3 2 3 *The limitation upon intellectual property*

Regulations 16(2) and (3), as well as 62(2) and (3) of the proposed R429 also will have an impact on the intellectual property which food manufacturers have in their brand names, as was described above.¹³⁶³ In terms of regulation 16 formulated foods¹³⁶⁴ may not make any health claim or claim to have nutrients or a category of nutrients and/or ingredient(s) with health benefits in the brand or trade name. This will mean that, for example, products such as Pro-vita, Super-C or Vitasnack will no longer be able to be used as brand names in South Africa. In terms of regulation 62 the brand name of foods and beverages may not contain content claims about energy, and therefore may not include the words "diet" or "zero" or words to a similar effect as a descriptor in the name, brand name or trade name or in any other manner. This will have the effect Coke Zero, Diet Sprite, Ultra-Mel Zero or Slim Slab will no longer be able to be used as trade or brand names in South Africa.

In chapter 4 of this thesis it was explained that intellectual property is also considered as property for the purposes of section 25 of the Constitution. This means that, should a limitation be imposed upon trade marks, in addition to the analysis which would have to take place in terms of section 36 of the Constitution, the requirements provided by section 25 will also have to be met. Section 25 provides that one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property. Should property be expropriated, it must be for a public purpose or in the public interest and compensation must be offered.¹³⁶⁵

It is submitted that the limitation proposed upon brand and trade names in terms of regulations 16 and 62 described above will amount to deprivation of property since some trade mark owners will not be allowed to use their intellectual property. It can furthermore be argued that it would amount to arbitrary deprivation of property since it is unclear as to what the purpose of such a deprivation of intellectual property would be. It is difficult to understand how the use of a brand name such as that the examples mentioned above, will cause any harm to consumers. Should the concern be that such trade marks may mislead consumers, it should rather be prescribed that the owners

¹³⁶³ In ch 7 at 3 6.

¹³⁶⁴ The term is not defined in the proposed regulations or in the Foodstuffs, Cosmetics and Disinfectants Act.

¹³⁶⁵ S 25(1) and (2) of the Constitution. The amount of compensation and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court, while s 25(3) provides the criteria to be used in order to determine such an amount.

of such trade marks must substantiate such claims in their trade names by providing the nutritional content of their products.

In addition, section 15(2) of the Foodstuffs, Cosmetics and Disinfectants Act specifically provides that no regulation shall prescribe a trade name or prohibit the sale of a product registered under a particular trade mark if that trade name or mark had already been in use by the time the act came into operation.¹³⁶⁶ The proposed regulations also appear to stand in direct contradiction to this provision of the act. The Pro-vita trade mark, for example, was first registered in 1926.¹³⁶⁷ The act provides, however, that an exception may be made in instances “where the Minister is satisfied that the trade mark or trade name falsely or misleadingly describes the foodstuff.” Once again, the original intention by the Legislature was clearly to prevent the use of names which misleads or falsely describes the product and not to merely deprive vested interests or property without a justifiable reason. It is furthermore submitted that, especially in cases where the manufacturer includes the word “zero” in the brand name, this generally refers to the fact that the product contains no sugar or no fat. In these instances, their claim should be substantiated by a nutritional analysis. If these aspects are proven to be true, the use of this terminology in the title cannot be regarded as being untruthful or misleading. Even in the event that the Department of Health can prove that the expropriation of such intellectual property will serve a public interest, sections 25(2) and (3) of the Constitution prescribes the manner and criteria in terms of which compensation for such expropriation must take place.

It is furthermore argued that these proposed regulations cannot be justified in terms of section 36 of the Constitution as reasonable and proportional limitations upon both the rights to commercial speech and property. The extent of such limitations is comprehensive in that it will prohibit the use of several brands in their totality. As a result, there will be a complete ban on the branding of products in South Africa, whilst their trade marks are recognised and used elsewhere in the world. The purpose of such limitations, furthermore, is unclear. Should it be presumed that the aim of such measures is to protect consumers and their health, the efficacy of such limitations on the use of a brand name must be established. It appears that a link between the use of a brand name or trade mark and the increased consumption of the product

¹³⁶⁶ This act came into operation on 1 January 1973.

¹³⁶⁷ Hospitality Marketplace “The History of Provita” (2012) *Hospitality Marketplace* <<http://www.hospitalitymarketplace.co.za/provita>> (accessed 10-07-2016).

represented by the brand name, has not been established. It is therefore unclear whether the prohibition on the use of a particular brand name or trade mark will cause a reduction in the consumption of a product. Moreover, there is no explanation or criteria built into this provision as to why the consumption of a product such as Provita, for example, should be reduced.

Finally, criteria (5) of guideline 14 proposes that vending machines selling, presumably, healthy foods at schools may not be branded. This seems to imply that the machines dispensing the products may not be allowed to display the brand or company name of the manufacturer but the products themselves may contain the company logo. It is submitted that this proposal is illogical and cannot be justified as a rational measure that will achieve the aim of reducing the exposure and impact of the marketing of food products saturated in salt, sugar and fat.

4 Conclusion

From the discussion above it is evident that the very limited amount of regulation that presently attempts to provide some guidance in this respect of food marketing to children, cannot be said to give effect to the best interests of children, either as a procedural guarantee, a principle of interpretation or as a substantive right. In fact, it seems clear that the interests of shareholders who demand profits, are regarded as more important than the right of the child to not be exploited. It can therefore be said that the South African marketing industry, as well as the food manufacturing businesses, do not meet their responsibilities to continuously consider the impact that their respective sectors have upon the rights of children.¹³⁶⁸

Although the proposed regulations of R429 may be regarded as an improvement to the current position in the sense that a legislative intervention can be accepted as a positive development, the execution thereof in its current format is arguably an effective solution. Many of the provisions are poorly drafted and some are vague, contradictory and superfluous. It is submitted that the aim of reducing the exposure and impact of the marketing of nutritionally poor food products may be achieved through much more concise and simple legislative measures. The final chapter of this thesis will provide a recommendation in this respect by formulating such a legislative

¹³⁶⁸ See the discussion of the Committee on the Rights of the Child's 16th General Comment at 3 3 2 of ch 3 this thesis.

attempt. Nevertheless, it is conceded that there are a number of marketing techniques, such as those found online and through product placement in television programming and films which provide particular regulatory challenges. In order to effectively address the effect that these marketing methods has on children, it is submitted that only a global strategy will have an impact.

CHAPTER 9: CONCLUSION AND RECOMMENDATIONS

1 Introduction

Chapters 2 to 6 of this thesis provided a description of the international standards and imperatives pertaining to the implementation of the best interests of the child when food is marketed to her. It was explained how food marketers spend vast amounts of money on promoting their products to children and how they constantly generate new and ingenious methods to grab children's attention. The association between fun and food is a method that is continuously used to market foods which contain high amounts of sugar, salt and fat to children. These ubiquitous marketing messages target every aspect of children's lives and are embedded in their school environments, sport activities, television, entertainment and areas of free play activities. Much money and effort are put into these promotional activities because marketing works: it has been proven to have the desired increase in consumption. A number of studies have found that there is a direct link between the promotion of food and children's dietary choices. Hence, this thesis has cited the research which clearly illustrates that many marketing practices have the sole purpose of encouraging children to eat foods which may have an adverse effect on their health and well-being.¹³⁶⁹

It is therefore not surprising that many non-governmental and inter-governmental organisations have strongly advised governments to reduce the exposure and impact of marketing practices of nutritionally poor food. Consumer protection organisations too have stressed the important role of the state in ensuring that consumers are provided with accurate information about food products. Governments should provide children with information and training on topics such as health, nutrition, prevention of food-borne diseases and food contamination, and product labelling, as part of their school curriculum. In chapter 5 of this thesis it was explained how international guidelines found in, for example, the WHO's Global Strategy on Diet, Physical Activity and Health and its Set of Recommendations on the Marketing of Foods and Non-alcoholic Beverages to Children (including its Framework for Implementation) call for decisive action by governments in ensuring accurate and balanced information are provided to consumers to enable them to make healthy choices easily, and ensure the availability of appropriate health promotion and education programmes. Such accurate

¹³⁶⁹ In ch 2 at 2 3 in particular.

and balanced information cannot be provided to children through marketing messages that encourage unhealthy dietary practices or physical inactivity. Exploitative marketing messages must be restricted in all formats and governments must ensure the effective implementation and monitoring of such restrictions. The WHO and the IASO are also unequivocal in their position regarding the role of the state in these efforts as being the key determining factor for its success. However, the vital role of all other stakeholders, including members of civil society, academia, the private sector and the advertising and media industry, cannot be ignored either. It remains the duty of Member States, nevertheless, to develop policies in this regard: the government must consider their country's available resources, the benefits and burdens of the different approaches upon all stakeholders involved and then develop a comprehensive and effective policy – one with clear definitions to facilitate uniform implementation but also to address specific national challenges. Once again the recommendation by the Sydney Principles must be emphasised. This is the only set of guidelines which explicitly explains that all regulatory efforts should be aligned with the rights of the child contained in the CRC. The Sydney Principles call on governments to introduce statutory measures which recognise and curb a broad spectrum of marketing activities and which will be effectively monitored and enforced.

In this regard, it is important to note that the Framework for Implementing the Set of Recommendations on the Marketing of Foods and Non-Alcoholic Beverages to Children recommend one of two approaches: either a comprehensive or a stepwise approach. The comprehensive approach recognises the child's right to a commercial free childhood and advocates that marketing be removed from all exclusively child-centred environments and media, including schools and children's television programmes, as well as from environments shared with adults, such as shopping malls and prime-time television. It is my submission that the stepwise approach, in terms of which the first steps of self-regulation have been taken, is one which has already been implemented in South Africa to some extent, and one which has not yet had the desired effect. Despite the fact that even the marketing industry itself, and in particular through the ICC, has recognised that children have the right to be protected against unethical and exploitative marketing practices, the current method of regulation in South Africa appears to be failing in ensuring such protection.

It was furthermore explained in chapter 6 that a number of jurisdictions have taken concerted steps to implement such a comprehensive approach endorsed by the WHO.

The most notable of these is the example of Brazil, where Resolution 163 prohibits all forms of marketing communications, including television and radio commercials, sales promotions, print advertisements, banners, websites, packaging, merchandising, and other promotional activities. However the one aspect which is absent from the Brazilian legislation is the fact that the prohibition does not protect all children but only applies to marketing communications targeting children under the age of twelve. In a number of other jurisdictions, such as Sweden, Norway and Quebec, the injunction against television advertising to children also only applies to messages aimed at children younger than twelve or thirteen. In the UK, Ireland, Mexico, Chile and Peru governmental restrictions on television advertising also only apply to commercials aimed at a certain age category of children, being children under the ages of fourteen or sixteen. South Korea appears to be the only jurisdiction in which the prohibition extends to advertising aimed at all children – that is people under the age of eighteen.

With respect to the removal of all marketing communications from all exclusively child-centred environments, the USA may be mentioned as an example of good intentions, though the proposed rule has not yet been implemented. Here the schools are not allowed to sell unhealthy food in their cafeterias, vending machines or at any fundraising event that occur during school hours and the plans are to also prohibit the marketing of any unhealthy foods in American schools. Marketing is already prohibited in schools in parts of Belgium and Germany, Quebec, Vietnam, Uruguay and in Portugal, whilst such practices are subject to approval in certain instances in France, Luxembourg, Greece and Finland.

In addition, it was explained in chapter 6 that most countries do not offer any solution as to the question of regulating online marketing messages, sponsorship or product placement. There are, however, numerous jurisdictions that have heeded the call for more product information, including the EU which will require food manufacturers in its member states to provide the nutrient content of their products to be displayed on all packaging.¹³⁷⁰ South Korea could once again be used as an example of good practice since in this country nutritional information is provided in a format which is easily understood and child user friendly. The colour-coded or “traffic light” system is also used in the UK, whilst a variant thereof, the “keyhole” system, is used in Sweden,

¹³⁷⁰ See ch 6 at 2 5 for a list of countries which already introduced such measures prior to the coming into operation of the EU Directive.

Norway, Denmark and Iceland. These pictorial and clearly noticeable messages convey immediately recognisable information to the consumers as to the nutritional values of the product. Some countries, including the UK, France, Chile, and Finland make use of warning labels, whereas others, including South Africa, have opted to force manufacturers to reduce the salt, fat or sugar content of their foods. Mexico, in the meantime, has introduced fiscal measures in the form of a tax on sugared beverages, with apparent success.

The central question that this research set out to answer, is whether or not the best interests of children are considered when food is marketed to them. It is submitted that this thesis has highlighted the complex nature of the best interests of the child. This multi-faceted concept cannot be used and implemented in the same way as any other fundamental right or principle. In addition to being recognised as a substantive right, the best interests of the child is also a standard and a procedural guarantee. It must be employed by every court, tribunal and administrative authority, and for the present purposes, in particular by the Legislature. In the context of food marketing to children, the South African Parliament must be able to provide a detailed exposition of how it took the best interests of children into account, considering that it is aware of the effect that food-marketing practices have on children. It must prove that it has duly deliberated on how marketing techniques affect children's rights to health, life, development and survival, their right to play and leisure, to not be exploited and to be able to express her view and receive information. The South African Parliament must do so at all stages of the adoption of laws, policies, strategies, programmes, plans, budgets, legislative and budgetary initiatives and guidelines.

The implementation of the best interests of the child also means that if any action is taken in the name of the best interests of the child, other rights affected by the decision are of secondary importance. This does not mean that the best interests of the child trump any other rights but if regulatory measures are introduced to protect children's vulnerability and their well-being, the freedoms of other role-players may be reasonably and proportionally limited. It has been explained that section 28(2) of the Constitution in particular, enshrining the best interests of the child, constitutes a substantive right, and for this reason, it may be limited in certain circumstances, as is the case with any other fundamental right enshrined in the Bill of Rights. At the same time the best interests of the child may limit any other fundamental right. The balance that needs to be struck is one that is always required in the South African democracy

where fundamental rights may have a restrictive effect on each another. The essential difference between the rights of children and the rights of adult persons, however, is that children's rights are the principal aspect to consider. All persons involved in any decision affecting a child must consider the child's interests as the supreme issue. Children's best interests stand first in line when fundamental rights and freedoms are to be considered and balanced against each other: the welfare of children is more important than anything else. Nevertheless, everything else may not be disregarded as unimportant and the best interests of the child do not outplay any other rights. In addition, this balance is one that must be guided by an interpretative measure which affirms the values of human dignity, equality and freedom but at the same time ascribes a particularly high value to the interests of the child. The interpretative process must first ensure that all aspects of children's moral, spiritual, and physical well-being are being satisfied and this must still be the case after the balance has been struck.

What is furthermore unique to the best interests of the child is that parents and caregivers too have the duty to comply with this standard. Parental responsibilities and rights have to be exercised with children's interests as the main concern.

From the description of the regulatory measures currently in place in South Africa, contained in chapter 7, and the assessment provided by chapter 8 of this thesis, it is apparent that the best interests of the child are not regarded to be the paramount consideration in respect of food marketing to children in South Africa. There is no indication that the best interests of children have been considered at all since there is in effect only a very weak self-regulatory framework in place that governs some aspects of food-marketing practices to children. Chapter 7 also contains a description of how the South African Department of Health has proposed far-reaching amendments in the form of regulations R429. It has been submitted in chapter 8 that these regulations, in its current format, cannot be adopted as an appropriate solution to the existing position. Apart from the lack of reference to the best interests of the child, it is submitted that some of the proposals impose an undue and disproportionate limitation on competing rights of commercial speech and intellectual property.

2 Recommendations

It is submitted that the first step required is that of a national policy document concerning the childhood obesity crisis, one in which the clear stated aim is that of

promoting the best interests of the child. Even though the Department of Health published a Strategy for the Prevention and Control of Obesity, it has been explained in chapter 8 that this document fails to mention the best interests of the child and fails to appreciate the level of governmental intervention that is required. One positive aspect of the Strategy is that it recognises the importance of a multi-sectorial approach. A childhood obesity strategy must also recognise that behind any attempt at regulating lifestyle, there must be a holistic, yet realistic, appreciation of the underlying phenomena. For this reason, it is crucial that children participate in the process of developing such a strategy, and that the reasons for their consumer behaviour in a South African context, is studied and considered in the development of the policy. The complex nature of weight gain and obesity, the role of genetic and epigenetic influences, and especially the crucial role of societal and environmental factors must be acknowledged, while at the same time the matters of personal responsibility and the evolving capacities of the child must be recognised. It is furthermore recommended that a situation analysis of the current regulatory environment be performed, in line with the proposal contained in the WHO Framework for Implementing the Set of Recommendations on the Marketing of Foods and Non-Alcoholic Beverages to Children. The policy must acknowledge that there are certain limits to intervention through means of the law but that it is the duty of a government to ensure an environment where it is easier to make healthier decisions than not. It is crucial that all relevant stakeholders from industry and other platforms should be responsible for the implementation, monitoring and evaluation of this policy. However, the South African Government must take the ultimate responsibility in ensuring that exploitative food-marketing practices of unhealthy food to children be prohibited.

It is strongly recommended that this policy adopts a comprehensive approach, one which recognises and enforces the child's right to not be exploited by marketing practices. The policy should also consider issues such as "positive" marketing which encourages healthy behaviour. Clear parameters and definitions must be formulated in order to facilitate uniform implementation. The South African government must consider the country's available resources and challenges, and in particular indicate which departments will be responsible for the enforcement of the various components of the policy. The policy must therefore establish specific monitoring and enforcement mechanisms, which includes definitions of sanctions and a complaints reporting system. It must furthermore ensure that mechanisms for future research and

continuous monitoring procedures evaluating the impact and effectiveness of the policy and its overall aim, are put in place. This policy document must explain how the rights of other stakeholders have also been considered and will be continuously be regarded as important. It must, however, be emphasised that the interests of children are the most important factor which will always receive priority and that the Department of Health will make every effort in ensuring that the relevant rights of children are effectively enforced.

Apart from introducing an efficient regulatory framework which prohibits marketing of nutritionally poor foods and beverages to children, the policy must present a clear outline of how the government plans to provide more information on nutritional health to consumers, and in particular to child consumers. A holistic approach, which involves role players from various areas of society and encouraging educational programmes and assistance, must be implemented. The most basic realisation of the right to information is to provide for the compulsory declaration of nutritional information on packaging of foods. It is submitted that a similar mechanism to that of the “traffic light” system or any other visual method be used to convey such information in a simple, yet effective and truthful manner to every consumer. Parents must be able to assist and guide their children in understanding this information in a manner which is consistent with the evolving capacities of their children. This information must also be assessable to consumers and children with visual impairments. The argument that this will result in an additional cost for the manufacturer may not be used since the provision of children's rights, in comparison to other socio-economic rights, is not subject to any internal limitation such as the availability of resources and legislative measures for their progressive realisation.

In order to determine which products may be marketed to children and which products may be provided to children in schools, it is crucial that an accurate and effective nutrient profiling mechanism is used. To this end, scientific research as to the nutritional needs of children will be required. It is submitted that, should this information not yet be available in South Africa, which is unlikely, this type of research be commissioned by the Department of Health. It is submitted that South Africa may also rely on the research that already has been performed by the WHO Regional Office for Europe in this regard. The benefits of the type of Nutrient Profiling model that this office developed, were explained in chapter 5.

Moreover, it must be borne in mind that the restriction of marketing practices should constitute only one component of a comprehensive policy framework. It is submitted that the policy should also support and further develop the efforts to reformulate foods so that all food products ultimately contain less salt, sugar and fat. The introduction of fiscal measures to discourage the purchase and consumption of nutritionally poor foods must be continued but only if it can be shown that such taxes reduce consumption.

As part of a comprehensive policy framework, the marketing of food products that do not meet the requirements, set by a realistic and effective nutrient profiling model, should be prohibited by legislation. It is therefore submitted that a set of regulations, promulgated in terms of the Foodstuffs, Cosmetics and Disinfectants Act, in the following proposed format, should be considered as a possible legislative solution to the matter of food marketing to children.

To be included in a regulation which provides the definitions of certain terminology used in the regulations:

“advertisement” refers to commercial communications or actions brought to the attention of any member of the public in any manner with the aim, effect or likely effect of –

(i) promoting the sale or use of a product, product brand element or a food or beverage manufacturer's name; or

(ii) being regarded as a recommendation any such products;

(b) includes product placement;

and “advertise” has a corresponding meaning.

“promote” means to –

(a) advertise, display or offer to supply any goods or services in the ordinary course of business, to all or part of the public for consideration;

(b) make any representation in the ordinary course of business that could reasonably be inferred as expressing a willingness to supply any goods or services for consideration; or

(c) fostering awareness of and positive attitudes towards products, brand element or manufacturer for the purposes of selling products through various means, including direct advertisement, sponsorship, incentives, free distribution, entertainment, organised activities, marketing of brand elements by means of related events and products through any public medium of communication including cinematographic film, television production, radio production or the internet;

(d) engage in any other conduct in the ordinary course of business that may reasonably be construed to be an inducement or attempted inducement to a person to engage in a transaction;

and “promotion” has a corresponding meaning.

“unhealthy food” means foods and beverages which do not pass the screening criteria of the Nutrient Profiling Model, using the electronic calculator, found on the web page of the Directorate: Food Control via the website of the Department of Health: <http://www.doh.gov.za> or <http://www.health.gov.za>”.

To be included as a regulation:

THE PROMOTION OF FOODS AND NON-ALCOHOLIC BEVERAGES TO CHILDREN

No food or non-alcoholic beverage shall be promoted to children unless it passes the screening criteria of the Nutrient Profiling Model, using the electronic calculator, by clicking on “Nutrient Profiling Model Calculator” found on the web page of the Directorate: Food Control via the website of the Department of Health: <http://www.doh.gov.za> or <http://www.health.gov.za> .

THE PROMOTION OF CERTAIN FOODSTUFFS AND NON-ALCOHOLIC BEVERAGES

- (a) The promotion of unhealthy food shall not take place on radio or television, between 06:00 to 21:00 or during any other times when children are likely to constitute more than 20 percent of the audience.*
- (b) The use of celebrities or public figures to promote unhealthy food is prohibited.*
- (c) Food and beverage advertisements shall not encourage or condone excess consumption, including foods which passes the screening criteria of the Nutrient Profiling Model. Portion sizes should be shown in an appropriate relation to the setting portrayed. Any promotional activities (such as redemptions, under-the-cap offerings, text message/SMS contests, et cetera) offering prizes or rewards which will require consumers to eat and drink immoderate quantities of any products in order to participate, shall not be permissible.*

3 Conclusion

The best interests of children must be considered in all matters that affect them. It must not only be acknowledged or referred to out of a sentimental sense of responsibility, but must be considered and implemented as the most important factor in any equation. The attitude with which the best interests of the child is being promoted is indicative of a society’s approach to children and the importance of their rights. In terms of the imperatives imposed by the CRC, a children’s rights approach requires an equal application of all categories of their rights, namely prevention, promotion, provision and participatory rights to be implemented in all actions relating

to children. As a result, it is an undeniable fact that as a signatory to the CRC, South Africa has to adopt this approach with respect to all matters that affect children. This approach must, in particular, be adopted in instances where children's rights to health, life, development and survival are being violated. If the choices that children and their parents make regarding the foods which they eat, are manipulated by market forces and an ambition for profit, whilst such foods have a detrimental effect on children's health, the state must step in and prevent such practices from continuing. If marketing communications exploit the vulnerabilities of children in a particular effort to increase the consumption of products that have damaging consequences for children, a government must protect its children from such techniques. If the South African government is serious about the health, survival and development of its society, it will realise that it needs to intervene and consider children's best interests as the paramount aspect in these circumstances.

The failure to meet international standards, and especially the overall lack of statutory regulation in South Africa restricting the various marketing techniques used to promote food products, disregard all of the categories of children's rights. This thesis has shown that the current regulatory framework does not protect or promote children's rights to health, life, survival and development, does not prevent them from being exploited, does not protect their right to free play, does not provide for their right to information and consequently, does not give children the opportunity to make informed choices and express their honest views regarding what it is that they need to eat. This thesis has also explained that the solution to this challenge is not a simple one and that just because children's rights are at stake, it does not mean that the rights of all other role-players can be ignored. The proposal of regulations R429 is therefore a welcome sign that the South African Government has appreciated that legislative intervention is required. Although in its current format the proposed measures may not provide the best answer to the challenge, it is hoped that there will be continued efforts to find a solution. The proposals that this thesis provides can also only be viewed as mere recommendations as to a possible answer. Nevertheless, the South African government must always and continuously consider the best interests of children to be of paramount importance, also when food is being marketed to them.

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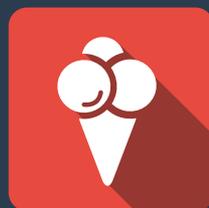
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WHO Regional Office for Europe NUTRIENT PROFILE MODEL



WHO Regional Office for Europe nutrient profile model

Abstract

This publication describes a regional nutrient profile model for use and adaptation by Member States of the WHO European Region when developing policies to restrict food marketing to children.

Keywords

CHRONIC DISEASE
OBESITY
NUTRITION POLICY
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Introduction

In July 2013 the ministers of health of the WHO European Member States adopted the Vienna Declaration on Nutrition and Noncommunicable Diseases in the Context of Health 2020 (1). This Declaration acknowledged the high burden of disease caused by unhealthy diets in many countries of the Region and expressed particular concern about the rise of overweight and obesity among children.

The Vienna Declaration included a commitment to take “decisive action to reduce food marketing pressure to children with regard to foods high in energy, saturated fats, *trans* fatty acids, free sugars or salt” and to develop and implement common policy approaches that promote, among other things, the use of common nutrient profiling tools. The development of a regional nutrient profile model as a common tool for use or adaptation by Member States across Europe (on a voluntary basis and taking into account individual national circumstances) has since been identified as a key activity in the European Food and Nutrition Action Plan 2015–2020 (2).

This nutrient profile model has been developed by the WHO Regional Office for Europe in response to this mandate and has been specifically designed for the purpose of restricting the marketing of foods to children. A 2013 report by the Regional Office indicated that few countries in the European Region have fully implemented restrictions on the marketing of foods to children (3). One of the reasons for the less than optimal progress in policy development may be the difficulty in overcoming the challenge of classifying foods for which marketing should be restricted, which in turn results from the lack of an appropriate nutrient profile model or other means of classifying foods. A handful of countries worldwide have developed, or are developing, nutrient profile models. Of the 53 countries in the Region, only Denmark, Ireland, Norway and the United Kingdom have used a nutrient profile model in connection with marketing restrictions.

WHO has been working to help Member States develop nutrient profile models since 2009. A Guiding Principles Framework and Manual has been developed and field-tested in six different countries (4). The first edition is due to be published shortly and a second edition, incorporating feedback from the workshops and field-testing, is planned. WHO has also developed a catalogue of nutrient profile models containing details of nutrient profile models that conform to certain standards (5).

The European Network on Reducing Marketing Pressure on Children, which is led by the Norwegian Directorate of Health

and involves 28 Member States and is facilitated by the Regional Office, has conducted some work related to nutrient profiling. Recent meetings of the Network have recognized the value of working towards a common nutrient profile model for use or adaptation by Member States in the European context. The Regional Office was requested to take action on this issue in seeking to develop a common approach to nutrient profiling across the Region. It is recognized that this work has implications for the other regional offices of WHO, and their collaboration has been sought throughout.

In December 2013, an expert meeting was held to agree on the principles and necessary steps in developing a common nutrient profile model (6) and to allow participants to draw on the lessons learned by those countries that have already developed nutrient profile models for the purpose of restricting the marketing of foods to children. Following this meeting, the Regional Office developed a proposal for a model and conducted a series of consultations on the draft with Member States (at the technical level), including in-country pilot testing and a face-to-face consultation during a meeting of the European Network on Reducing Marketing Pressure on Children, held in March 2014. The following countries have been actively engaged at various stages of the consultation process: Albania, Austria, Bulgaria, Czech Republic, Denmark, Estonia, Finland, Hungary, Israel, Norway, Poland, Portugal, Serbia, Slovenia, Switzerland and the former Yugoslav Republic of Macedonia. Other countries have expressed an active interest.

The in-country pilot testing involved countries applying the proposed model to a nationally generated list of between 100 and 200 foods that are either: (i) frequently marketed to children, or (ii) commonly consumed (ideally a combination of both). Countries were asked to comment on the food categories, the nutrient thresholds, the proposed exclusions and prohibitions, and to confirm that the model categorized foods in line with national food-based dietary guidelines. Countries responding to the consultation found the food categories and nutrient thresholds to be largely appropriate and only proposed minor modifications. There were some significant differences in the nutritional quality of frequently advertised and commonly consumed foods that countries reported, indicating that the marketing environment varies across the Region. Some countries reported food products being marketed or consumed with very high levels of nutrients of public health concern. All countries were, however, supportive and felt that the model was appropriately strict for their national context.

About the European nutrient profile model

Nutrient profiling is “the science of classifying or ranking foods according to their nutritional composition for reasons related to preventing disease and promoting health” (4). Nutrient profiling has been recognized by WHO as a useful tool for a variety of applications and is considered to be a critical tool for the implementation of restrictions on the marketing of foods to children (1,7). Nutrient profiling provides a means of differentiating between foods and non-alcoholic beverages (henceforth “foods”) that are more likely to be part of a healthy diet from those that are less likely (notably those foods that may contribute to excess consumption of energy, saturated fats, *trans* fats, sugar or salt). Nutrient profiling is a tool to categorize foods, not diets, but can be used through policy to improve the overall nutritional quality of diets.

A number of existing models were considered for use and adaptation at a European level. Worldwide, several governments – including those in the Australia, Ireland, New Zealand, Norway, Sweden, the United Kingdom and the United States – have developed nutrient profile models, some of which have now been incorporated into legislation. Ultimately, however, three European models were selected for consideration during this process: the Danish, Norwegian and United Kingdom models. These are the only three models that are currently in use in Europe for restricting marketing to children and have been either developed by governments or (in the case of the Danish model) endorsed by government.

After consideration, it was decided to base the European nutrient profile model on two existing models: the Norwegian model, developed by the Norwegian government and adapted by industry with minor changes for voluntary restrictions in Norway (8), and the model developed by the Danish Forum of Responsible Food Marketing Communication (9), endorsed by the Danish government for voluntary restrictions in Denmark. While all three models considered were relatively strict and categorized foods similarly (for example, in the majority of cases the same foods would/would not be permitted under any model), the rationale for selecting the Danish and Norwegian models was that they are based on food categories rather than using a scoring system. Category-specific models are considered easier to adapt or modify than models based on scoring, which is an important consideration for a regional model that countries will be looking to use nationally.

The final model consists of a total of 17 food categories (with some subcategories) (Annex 1). Categories 1–7 and 9 in the Regional Office model are broadly the same as the eight categories in the Norwegian model. Categories 8, 11 and 13–17 are taken from the Danish model. Categories 10 and 12 are new categories that were added during the consultation process with countries. Descriptions of the food products included/

not included within the food categories were taken from both models and supplemented with further examples. The list is not exhaustive and may be added to when used nationally.

Further indication of which food products fall within these categories is provided by using international customs tariff codes. This approach was first used by Hungary for the implementation of its public health tax, and subsequently used in the Norwegian nutrient profile model. The food tariff codes in the Regional Office nutrient profile model were taken from The Harmonized Commodity Description and Coding System, which is used globally including by the European Union. Every food product can be categorized according to a specific tariff code. These codes are provided at two levels of detail in this model: four digits, which is the position number and broadly relates to food product categories, and (where possible) a six-digit subposition number, which provides more detail about the specific subcategory of food products. At the national level, tariff codes can be further specified to eight digits, or item numbers. When adopting or adapting the model for use in national contexts, Member States may consider using the eight-digit codes. Food companies should be familiar with the international tariff code system.

Nutrient thresholds for the model have largely been taken from the Danish and Norwegian models. The nutrients covered by the model are: total fat, saturated fat, total sugars, added sugars and salt. Energy is included for category 9 (Ready meals, convenience foods and composite dishes), while non-sugar sweeteners have also been included for category 4 (specifically subcategories 4b Milk drinks and 4d Other beverages). Thresholds for the categories taken from the Norwegian model are largely as specified in that document, except in cases where the criteria for the same category are stricter or more comprehensive in the Danish model (categories 6, 7 and 9). For these categories, some of the thresholds are as specified by the Danish model. The thresholds for the Danish categories are largely as specified in the Danish model. Thresholds for categories 10 and 12 (new to this model) have been extrapolated from similar categories in the Danish model (the threshold for category 10 was taken from the equivalent threshold for category 8 and the thresholds for category 12 were taken from category 11). Thresholds for salt for categories 6, 8, 11, 12 and 14 have been taken from the Finnish Ministry of Trade and Industry Decree on food packing markings 1084/2004, section 25 (10).¹ For these categories, salt criteria were missing from the Danish and Norwegian models but during consultation and pilot-testing with countries it was considered important to set thresholds. According to the model, marketing for five categories is not permitted, meaning that no nutrient criteria are required. The same applies to the two food categories

¹ New thresholds will be implemented in Finland as part of this Decree from 2016, and the salt thresholds for the relevant categories in this model will then be updated accordingly.

for which marketing is always permitted. In a few instances stricter nutrient thresholds were introduced following consultation with countries and to be in line with WHO nutrition guidelines.

Marketing is prohibited if the product contains > 1 g per 100 g total fat in the form of industrially-produced *trans* fatty acids,² or ≥ 0.5% of total energy in the form of alcohol.

How to use this model

This model is designed for use by governments for the purposes of restricting food marketing to children.³ When determining whether a food product may or may not be marketed to children, a government (or food company) should take the following steps.

1. Identify which food category the product falls under. In some cases this will be clear according to the food category name (for example, breakfast cereals; yoghurts). In other cases, it may be necessary to reference the "included in category" or "not included in category" columns, and/or check the customs tariff code number.
2. Once the appropriate food category has been identified, the nutritional content of the food product must be cross-checked against the thresholds. A food product must not exceed on a per 100 g/ml basis any of the relevant thresholds for that food product category if marketing is to be permitted. For example, in the case of breakfast cereals, a product must not exceed the criteria for total fat, total sugars or salt.
3. The food products should, where possible, be assessed as sold or as reconstituted (if necessary) according to the manufacturer's instructions.
4. If the marketing is for a restaurant meal, including a quick-service or take-away meal of two or more menu items, all items must individually meet the relevant nutrient criteria.
5. If the product is a food that has a protected designation of origin or a protected geographical indication or is a guaranteed traditional speciality, marketing may be permitted according to national context.

²This is in line with the WHO recommendation on *trans* fat intake. It is recognized that some countries have implemented legislation that bans or virtually eliminates *trans* fats from the food supply and these countries may choose to adopt a per 100 g figure in line with their statutory limits.

³The definition of marketing to children will need to be established as part of the policy development process and may vary according to national context. WHO has defined marketing as "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" (11).

Definitions of terms used in this model

Total fat refers to the total fat content of the food product, which may be composed of different levels of fatty acids from the three broad groupings: saturated fatty acids, monounsaturated fatty acids and polyunsaturated fatty acids.

Total sugars refers to the total sugar content of the food product, which may be composed of: intrinsic sugars incorporated within the structure of intact fruit and vegetables; sugars from milk (lactose and galactose); and all additional monosaccharides and disaccharides added to foods by the manufacturer, cook or consumer; plus sugars naturally present in honey, syrups and fruit juices.

Added sugar. For the purpose of this nutrient profile model the term "added sugar" is used because available data in food composition tables refer to added sugar, defined here as all monosaccharides and disaccharides added to foods and beverages by the manufacturer, cook or consumer during processing or preparation. The WHO guidelines on sugars are for free sugars, covering monosaccharides (such as glucose or fructose) and disaccharides (such as sucrose or table sugar) added to foods by the manufacturer, cook or consumers in addition to sugars naturally present in honey, syrups, fruit juices and fruit concentrates (in this case, intrinsic sugars in, for example, fruits and vegetables are not considered free sugars).

Non-sugar sweeteners are food additives (other than a mono- or disaccharide sugar) which impart a sweet taste to a food. The technological purposes for this functional class include sweetener, intense sweetener and bulk sweetener. It should be noted that products such as sugars, honey and other food ingredients that can be used to sweeten are not associated with the term "sweetener".

Energy refers to the total chemical energy available in food and its macronutrient constituents (carbohydrates, fats, proteins).

Saturated fat refers to the major saturated fatty acids in the diet, namely C14, C16 and C18, except in the case of milk and coconut oil where saturated fatty acids range from C4 to C18.

Industrially produced trans fatty acids refers to the major *trans* fatty acids in the diet which are typically isomers of 18:1 *trans* derived from partial hydrogenation of vegetable oils, a technique that produces semi-solid fats for use in commercial baking and frying, margarines and food manufacturing.

Salt – 1 g of sodium is equivalent to about 2.5 g of salt.

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Annex I. WHO Regional Office for Europe nutrient profile model

Food category	Included in category (examples)	Not included in category (examples)	Customs tariff code (position and/or subposition number) ^a	Marketing not permitted if product exceeds, per 100 g ^b							
				total fat (g)	sat. fat (g)	total sugars (g)	added sugars (g)	non-sugar sweeteners (g)	salt (g)	energy (kcal)	
1	Chocolate and sugar confectionery, energy bars, and sweet toppings and desserts	Chocolate and other products containing cocoa; white chocolate; jelly, sweets and boiled sweets; chewing gum and bubble gum; caramels; liquorice sweets; spreadable chocolate and other sweet sandwich toppings; nut spreads, including peanut butter; cereal, granola and muesli bars; marzipan	Chocolate flavoured breakfast cereals; cakes and pastries; biscuits and other baked goods covered in chocolate	17.04; 18.06; some of 19.05; 20.06; some of 20.08; some of 21.06	Not permitted						
2	Cakes, sweet biscuits and pastries; other sweet bakery wares, and dry mixes for making such	Pastries; croissants; cookies/ biscuits; sponge cakes; wafers; fruit pies; sweet buns; chocolate-covered biscuits; cake mixes and batters	Bread and bread products	19.01.20; 19.05.20; 19.05.31; 19.05.32	Not permitted						
3	Savoury snacks	Popcorn and maize corn; seeds; nuts and mixed nuts; savoury biscuits and pretzels; other snacks made from rice, maize, dough or potato		08.01; 08.02; 10.05; 19.04.10, 19.04.20; some of 19.05; 20.05.20; 20.08.11; 20.08.19; 20.08.99			0		0.1 ^c		
4	Beverages										
a)	Juices	100% fruit and vegetable juices; juices reconstituted from concentrate, and smoothies		20.09	Not permitted ^d						
b)	Milk drinks ^e	Milks and sweetened milks; almond, soya, rice and oat milks	Cream	Some of 04.01; some of 04.02; 22.02.90	2.5			0	0		
c)	Energy drinks ^f			Some of 22.02	Not permitted						
d)	Other beverages	Cola, lemonade, orangeade; other soft drinks, sweetened beverages, mineral and/or flavoured waters (including aerated) with added sugars or sweetener	100% fruit and vegetable juices; milk drinks	22.01; some of 22.02			0	0			
5	Edible ices	Ice cream, frozen yoghurt, iced lollies and sorbets		21.05	Not permitted						
6	Breakfast cereals ^g	Oatmeal; cornflakes; chocolate breakfast cereals; mueslis		19.04.10; 19.04.20	10		15			1.6	
7	Yoghurts, sour milk, cream and other similar foods	Yoghurt; kephir; buttermilk; flavoured sour; fermented milk and drinking yoghurt; fromage frais; cheese-based and other yoghurt substitutes; yoghurt products containing additional ingredients (such as fruit; muesli); cream	Milks and sweetened milks; almond, rice and oat milks	Some of 04.02; 04.03; 04.04; some of 04.06.10; 19.01.10; 19.01.90; some of 21.06	2.5	2.0	10			0.2 ^c	
8	Cheese	Medium-hard and hard cheeses; soft cheeses; fresh cheese (such as ricotta, mozzarella); grated or powdered cheese; cottage cheese; processed cheese spreads		04.06	20					1.3	
9	Ready-made and convenience foods and composite dishes	Pizzas; lasagne and other pasta dishes with sauces; quiches; ready meals; ready-made sandwiches; filled pastas; soups and stews (packaged or tinned); mixes and dough		Some of 16; some of 19.01.20; 19.02.19; 19.02.20; some of 19.05; some of 20.05; 21.04	10	4	10			1	
10	Butter and other fats and oils	Butter; vegetable oils, margarines and spreads		04.05; 15		20				1.3	
11	Bread, bread products and crisp breads ^g	Ordinary bread (containing cereal, leavens and salt); gluten-free bread; unleavened bread; crisp breads; rusks and toasted breads	Sweet biscuits; pastries; cakes	19.05.10; 19.05.40; 19.05.90	10		10			1.2	
12	Fresh or dried pasta, rice and grains		Filled pasta and pasta in sauce	10; some of 11; 19.02 excluding 19.02.20	10		10			1.2	
13	Fresh and frozen meat, poultry, fish and similar	Eggs		02 excluding 02.10; some of 03 excluding 03.05	Permitted						
14	Processed meat, poultry, fish and similar	Sausage, ham, bacon; chicken nuggets; smoked and pickled fish; tinned fish in brine or oils; fish fingers and breaded/battered fish	Pepperoni pizza	02.10; some of 03; some of 16	20					1.7	
15	Fresh and frozen fruit, vegetables and legumes	Fruit and vegetables; legumes; starchy vegetables, roots and tubers	Tinned fruits, vegetables and legumes; fruit in syrup; dried fruit; frozen fruit with added sugar	07 excluding 07.10, 07.11, 07.12, 07.13; some of 08 excluding 08.01; 08.02; 08.11; 08.12; 08.13; 08.14	Permitted						
16	Processed fruit, vegetables and legumes	Tinned fruit, vegetables and legumes; dried fruit, ^h dried vegetables and legumes; marmalade; jams; pickled vegetables and fruit; stewed fruits; fruit peel; frozen French fries; frozen fruit with added sugar	Fruit juice	07.10; 07.11; 07.12; 07.13; some of 08.03; some of 08.05; some of 08.06; 08.11, 08.12, 08.13 and 08.14; 20.01; 20.02; 20.03; 20.04; 20.05; 20.06; 20.07; 20.08.20, 20.08.30, 20.08.40, 20.08.50, 20.08.60, 20.08.70, 20.08.80; 20.08.93; 20.08.97; 20.08.99	5		10	0		1	
17	Sauces, dips and dressings	Salad dressings; tomato ketchup; mayonnaise; ready-to-use dips; soya sauce; mustard and mustard flour		21.03	10			0		1	

Sat. fat = saturated fat.

^a Where appropriate, a four-digit position number has been given. Where "some of" is indicated, this means that most (but not all) food products in this position number are covered. In some instances a six-digit subposition is provided so as to pinpoint specific products more easily.

^b The food products should, where possible, be assessed as sold or as reconstituted (if necessary) according to the manufacturer's instructions.

^c Salt equivalent.

^d This is in line with the WHO Guidelines on Sugars Intake for Children and Adults (in press), as fruit juices are a significant source of free sugars for children. However, it is recognized that countries, according to national context and national food-based dietary guidelines, may take the decision to permit the marketing of 100% fruit juices in small portions.

^e Follow-up formulas and growing-up milks are not covered by this model. It should be noted that World Health Assembly Resolution WHA39.28, adopted in 1986, states that the practice of providing infants with specially formulated milks (so called "follow-up milks") is not necessary. Further, any food or drink

given before complementary feeding is nutritionally required may interfere with the initiation or maintenance of breastfeeding and should, therefore, be neither promoted nor encouraged for use by infants during this period.

^f There is no agreement on a definition of energy drinks. However, such a category of drinks includes a variety of non-alcoholic beverages. While caffeine is considered the main ingredient, a number of other substances are often present. The most common of these include guarana, taurine, glucuronolactone and vitamins. A common feature is that these beverages are marketed for their actual or perceived effects as stimulants, energizers and performance enhancers.

^g For this category, countries may choose to include a threshold for minimum dietary fibre content, for example >6g dietary fibre.

^h This is in line with the WHO Guidelines on Sugars Intake for Children and Adults (in press), as dried fruits are a significant source of concentrated sugars for children. However, it is recognized that countries, according to national context and national food-based dietary guidelines, may take the decision to permit the marketing of dried fruits in small portions.

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1. DEFINITIONS

In these regulations, any expression to which a meaning has been assigned in the Act shall bear such meaning and, unless inconsistent with the context –

“**address**” means a physical address and includes the street or road number and name, the name of the town, village or suburb and, in the case of a farm, the name or number of the farm and of the magisterial district in which it is situated, and, in the case of imported foods, if otherwise, the name and address as provided for in the Codex Alimentarius Commission's document entitled: General Standard for the Labelling of Pre-packaged Foods, CODEX STAN 1-1985;

“**added sugar**” means any sugar added to foods during processing, and includes but is not limited to: mono and disaccharides (sugars), honey, molasses, sucrose with added molasses, coloured sugar, fruit juice concentrate, de flavoured and/or deionised fruit juice and concentrates thereof, fruit nectar, fruit and vegetable pulp, dried fruit paste, high-fructose corn syrup (HFCS), malt or any other syrup of various origins, whey powder, milk solids or any derivative thereof;

“**allergen**” means any substance that causes an allergic or other adverse immune response;

“**allergen cross-contamination**” means the presence of any common allergen within a food, though not intentionally added to the food, as a result of the cultivation, production, manufacturing, processing, preparation, treatment, packing, packaging, transport or holding of such food or as a result of environmental contamination;

“**allergen control program (ACP)**” means a program for the identification and management of ingredients which are allergens or contain allergens and for the prevention of allergen cross-contamination at every stage of the manufacturing process; from harvesting through packaging and retailing;

“**annexure**” means an annexure to these regulations;

“**antioxidant as additive**” means an additive that prolongs the shelf life of foods by protecting against rancidity, colour changes or other deterioration caused by -oxidation;

“**antioxidant as a nutrient**” for the purpose of nutrient content claims, means vitamins A, C and E, riboflavin, copper, selenium, zinc, polyphenols in olive oil, beta carotene, lycopene, lutein and zeaxanthin;

"**audit**" in terms of certification means a systematic and functionally independent examination to determine whether activities and related results comply with planned objectives or legislative requirements;

"**batch**" means a definite quantity of a commodity produced essentially under the same conditions, not exceeding 24 hours;

"**beer**" means a product of alcoholic fermentation of wort prepared from starch and sugar containing raw materials with or without the addition of potable water, flavoured with hops or hop products, produced in such a manner that at least 35 per cent of the fermentable extract of the wort is derived from malted barley or malted wheat;

"**Best Before**" or "**Best Before End**" means the date which signifies the end of the period under any stated storage conditions during which the product will remain fully marketable and will retain any specific qualities for which tacit or express claims have been made. However, beyond this date the food may still be perfectly satisfactory;

"**brine**" means a solution of sodium chloride in water where the solution is used for curing, and/or preserving;

"**bulk stock**" means either a container that is used to display several individual units suitable for sale by itself, or several units, which are pre-packed or wrapped for the purpose of bulk sales of foods, which are offered for sale to consumers in quantities of their own choice from a large-scale container, or foods, ingredients or additives which are sold in large quantities to other food manufacturers or catering establishments;

"**catering establishment**" means any establishment including a vehicle or a fixed or mobile stand where, in the course of business, ready-to-consume foods are prepared for direct sale to the consumer for consumption;

"**cereal**" means a product derived from the grain or edible seed of any cultivated grasses of the family *Poaceae*, which may be used as a food, such as wheat, rice, oats, barley, rye, maize, millet;

"**certification**" means the procedure by which a certification body accredited to ISO Guide 65 (or ISO 17065) provide written assurance that a product, process or service is in conformity with certain standards;

"**certifying organisation**" means an organisation performing conformity assessment against

specified requirements through an audit process resulting in a certificate being issued;

“chilled” or “refrigerated” means stored at an appropriate temperature ranging from 0°C to 7°C for a specific product type, but specifically means a maximum core temperature of 4°C for raw unpreserved fish, molluscs, crustaceans, edible offal, poultry meat and milk, and for any other perishable food that must be kept chilled to prevent spoilage, a maximum temperature of 7°C;

“chocolate confectionery” means any food that is meant to be consumed as a sweet snack and which contains chocolate and/or other ingredients as described in Codex Alimentarius;

“claim” in relation to a food, means any written, pictorial, visual, descriptive or verbal statement, communication, representation or reference brought to the attention of the public in any manner including a trade name or brand name and referring to the characteristics of a product, in particular to its nature, identity, nutritional properties, composition, quality, durability, origin or method of manufacture, production or storage;

“Codex” means the latest adopted version of the relevant text of the Codex Alimentarius Commission of the Joint FAO/WHO Food Standards Programme;

“colourant” means any substance described as such in the Regulations Relating to Food Colourants published under the Act;

“common allergen” means egg, cow's milk, crustaceans, molluscs, fish, peanuts, soybeans, tree nuts and any significant cereals (as defined), as well as ingredients derived from these foods which have retained their allergenicity in the final end product;

“comparative claim” means a claim that compares certain nutrient level(s) and/or energy value(s) and/or alcohol level(s) of two or more similar foods;

“complementary medicine” has the meaning as defined in the General Regulations Made in terms of the Medicines and Related Substances Act, 1965 (Act No 101 of 1965): Amendment;

“compound ingredient” means any ingredient, which itself is composed of two or more ingredients;

“container” means any packaging medium of foods for sale at retail level or for catering purposes for delivery as a single item or for free sample hand-out purposes, whether by completely or partially enclosing the food, and includes wrappers or shrink-wrap for individual and multiple-unit-packs;

“contaminant” means any biological or chemical agent, physical foreign matter or other substance not intentionally added to the food, which is present in such food as a result of the production (including operations carried out in crop husbandry, animal husbandry and veterinary medicine), manufacture, processing, preparation, treatment, packing, packaging, transport or holding of such food or as a result of environmental contamination and which may compromise food safety, quality or suitability;

“cold extraction” or “cold pressed” in terms of edible vegetable fat and oil manufacturing, means oil which has been obtained at a temperature of not more than 27°C by percolation or centrifugation of the crushed fruit or seeds;

“daily serving” means the average daily intake in terms of a food vehicle as defined in Regulations Relating to the Fortification of Certain Foodstuffs under the Act;

“dairy product” means a primary dairy product, a composite dairy product or a modified dairy product as defined by the regulations published in terms of the Agricultural Product Standards Act, 1990 (Act No.19 of 1990), as amended;

“date of manufacture” means the date on which the food becomes the final end product as described on the label;

“deflavour” means the intentional removal of the bulk of volatile and non-volatile natural flavourings from fruit juices or fruit juice concentrates;

“deionise” in terms of fruit juices or fruit juice concentrates means the intentional removal of the bulk of mineral salts from fruit juices or fruit juice concentrates;

“dietary fibre” means edible carbohydrate polymers with ten or more monomeric units from plant origin only, which are not hydrolysed by the endogenous enzymes in the small intestine of humans and belong to the following categories:

1. Edible carbohydrate polymers naturally occurring in the food as consumed,
2. Edible carbohydrate polymers, which have been obtained from food raw material by physical, enzymatic or chemical means and which have been shown to have a physiological effect of benefit to health as demonstrated by generally accepted scientific evidence to competent authorities, or

3. Synthetic edible carbohydrate polymers which have been shown to have a physiological effect of benefit to health as demonstrated by generally accepted scientific evidence to competent authorities;

“drained weight” means the net mass of the remaining solid component after the liquid medium has been removed via drainage;

“endorse” means to confirm or convey or declare an approval of a particular food with the permission of an endorsing body through the endorsing body's specific logo, picture or text, but excludes certification;

“endorsing entity” means an entity which is permitted by these regulations;

“end product” means a final product defined by ISO 22000:2005 that will undergo no further processing by a food manufacturer;

“energy intake” means the ingestion, orally or otherwise (such as enteral) of energy-providing substances or ingredients;

“engineered nanomaterial” means any intentionally produced material that has one or more dimensions of the order of 100 nm or less or that is composed of discrete functional parts, either internally or at the surface, many of which have one or more dimensions of the order of 100 nm or less, including structures, agglomerates or aggregates, which may have a size above the order of 100 nm but retain properties that are characteristic of the nanoscale. Properties that are characteristic of the nanoscale include:

- i) Those related to the large specific surface area of the materials considered; and/or
- ii) Specific physic-chemical properties that are different from those of the non-nanoform of the same material;

“enrichment” means the voluntary addition, by a manufacturer, of one or more nutrient to a processed/manufactured food, with the sole purpose of adding nutritional value to the food, excludes “fortification” and is not permitted in raw-processed meat and poultry;

“enteral” means the provision of nutrients directly into the gastrointestinal tract or stomach, orally or through a tube or catheter, when oral intake is inadequate or not possible;

“evidence-based nutrition” means the application of the best available systematically assembled scientific evidence in setting nutrition policy and practice in terms of the reduction of risk for the development of a non-communicable disease;

“fake food” means a food or beverage consisting solely of a mixture of food additives and/or ingredients, not ordinarily consumed on its own in the same form as the ingoing additive or ingredient, excluding water and salt;

“fat” means the sum of fatty acids expressed as triglyceride equivalents;

“flavouring” is as defined under the Regulations Related to Flavouring, published under the Act;

“flavour enhancer” means an additive (non compound food) with the exclusive technological function of enhancing, intensifying or supplementing the existing taste and/or odour of a food;

“four confectionery” means any cooked food ready for consumption without further preparation (other than reheating) and intended to be consumed within 48 hours of manufacture, having as its characteristic ingredients ground cereal and sweeteners and/or other ingredients, but exclude dry biscuits;

“food additive” means any substance, regardless of its nutritive value, that is not normally consumed as a food by itself and not normally used as a typical ingredient of the food, which is added intentionally to a food for technological (including organoleptic) purposes in the manufacture, processing, preparation, treatment, packing, packaging, transport or storage of the food, and results, or may reasonably be expected to result (directly or indirectly) in such a substance, or its by-products, becoming a component of, or otherwise affecting the characteristics of such foods and excludes any substance added to foods for maintaining or improving nutritional qualities or any contaminants and sodium chloride, but exclude processing aids;

“food constituent” means any biologically active substance other than a nutrient, which is naturally present in certain single ingredient agricultural foods;

“food business operator” means a food manufacturer, seller or importer as defined by the Act;

“food home industry” means a micro business, involved in the manufacturing of food products on small scale for sale and is a sole proprietor, company or close corporation with an annual turnover less than the amount determined by SARS from time to time;

“food for catering purposes” means those foods intended for use in catering establishments, hospitality services including restaurants, schools, hospitals and similar institutions;

“food for special medical purposes (FSMPs)” means foods which are specially formulated and

processed, with distinctive nutritional properties, presented for the dietary management of persons with specific medical conditions, administered through any enteral route under medical supervision;

“food vending machine” means any mechanical device, whether attended to or not, by means of which foods are sold;

“formulated meal replacement” means a food, in powder or liquid form, specifically designed to replace one or more daily meals for the purpose of weight loss;

“fortification” means the addition of one or more micronutrients by means of a prescribed fortification mix to a food vehicle whether or not it is normally contained in a food vehicle for the purpose of preventing or correcting a demonstrated deficiency of one or more nutrients in the general population or specific population group of South Africa as determined by the Department;

“Front of pack labelling or FOP” means the emphasis of certain nutritional information associated with the risk of developing and contributing to non-communicable diseases, outside of the Table with Nutritional information;

“frozen” means stored at any appropriate temperature equal to or colder than 0°C which will maintain and preserve the inherent quality of a specific product in a hard, frozen condition or state and includes frozen foods for which special temperature requirements were stipulated for in regulations under the Agricultural Product Standards Act 1990, (Act No.119 of 1990), the National Regulator for Compulsory Specifications Act, 2008 (Act No.5 of 2008) and any other Regulations promulgated under the Act;

“function claim” means a claim that describes the physiological role and function of a nutrient or substance in growth, development and normal physiological functioning of the body;

“generic health promotion” means the promotion of a healthy diet and lifestyle to reduce risk of developing non-communicable diseases, including but not limited to cancer, heart disease, hypertension, Diabetes Mellitus, obesity (which includes food choices, exercise, serving sizes, food preparation methods, et cetera) by an organization or foundation, which focuses its work on educating consumers about these aspects without promoting the consumption or sale of any particular food, brand name, trademark or company in any manner, and where records shall be kept of all generic health promotional materials;

“Glycaemic Index (GI)” means a measure of the blood glucose responses of glycaemic carbohydrates in a food as determined by the latest edition of ISO 26642:2010 standard;

“Glycaemic load (GL)” means a numerical expression of how much impact a specific carbohydrate food serving will have in affecting blood glucose levels and which is calculated according to the formula:

$$GL = \frac{\text{Carbohydrate content (in grams) per serving} \times GI}{100}$$

“gluten” means the main protein that occurs naturally in significant cereals such as wheat, rye, oats, barley, triticale and spelt relevant to the medical conditions Coeliac disease and dermatitis herpetiformis;

“glycaemic carbohydrate” means the sum of all the analytical values of the following individual carbohydrate components which are available for metabolism, namely glucose, fructose, galactose, sucrose, lactose, maltose, trehalose, maltodextrins and starch;

“Good Manufacturing Practice” (GMP) means that combination of manufacturing, quality control and hygiene procedures aimed at ensuring that food products are consistently manufactured to their specifications;

“guidelines” means guidelines accompanying and supporting these Regulations as updated and amended from time to time by the Director-General;

“health claim” means an effect on the human body, including an effect on one or more of the following –

- (a) a biochemical process or outcome;
- (b) a physiological process or outcome;
- (c) a functional process or outcome;
- (d) growth and development;
- (e) physical performance;
- (f) mental performance;
- (g) a disease, disorder or condition; and
- (h) oral hygiene;

“health practitioner” means any health professional referred to in the Health Professions Act, 1974 (Act No.56 of 1974), the Allied Health Professions Act, 1982 (Act No.63 of 1982), the Pharmacy Act, 1974 (Act No.53 of 1974), the Nursing Act, 2005 (Act No.33 of 2005) or the Dental Technician Act, 1979 (Act No.19 of 1979);

“honey” as defined by the Agricultural Products Standards Act, 1990 (Act No.119 of 1990);

“**ILAC**” means the International Laboratory Accreditation Cooperation;

“**hydrogenated**” means fully hydrogenated;

“**intrinsic sugar**” means sugars which form an inherent part of certain unprocessed single ingredient agricultural foods which are naturally occurring and are always accompanied by other nutrients;

“**ingredient**” for the purpose of the list of ingredients on the label of a compound food, means any substance, including any food additive, which is used in the manufacture or preparation of a food and which is present in or on the final product, although possibly in a modified form;

“**ingredient content claim**” means a claim that describes the level of certain ingredients which are simultaneously nutrients in an end product and exclude additive claims;

“**import**” is as defined in the Act;

“**irradiation**” means deliberate exposure to ionising radiation;

“**label**” means any permanent tag, brand, mark, sticker, pictorial, graphic or other descriptive matter, which is written, printed, stencilled, marked, embossed, impressed upon, or permanently attached to a container of a food, and includes labelling for the purpose of promoting its sale or disposal;

“**liquid medium**” means water, or aqueous solutions of sugar, sugars or other sweeteners, food acids or salt, brine, vinegar, fruit and vegetable juices in canned fruits and vegetables, or alcohol beverages in the case of typical traditional South African dishes, either singly or in combination;

“**main ingredient**” means the ingredient in a food which contributes the highest percentage mass in the end product;

“**main panel**” means that part of the label that bears the brand name or trade name and product name in greatest prominence and which is likely to be seen at first glance by the consumer at the time of purchase, that enables the consumer to immediately identify a product in terms of its character or nature;

“**malnutrition**” means both under-nutrition and over-nutrition;

"manufacture" as defined in the Act;

"mechanically pressed" in terms of edible vegetable fat and oil manufacturing has the same meaning as "cold pressed";

"medicinal claim" means any words, graphics, pictorials or implications that a relationship exists between a food or substance of a food and the cure or alleviation of any abnormal health condition or physiology of the human body;

"milk" means cow's milk unless otherwise specifically indicated;

"Moderate Acute Malnutrition (MAM)" as defined by the WHO means weight-for-height indicator between minus 3 and minus 2 standard deviations (SD) / z-score between -3 and -2 of the international standard, and mid-upper arm circumference (MUAC) between 11.5 cm and 12.5 cm in children 6-60 months old;

"naked bread" means bread, bread rolls and bread buns displayed for sale without being pre-packaged;

"name" means a word or words giving a true description of the nature of the food product concerned, sufficiently precise to avoid misleading or confusing the consumer with regard to the true nature, physical condition, type of packing medium, style, condition, content and type of treatment it has undergone and to enable such product to be distinguished from products with which it could be confused with and, if necessary, including a description of the product where the name of a food is not self evident or self-explanatory;

"nectar" as defined in relevant regulations under the Agricultural Products Standards Act, 1990 (Act No.119 of 1990);

"non-addition claim" means any claim that a sodium, salt or sugar containing ingredient has not been added to a food, either directly or indirectly where the ingredient is one whose presence or addition is permitted in the food and which consumers would normally expect to find in the food;

"non-nutritive sweetener" means a sweetener listed in Regulations Relating to the Use of Sweeteners in Foods under the Act as amended, or a mixture of such non-nutritive sweeteners, of which an amount with the sweetening equivalent of 5 g of sucrose does not have an energy value of more than 8 kJ;

“Not Acute Malnutrition (NAM)” as defined by the WHO, means Low weight-for-age; below minus two standard deviations (SD)/ z-score $-2SD$ below the international reference for weight-for-age also known as undernutrition;

“novel fibre” has the same meaning as prebiotics;

“NRV” means Nutrient Reference Value and is a set of numerical values which is based on scientific data for the purpose of nutrition labelling and relevant claims for the general population from 37 months and older. NRVs are based on levels of nutrients associated with nutrient requirements, or with the reduction in the risk of diet-related non-communicable diseases;

“NSP” means the non-starch or non- α -glucan polysaccharides of carbohydrates namely, cellulose, hemicellulose, pectin, arabinoxylans, β -glucan, glucomannans, plant gums, mucilages, and hydrocolloids;

“nutrient” means any natural or synthetic substance normally consumed as a constituent of a food, which provides energy and/or which is needed for growth, development and maintenance of life and physiological health, or of which a deficit may cause characteristic biochemical or physiological changes to occur;

“nutrient content claim” means a claim that describes the present level of certain micro and macro nutrients, carotenoids or energy contained in an end-product food;

“Nutrient profiling model” means an electronic tool based on a set of scientific criteria to categorise foods according to their total nutritional composition for the purpose of screening foods to determining their eligibility to make nutrient, ingredient content and/or health claims;

“nutrition claim” means any representation that refers to a specific nutrient or food constituent content of a particular food such as a nutrient content claim, a comparative claim, but excludes:

- (a) the mention of substances within the list of ingredients; and
- (b) the mention of substances in the Table with Nutritional Information;

“omega-3 fatty acids” means one or more of the following;

- alpha-linolenic acid (ALA);
- omega-3 derivative docosahexaenoic acid (DHA $22:6\omega3$);
- omega-3 derivative eicosapentaenoic acid (EPA $20:5\omega3$); and
- omega-3 derivative docosapentaenoic acid (DPA $\omega3, 22:5\omega3$);

“**partially whole grain**” means the addition of a specified percentage of intact whole grain kernels to a food;

“**peanuts**” mean the kernels of the underground fruit of the plant *Arachis hypogaea* of the species/legume family *Fabaceae*;

“**polyol**” means an alcohol containing multiple hydroxyl groups;

“**polyunsaturated fatty acids**” mean fatty acids with cis-cis methylene interrupted double bonds;

“**poultry**” means any chicken, duck, goose, guinea fowl, ostrich, partridge, pheasant, pigeon, quail, turkey and the chicks thereof;

“**prebiotics**” or novel fibres mean edible carbohydrates, of which the degree of polymerization (DP) varies between two (2) to sixty four (64) monomeric units; which resist hydrolysis by mammalian enzymes that allow specific changes, both in the composition and/or activity in the indigenous human gastrointestinal microflora, which confer benefits upon host well-being and health, demonstrated by generally accepted scientific evidence to competent authorities;

“**pre-packaged**” means the packaging of a food in packaging material or made up in advance in a container, ready for sale to the consumer or to a catering establishment, so that such food cannot be altered without opening or changing the packaging but does not include individually wrapped one-bite sweets or chocolate confectionery which is not enclosed in any further packaging material and is not intended for sale as individual items, and does not include the outer containers of bulk stock;

“**preservative**” means an additive that prolongs the shelf life of a food by protecting against deterioration caused by microorganisms;

“**processed**” means a food that has been subjected to any process which alters its original state, but excludes –

- (i) harvesting;
- (ii) slaughtering;
- (iii) cleaning;
- (iv) decapitating;
- (v) defeathering;
- (vi) dehairing;
- (vii) eviscerating;
- (viii) portioning;

- (ix) sectioning;
- (x) mincing;
- (xi) deboning;
- (xii) washing;
- (xiii) chilling;
- (xiv) removal of fish scales,
- (xv) removal of blemishes and foliage of fruit and vegetables;
- (xvi) removal of inedible skins and seeds of fruits and vegetables;
- (xvii) removal of the skins of animals; or
- (xviii) the mixing, compounding or blending of two or more single ingredient agricultural ingredients that have not been processed;

“processed meat” means products containing meat as defined in the South African National Standard SANS 885:2011;

“processing aid” means any substance consumed as a food ingredient by itself, intentionally used in the processing of raw materials, foods or its ingredients, to fulfill a certain technological purpose during treatment or processing and which may result in the non-intentional but unavoidable presence of residues or derivatives in the final product;

“protein” means—

- (i) organic compounds consisting of amino acids, arranged in a linear chain and joined together by peptide bonds between the carboxyl and amino groups of adjacent amino acid residues;
- (ii) any of a group of complex organic macromolecules that contain carbon, hydrogen, oxygen, nitrogen, and usually sulphur and are composed of one or more chains of amino acids;
- (iii) measured as the sum of individual amino acid residues (the molecular weight of each amino acid less the molecular weight of water) plus free amino acids; and
- (vi) of which the nitrogen shall be multiplied with the appropriate factor as listed in Annexure 2;

“pulp” as defined in relevant regulations under the Agricultural Products Standards Act, 1990 (Act No. 119 of 1990);

“puree” as defined in relevant regulations under the Agricultural Products Standards Act, 1990 (Act No. 119 of 1990);

“raw-processed meat” means raw meat products from all species of meat animals and birds intended for human consumption, cured or uncured, or a combination thereof, pre-packaged or un-prepacked, that may have undergone freezing and/or partial heat treatment, and where any added

ingredients and/or additives and added water, including brine, is(are) retained in or on the product as sold, but excludes products covered by the SANS 885:2011 standard;

“ready-to-consume-food” means any solid or liquid food prepared into a form in which it is normally consumed without further processing;

“reconstituted whole grain” means the process of separating the main components of the intact grain kernel (endosperm, bran and germ) through a physically disrupting process such as milling, heat treating or halting the lipase activity in the germ to stabilise it and recombining or reconstituting the main components in a proportion less than 100% of the naturally occurring intact grain kernel, with substantial losses in essential minerals, vitamins and phytonutrients and a substantial increase in the Glycaemic Index value, when compared to the intact whole grain kernel;

“reputable laboratory” means a laboratory which has the required accreditation for each method and technique used for the purpose of nutritional and microbiological information on labels of foods by the South African National Accreditation System (SANAS) or another recognised international accreditation authority which is a member of the International Laboratory Accreditation Cooperation (ILAC) and part of the International Laboratory Accreditation Arrangement;

“salt” means the compound Sodium Chloride in the ratio Na:Cl of 40:60;

“SANAS” means the South African National Accreditation System, a statutory body governed by the Accreditation for Conformity Assessment, Calibration and Good Laboratory Practice Act, 2006 (Act No. 19 of 2006);

“scale label or sticker” means a self-adhesive label applied to the packaging of a food bearing a brief description sufficient to identify the food, mass or quantity contained and any other required information under applicable regulations, and which has been printed using a mass measuring instrument approved for trade in terms of the Trade Metrology Act (Act No. 77 of 1973);

“self” means as defined in the Act;

“sell by date” or “display until date” means the last date of offer for sale to the consumer after which there remains a reasonable storage period at home;

“serving” in relation to a food, means the mass, volume or number, as the case may be, of a food which is typically consumed as a single serving by the average consumer and which is referred to in the nutritional information table;

"significant cereal" means any one of the following cereals:

- (i) Wheat, meaning any species belonging to the genus *Triticum*, including varieties such as kamut and spelt;
- (ii) Rye, meaning any species belonging to the genus *Secale*;
- (iii) Barley, meaning any species belonging to the genus *Hordeum*;
- (iv) Oats; or
- (v) Crossbred hybrids of wheat, rye or barley (e.g., triticale, which is a cross between wheat and rye);

"single ingredient agricultural commodities" mean:

- (i) single type fresh fruit or vegetables;
- (ii) single type frozen fruit or vegetables;
- (iii) single type dehydrated vegetables without any added additive or ingredient;
- (iv) single ingredient dried fruit without any added additive or ingredient;
- (v) Single type fruit or vegetable juice without any additive(s);
- (vi) whole eggs;
- (vii) raw, fresh or frozen unprocessed fish and marine products;
- (viii) unprocessed meat of birds and animals referred to in Schedule 1 of the Meat Safety Act, 2000; (Act No. 40 of 2000);
- (ix) black and green tea, honeybush tea and rooibos tea;
- (x) vinegar;
- (xi) pure/100% honey;
- (xii) single ingredient whole grain cereal kernels, excluding rice;
- (xiii) single ingredient raw oil seeds;
- (xiv) raw soya beans;
- (xv) raw groundnuts without any added ingredient or additive;
- (xvi) single ingredient dry legumes;
- (xvii) milk, dairy cream and unsalted butter;
- (xviii) raw, fresh tree nuts without any added additive or ingredient; and
- (xix) fresh or dried coconut flesh;
- (xx) Single ingredient vegetable oil such as 100% sunflower oil

"starch" means edible starch as listed in Guideline 2 and excludes chemically modified starches;

"strict vegetarian diet" means a diet which excludes all ingredients and additives derived from animal origin and the expression "vegan" has the same meaning;

"substance" is a collective term for any chemical, enzymes, microbiological, or physical component, nutrient, or food constituent present in or added to a food;

“sugar” means all mono and disaccharides;

“the Act” means the Foods, Cosmetics and Disinfectants Act, 1972 (Act No. 54 of 1972);

“therapeutic claim” has the same meaning as medicinal claim;

“total carbohydrates” means the sum of the mono-, di- oligo- and polysaccharides as indicated in Guideline 2 (sum of glycaemic carbohydrates, polyols, prebiotics and dietary fibre); .

“total sugar” means the sum of all intrinsic and added sugars but exclude polyols or sugar-alcohols;

“traceable/traceability/product tracing” means the ability to follow the movement of a food through specific stage(s) of production, processing and distribution;

“traditional African beer” means a product produced by the alcoholic fermentation of malted grain of sorghum, maize, finger millet or pearl millet, be it in a state of alcoholic fermentation or have its alcoholic fermentation arrested, contain at least four per cent solids derived from the grain or meal, and if sold in powder form, comprises not more than three parts by mass of milled sorghum or maize malt, not less than seven parts by mass of milled, precooked maize, unmalted sorghum grain or meal and does not contain or is not flavoured with hops or any product derived from hops;

“tree nuts” mean almonds (*Prunus dulcis*, syn. *Prunus amygdalus* Batsch, *Amygdalus communis* L., *Amygdalus dulcis* Mill), brazil nuts (*Bertholletia excelsa*), cashew nuts (*Anacardium occidentale*), hazelnuts (*Corylus avellana*), macadamia nuts (*Macadamia ternifolia*), pecan nuts (*Carya illinoensis*[Wangenh] K. Koch), pistachio nuts (*Pistachia vera*) and walnuts (*Juglans regia*);

“typical values” mean the average of real, typical, representative, composite nutritional or microbiological values of a food sampled and analysed according to the relevant criteria and methods stipulated in Guideline 9 and Codex, and which has the required accreditation by the South African National Accreditation System (SANAS) or other recognised international accreditation authorities which are part of the ILAC arrangement;

“vegetarian” means a diet which-

- (i) consists of ingredients of multi-cellular plant, fungal, algal and bacterial origin;
- (ii) may include honey, dairy foods produced without any slaughter by-products, and/or unfertilised eggs obtained from live animals; and

(iii) excludes all animal flesh and products obtained from the slaughter of an animal, such as gelatine, animal fats, caviar and roe;

"uncommon allergen" means any food or non-food allergen not classified as a common allergen;

"Use by" (Best Consumed Before, Recommended Last Consumption Date) means the date which signifies the end of the estimated period under the stated storage conditions, after which the product probably will not have the quality attributes normally expected by the consumers and after which date the food should not be regarded as marketable;

"unprocessed meat" means uncooked, uncured meat which has not been processed or heat treated and which does not fall under the categories "processed meat" or "raw-processed meat";

"weight loss substance or ingredient" means a specific ingredient or substance that is a normal constituent of food, or is added; including vitamins, minerals or herbs which is not scheduled substances under the Medicines and Related Substances Act, 1065 (Act No.101 of 1965), as amended, that is linked to or by implication has an effect on reducing energy intake and/or on energy uptake, and/or increases energy expenditure; including through actions such as thermogenesis, increased satiety, appetitive suppression, absorption blocking effect, or similar actions;

"weight loss" means an intentional imbalance between energy intake and/or uptake and energy expenditure accounting for a reduction in total body weight by a loss of total body fat and/or abdominal fat; and a subsequent increase in lean tissue;

"whole grain" means intact grains from cereals, of which the inherent characteristics have not been physically disrupted through processes such as cracking, which naturally contain all the components namely endosperm, bran, germ, all the macronutrients, micronutrients and trace elements of the original unprocessed whole kernel, and inherently have a low glycaemic response;

"whole grain flour" means flour obtained by the milling of whole grains which still contains all the components namely endosperm, bran, germ, all the macronutrients, micronutrients and trace elements of the original unprocessed whole kernel in its original form, usually having a short shelf life in itself as well as the food in which it is used, and which, as a result of the milling, results in a product which has a higher glycaemic response than intact whole grains;

"whole wheat" has the same meaning as whole grain.

GENERAL PROVISIONS

General

2. No person shall,-
 - (a) manufacture, import, sell, donate or offer for sale any pre-packed food, unless the food container, or the bulk stock from which it is sold or taken, is labelled in accordance with these regulations;
 - (b) neglect to fully and accurately inform, omit or withhold information pertaining to a food's character, origin, composition, quality, nutritive value, nature or other properties from the consumer or manufacturer, which may result in misinformation to consumers at any point between farm and fork.

3. A food business operator responsible for the information required by these Regulations shall be the operator under whose name or business name the food is marketed or, if that operator is not established in South Africa, shall be the name of the importer into South Africa.

4. No person shall-
 - (a) promote or advertise a food in any manner, which contains any information, claim, reference or declaration not explicitly permitted on the label by these regulations; and
 - (b) include any information, other than what is required by these regulations, on the label.

5. Subject to the specific conditions of regulation 64(3) a non-repacked food that is displayed for sale, shall have the particulars required in terms of these regulations to be displayed in its immediate proximity, unless otherwise indicated.

6. All information relating to the requirements of these Regulations shall be kept on record by the manufacturer, importer, or seller, in the form of Supplier Ingredient Information File as per example provided in Guideline 1. This applies to every ingredient, additive or substance used in the manufacturing of the food, irrespective of whether the food is intended for direct sale or for further processing and/or manufacturing. This is required for the purpose of traceability issues and subsequent labelling. All Supplier Ingredient Information Files shall be kept on record by the manufacturer or importer, whatever is applicable, and failure to produce the relevant documentation within two (2) working days, upon request by an inspector or employee of the Department, shall constitute an offence.

7. No label, promotion or advertisement of a food shall refer to the Act, Regulations, the Department of Health, Provincial or Local Government, or any official of the said Department, Provincial or Local Government.

(4) In cases where several items are included in an outer wrapper or sleeve, which during normal usage by the consumer will be discarded, the date shall appear on the packaging that will be retained by the consumer until consumption.

(5) The date shall be indicated in the order, "Day-Month-Year", when numbers only are used. In the case where an order other than "Day-Month-Year" is used, the month shall be indicated in letters, either written out in full or abbreviated (e.g. "Feb" or "February"), and the year shall be written out in full (e.g. 2014).

Prohibited statements

16. (1) The following information or declarations shall not be reflected on a label or advertisement of a food:

(a) words, pictorial representations, marks, logos or descriptions which create an impression that such a food is supported, endorsed, complies with or has been manufactured in accordance with recommendations by-

(i) a health practitioner, (individually or as part of any professional or consumer advisory organisation consisting of one or more of the aforementioned health practitioners);

(ii) Endorsing entities (excluding any Fauna and Flora related certifying and endorsing entities, or other endorsing entities certifying certain safety or quality aspects of foods), unless approved by the Director-General and which can provide a complete dossier with proof of the fact that:

(aa) the endorsing entity is involved in generic health promotion activities, which promote the reduction of risk of developing one or more particular non-communicable diseases to all consumers in South Africa, or other public health concerns, through specific food choices supported by evidence-based nutrition science;

(bb) the endorsing entity is independent of, free from influence by, and not related to the supplier of food/manufacturer in relation to which an endorsement is made;

(cc) the food business operator has no financial interest in the endorsing entity, nor benefits financially from applying the endorsement, has not established, either by itself or with others, the endorsing body and exercises no direct or indirect control over the endorsing body;

(dd) the foods being endorsed are fully compliant with all applicable regulations published under the Act;

- (ee) the directions of the endorsement entity and the criteria it uses, do not contradict the requirements of these regulations, specifically in terms of the criteria related to nutrition, ingredient content and health claims;
- (ff) the food which is endorsed, is eligible for making a nutrition, ingredient content or health claim according to the Nutrient Profiling Model; and
- (gg) in the case of fruit or vegetable juices being endorsed, the fruit or vegetable juice shall not contain added fructose, shall qualify for the non-addition claim for sugar and shall have a dietary fibre content per 100 ml that equals at least 80% of the dietary fibre content of 100 g of the same fresh fruit or vegetable.
- (b) endorsements by specific religious entities, unless food business operators give consumers their constitutional right of freedom of choice, by making such foods without any particular religious endorsement available on the shelf at all times.
- (c) endorsement logos representing a particular industry, categorised according to the South African Food Based Dietary Guidelines and its accompanying Food Guide where applicable, for the promotion of the products of such an industry, unless the message in terms of the recommended number of servings per day shall comply with the guidelines of the National Department of Health/s Food Guide and subject to regulation 53(11), may include the wording of the applicable Food Based Dietary Guideline.
- (d) an endorsement or testimonial of an individual in the form of a picture, written or verbal statement or in any other form, when the individual's endorsement or testimonial specifically imply any type of energy, nutrition, ingredient content or health claim;
- (e) an endorsement by a food business operator in terms of its nutritional or health properties unless compliant and permitted by these Regulations.
- (f) the words "health" or "healthy" or any other words, logos or pictorials with a similar meaning in any manner including the name and trade name; except in the case of the fortification logo for food vehicles as determined by regulations made under the Act and regulation 51(2) and where the word(s) is/are used in permitted function or disease risk claims;
- (g) the words "wholesome" or "nutritious" or any other words, logos or pictorials with a similar meaning in any manner including the name and trade name;

(h) a claim that a food provides complete or balanced nutrition or any other words, logos or pictorials with a similar meaning in any manner including the name and trade name;

(j) subject to the provisions of the Medicines and Related Substances Act, 1965 (Act No.101 of 1965) as amended, the word "cure", "restore", "heal" or any other medicinal or therapeutic claim;

(2) Any formulated food, whether in solid or liquid form, which claims certain beneficial nutrients or category of nutrients and/or ingredient(s) with health benefits in the brand or trade name-

(a) will be allowed to use the brand or /trade name until 1 May 2015: Provided the brand/trade name was registered before 1 May 1995, where-after the use of such brand or trade name shall not be permitted anymore; and

(b) shall, if the brand or trade name of the food was registered after 1 May 1995, not be permitted to use such brand/trade name after the day of final publication of these Regulations.

(3) Any formulated food, whether in solid or liquid form, which contains a health claim in the brand or trade name-

(a) will be allowed to use the brand or /trade name until 1 May 2015: Provided the brand/trade name was registered before 1 May 1995, where-after the use of such brand or trade name shall not be permitted anymore; and

(b) shall, if the brand or trade name of the food was registered after 1 May 1995, not be permitted to use such brand/trade name after the day of final publication of these Regulations.

Negative claims

17. (1) Subject to the conditions for nutrient content claims in Table 2 of Regulation 54(16), and referring to Guideline 4, no claim, declaration or implication shall be made on the label of a food that such food –

(a) alone possesses a particular characteristic, property or substance when in fact similar foods in the same class or category also possess the same characteristic, property or substance; unless –

(i) the characteristic, property or substance is often found or commonly present in the referred-to class or category of foods; and

(ii) the claim, declaration or implication is worded in a generic manner as follows:

SUBSTANCE	PERMITTED WORDING FOR A CLAIM	ADDITIONAL CONDITIONS AND/OR RESTRICTIONS OF USE OF THE CLAIM OR THE FOOD AND/OR ADDITIONAL STATEMENT OR WARNING	FOOD CATEGORY
		of 70 or more), such as glucose, glucose polymers and sucrose. In addition, these beverages should contain between 20 mmol/ litre (460 mg/litre) and 50 mmol (1,150 mg/ litre) of sodium, and have an osmolality between 200-33- mOsm/kg water.	
Carbohydrate-electrolyte solutions	Carbohydrate-electrolyte solutions enhance the absorptions of water during physical exercise	In order to bear the claim carbohydrate-electrolyte solutions should contain 80-350kcal/ litre (335 – 1463 kJ/ litre) from carbohydrates, and at least 75% of the energy should be derived from carbohydrates which induce a high glycaemic response (Glycaemic Index value of 70 or more), such as glucose, glucose polymers and sucrose. In addition, these beverages should contain between 20 mmol/litre (460 mg/litre) and 50 mmol (1,150 mg/litre) of sodium, and have an osmolality between 200-33- mOsm/kg water.	
High biological value (quality) protein	<ul style="list-style-type: none"> Protein contributes to a growth in muscle mass 		
High GI	"High GI foods generally provide a fast release of energy and are ideal for regular sportsmen after one hour's exercise or during and after exercise lasting more than one hour and diabetic individuals during and after exercise lasting at least two hours or more."	Subject to the requirements of regulation 56	

Claims for slimming/ weight loss

62. No claim shall be made that a food is an aid to weight reduction, weight loss, diet or slimming, or words to a similar effect, unless the following requirements are complied with:-

- (1) The food shall be labelled with the words "ONLY EFFECTIVE AS PART OF AN ENERGY-CONTROLLED PRUDENT DIET AND AN INCREASE IN MODERATE PHYSICAL ACTIVITY" in bold, capital letters not less than 3,0 mm in font height.

- (2) Subject to these regulations, in particular regulations 53(2) and 53(12) and notwithstanding regulation 55(1)(c), the total energy of the food shall be at least 40% less than the same quantity of reference food; Provided that a content claim about energy, including the word "diet" or "zero" or words to a similar effect, shall not be used as a descriptor in the name, brand name or trade name or in any other manner.
- (3) No words, pictures or graphics which imply that the food has weight loss properties, may result in weight loss or slimming, directly or indirectly, shall be permitted, unless fully compliant with regulation 62.
- (4) The single serving indication is equal or less than the single serving sizes indicated in Annexure 6 and a statement to the effect that the slimming effect is only applicable when consumption of the food is in accordance with the recommended serving size as well as the recommended number of daily servings as indicated on the label, in capital letters not less than 3,0 mm in font height;
- (5) Subject to the composition criteria referred to in Regulation 56(2), the GI of the food shall be low, and the GL equal to or less than 10 for a snack or a carbohydrate-rich main meal component, equal to or less than 20 for a complete breakfast or light meal and equal to or less than 25 for a complete main meal.
- (6) No reference shall be made to the rate (e.g. "lose 3 kg in one week") or amount (e.g. "lose 3 kg") of weight loss, or any suggestion that it would be detrimental to health not to consume a certain type of food, or a claim which suggest that health could be adversely affected by not consuming the food.
- (7) In the case of formulated meal replacements for the purpose of slimming, weight loss/ weight reduction, or diet, the food shall in addition to Regulation 62 comply with the Codex standard for formula foods for use in weight control diets.
- (8) No food containing a weight management substance or ingredient that is linked to or is implicated to have an effect on reducing energy intake and/or on energy uptake, and/or increases energy expenditure; result in actions such as thermogenesis, increased satiety, appetitive suppression, absorption blocking effect, or similar actions shall be permitted, unless a dossier which provides conclusive scientific substantiation, in the format and to the requirements of Guidelines 15 and 16, is submitted to the Directorate: Food Control prior to market appearance; Provided that no scheduled substance under the Medicines and

are required, these statements shall be indicated on the label in accordance with relevant regulations under the Act;

(f) unprocessed fish, marine products, meat of animals and birds referred to in Schedule 1 of the Meat Safety Act, 2000 (Act No.40 of 2000) that is intended for human consumption in South Africa, that have not been pre-packed, except-

- (i) for an indication of the type of animal, bird, fish or marine product;
- (ii) the information of (i) above-
 - (aa) appears on a poster placed in close vicinity of where the food is offered for sale;
 - (bb) is easily legible and in clear view of the consumer;
 - (cc) is in black, bold letters of which the size is suitable for easy legibility on a poster, where such foods are exhibited for sale in bulk;

(g) unprocessed fish, marine products, meat of animals and birds referred to in Schedule 1 of the Meat Safety Act, 2000 (Act No. 40 of 2000) that is intended for human consumption in South Africa, pre-packed in such a way that the purchaser is able to identify the contents of the package, except for an indication of the type of animal, bird, fish or marine product, the date on which the product was packaged, the price per kilogram, as well as the price per container, printed on the scale label;

(h) any ready-to-consume food, prepared and sold on the premises of a catering establishment for consumption, except for information on the list of ingredients, allergens, QUID, an appropriate date marking, printed on the scale label or kept on file and made available immediately upon request, whatever the case may be;

(i) unpacked or transparently-packed servings of foods that are sold as snacks or meals on the premises of preparation, except for information on the list of ingredients, allergens, QUID, an appropriate date marking and price, printed on the label scale;

(j) flour confectionary intended to be consumed within 48 hours of manufacture, except for information on the list of ingredients, allergens, QUID, an appropriate date marking and price, printed on the label scale; and

(k) ice, except for the name and address of the manufacturer.

COMMERCIAL MARKETING OF FOODS AND NON-ALCOHOLIC BEVERAGES TO CHILDREN

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



health

Department:
Health

REPUBLIC OF SOUTH AFRICA

DRAFT GUIDELINES

**THESE DRAFT GUIDELINES ARE APPLICABLE TO THE DRAFT REGULATIONS RELATING
THE
LABELLING AND ADVERTISING OF FOODS (R429 OF 29 MAY 2014),
FOR COMPLIANCE PURPOSES**

GUIDELINE 14

GUIDELINES ON:

CRITERIA FOR THE COMMERCIAL MARKETING OF FOODS AND NON-ALCOHOLIC BEVERAGES TO CHILDREN ACCORDING TO THE LATEST REGULATIONS RELATING TO THE ADVERTISING AND LABELLING OF FOODSTUFFS (NO. R 429 OF 29 MAY 2014).

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The policy aim of the National Department of Health is-

- * to reduce the impact on children of the marketing of unhealthy foods and non-alcoholic beverages, which are high in fat, saturated fats, trans-fatty acids, free sugars, and sodium (salt),***
- * to reduce the risk of developing non-communicable diseases (NCDs) such as cardiovascular disease, diabetes mellitus, some cancers and obesity.***

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KEYWORDS

Advertising

Labelling

Non-communicable diseases

ACRONYMS

ASASA – Advertising Authority of South Africa

FBDG - Food Based Dietary Guidelines

INS - Integrated Nutrition Strategy

NCDs – Non-communicable diseases

WHA – World Health Assembly

WHO – World Health Organisation

1. OBJECTIVE

The objective of this Guideline is to provide a framework for implementing a set of recommendations and regulations to limit children's exposure to the marketing of foods and non-alcoholic beverages (resolution WHA63.14), endorsed by the 63rd World Health Assembly (WHA) in May 2010.[1]

2. PRINCIPLE

This guideline is intended to support the new proposed Regulations relating to the Labelling and Advertising of Foods, which will be published in terms of the Foodstuffs, Cosmetics, and Disinfectants, 1972 (Act 54 of 1972), as amended in 2009. The guideline is applicable to food manufacturers, retailers, restaurants, supermarkets, television and radio stations, public relations and advertising agencies, schools, organizers of sporting or children's events, etc., with the intention to manufacture, sell, market, advertise, or otherwise promote food to children. The guideline is intended to provide criteria for advertising and marketing of food to children in order to reduce the impact on children of marketing of foods high in fat, saturated fat, *trans*-fatty acids, total sugars, or total Sodium in a manner that does not compromise their health.

The Guideline is also intended to provide education and public information in promoting a healthy diet, in response to a resolution WHA63.14)[1] and to implement "a set of recommendations to limit children's exposure to the marketing of foods and non-alcoholic beverages".

3. BACKGROUND

The World Health Organization (WHO) as body responsible for directing and coordinating authority for health within the United Nations system, has as part of its responsibility to provide leadership on global health matters, recognized that there is a growing burden of NCDs, which was recognised by the adoption of a target to reduce non-communicable diseases (NCDs) by 25% by 2025.

In 2010 the WHO Global Status Report on NCDs[2] reported that diseases such as cardiovascular diseases (like heart attacks and stroke), cancers, chronic respiratory diseases (such as chronic obstructed pulmonary disease and asthma) and diabetes, are major causes of death and illness around the world with an estimated more that 36 million deaths each year occurring due to NCDs. Low- and middle-income countries such as South Africa, now bear nearly 80% of the burden from diseases like cardiovascular disease, diabetes, cancer and chronic respiratory diseases. One of the four main risk factors for NCDs is an unhealthy diet. Although poor diets can contribute to NCDs without leading to obesity, overweight and obesity are among the most visible signs of this crisis. The

dramatic rise in obesity in children and youth worldwide means children are at an increased risk of obesity and related chronic diseases in adulthood. Unhealthy diet is a risk factor for non-communicable diseases. The risks presented by unhealthy diets start in childhood and build up throughout life. In order to reduce future risk of non-communicable diseases children should maintain a healthy weight and consume foods that are low in fat, saturated fat, trans-fatty acids, free sugars, and salt. Unhealthy diets are associated with overweight and obesity, conditions that have increased rapidly in children around the world over recent years. It has been widely reported that many countries, including low- and middle- income countries, are witnessing the fastest rise in overweight and obese young children which are contributed by unhealthy diet and lifestyles and occur both in higher and lower income groups. According to the WHO, deaths are attributed by among other risks physical inactivity (6%) and overweight and obesity (5%).

A new study by researchers at NYU School of Medicines reveals for the first time that metabolic syndrome (MetS) is associated with cognitive and brain impairments in adolescents.[3]

In May 2010, the 63rd World Health Assembly (WHA) endorsed a set of recommendations to limit children's exposure to the marketing of foods and non-alcoholic beverages (resolution WHA63.14).[1] One of the key drivers for the increase in NCDs is the promotion, marketing and advertising by food companies of products that are high in fat, sugar and salt and low in nutritional value. A number of voluntary and self-regulatory codes and pledges have since been introduced by food and beverage companies. South Africa has developed a Nutrient Profiling Model with commitments from the food industry and other stakeholders, from which criteria could be developed to determine which foods could or could not be advertised.

South African Context

As a country, South Africa acknowledges the need to tackle the crisis in childhood obesity and that this requires a number of actions to improve children's diets and promote exercise, hence the need to give attention to foods and beverages which children can be encouraged to consume. In South Africa there is an "Integrated Nutrition Strategy (INS)", which was designed to address under- and over-nutrition and operates as the Integrated Nutrition Program (INP), The Strategy aims to facilitate an inter-sectoral collaboration in order to ensure that nutrition problems are solved. The strategic priorities include the "reduction of diseases of lifestyle related to over-nutrition", and promoting healthy lifestyles. The South African Food Based Dietary Guidelines (FBDG) was developed to specifically deal with this priority as well as the promotion of "Healthy Lifestyles" campaign. This has also prompted the Department of Health to develop, as part of the Labelling Regulations, the regulations on foods and beverages, which may not be marketed or advertised to children.

Self-regulation overview

The Advertising Standards Authority of South Africa (ASASA) is a well-established and accepted body with a code on advertising. The Code has an appendix to the code on food and beverage advertising,

which was specifically intended to address concerns about food advertising to children. It is in line with many other self-regulatory codes, but relatively unusual in including licensed characters and primary schools. In addition to this, a South African Pledge on Marketing to Children was signed on June 11 2009 - an initiative of the Consumer Goods Council of South Africa. It has 23 signatories, including food manufacturers, retailers and fast food chains. Companies have not yet developed individual pledges, but it follows in general the EU Pledge.[4] It applies to children under age 12, and to foods that do not meet (as yet unset) nutrient profiles.

The Department of Health believes that action to limit the marketing of energy dense, nutrient poor foods which high in fat, saturated fats, *trans*-fatty acids, total sugars, or total sodium directly to children, is fundamental to any long-term solution. Several major reviews of the evidence on the impact of food marketing to children show a connection between food marketing and children's food preferences, purchase requests and consumption patterns. [5]

International context

The International Obesity Taskforce (IOTF)[7] estimates that globally up to 200 million school-aged children are either overweight or obese and, of those, 40-50 million are classified as obese.

- Worldwide in 2010, it is estimated that 43 million children under the age of five were overweight and obese. Of those, 35 million lived in developing countries.
- The worldwide prevalence of overweight and obesity in pre-school children is expected to rise from 6.7% in 2010, and reach 9.1% or close to 60 million children under five in 2020.
- The estimated prevalence of childhood overweight and obesity in Africa in 2010 was 8.5%, and is expected to reach 12.7% in 2020.
- The prevalence is lower in Asia (4.9% in 2010) than in Africa (8.5% in 2010), but the number of affected

Globally, measured media spending on food is the third largest category after automotive and personal care. USD11.9 billion was spent on food advertising in 2008.

- In the US, in 2006, 44 of the largest food and beverage marketers spent USD1.6 billion adolescents. Of this, marketers spent USD745 million, or 46% of the 2006 total, on TV advertising.
- According to a 2010 forecast, global advertising spend online will reach USD96.8 billion by 2014, up from USD55.2 billion in 2009. Online advertising spend will make up 17% of total global advertising spending.
- Companies are directing more of their global advertising budgets towards emerging and developing countries; the share of global marketing spending increased in Asia and the Pacific, Latin America and the Middle East between 2007 and 2008.

The WHO Technical Meeting held in Oslo, Norway, on 2-5 May 2006 on Marketing of Food and Non-Alcoholic Beverages to Children, concluded that a strong scientific rationale is available through the

robust science and research that links commercial promotion of foods and beverages to poor diets in children.[6] The evidence shows that:

- there is extensive food and beverage promotion to children
- children are aware of, appreciative of, and engage with this promotion
- this food promotion is overwhelmingly for energy-dense, micronutrient-poor foods and undermines recommendations for a healthy diet
- this food promotion has a deleterious effect on children's food knowledge, attitudes, purchase behaviour and consumption

A systematic review of the extent, nature and effects of food promotion to children commissioned by the WHO[8] also indicates that children are likely to respond to advertising in the same way whichever part of the world they live in. However, it suggests that children in developing countries may be more vulnerable to food promotion because they are in some cases less familiar with advertising; they are a key entry point for developed country firms because they are more flexible and responsive than their parents.

Member States of the World Health Organisation- [7]

- AFFIRMING the importance of a multi-faceted approach to tackle non-communicable diseases as established in the Global Strategy on Diet Physical Activity and Health (Resolutions of the World Health Assembly 57.17 and 60.23);
- CONSCIOUS of the high rates of non-communicable diseases globally and the burden that this presents in both developed and developing countries;
- RECOGNISING that the spread of non-communicable diseases is a global problem with serious consequences for public health that calls for the widest possible international co-operation and the participation of all countries in an effective, appropriate and comprehensive international response;
- CONCERNED about the impact of marketing techniques, including advertising, promotion and sponsorship encouraging children to consume energy-dense, nutrient-poor foods high in fat, sugar or salt;
- ASSERTING that poor diet is an important risk factor for non-communicable diseases;
- ACKNOWLEDGING that the UN Convention on the Rights of the Child affirms the right of children to the highest attainable standard of health, to protection from exploitation and recognising the importance of ensuring that all segments of society, but particularly parents and children are supported in the use of basic knowledge of child health and nutrition;
- CONVINCED of the importance of ensuring that food marketing, particularly to children, does not undermine efforts to meet dietary guidelines and goals as established by the World Health Organization (WHO);
- RECOGNISING the recommendation from the WHO Technical Meeting on Marketing of Food and Non-Alcoholic Beverages to Children that there is now a strong scientific rationale linking commercial promotion of foods and beverages to poor diets in children

and that food promotion is overwhelmingly for energy-dense, micronutrient poor foods and undermines recommendations for a healthy diet;

- AWARE of the wide range of marketing techniques and media that are used to promote foods to children;
- RECOGNISING that national and domestic regulations and standards should ensure that advertising is legal, decent, honest, true, fair and not misleading regardless of the product or audience;
- ACKNOWLEDGING that the WHO's International Code of Marketing of Breast Milk Substitutes and subsequent relevant World Health Assembly recommendations already apply to the marketing of breast milk substitutes including infant formula and these are therefore outside the scope of this Code;
- CONSCIOUS that methods for nutrient profiling are now available that can be used to differentiate healthier and less healthy foods;
- BELIEVING that commercial operators have a responsibility to ensure that their marketing practices do not undermine children's health irrespective of national borders;
- COGNISANT of the need to implement comprehensive multi-sectoral measures to avoid exacerbating health inequalities;"

At the recent Sixty-Six World Health Assembly, in resolution WHA 60.23 on prevention and control on non-communicable diseases: implementation of the global strategy, requested the Director-General "... to promote responsible marketing including the development of a set of recommendations on the marketing of foods and non-alcoholic beverages to children in order to reduce the impact of foods high in saturated fats, trans-fatty acids, free sugars, or salt, in dialogue with all relevant stakeholders, including private-sector parties, while ensuring avoidance of potential conflict of interest".

In recent years the World Health Organisation also published two documents on this. The "Set of recommendations on the marketing of foods and non-alcoholic beverages to children" (WHO, 2010) and Marketing of foods high in fat, salt and sugar to children: update 2012 – 2013" (WHO, 2013).

The WHO Marketing of foods to children read as follows: "The promotion of potentially unhealthy food and beverage products is now widely recognized in Europe as a significant risk factor for child obesity and for the development of diet-related non-communicable diseases. Reviews conducted for WHO, for European parliamentarians and for national agencies in Europe and the United States of America have all concluded that, despite substantial gaps in the evidence, advertising and the promotional marketing of foods and beverages have enough effect on children's diets to merit action" (WHO, Marketing of foods high in fat, salt and sugar to children: update 2012 – 2013).

The obesity problem has industry's attention, and they are doing things, but the question is whether these things are meaningful or are the predictable behavior of an industry under threat and are designed to stop rather than support public health efforts. The food industry has had plenty of time to prove itself trustworthy. It has been in high gear, making promises to behave better, but their minor progress creates an impression of change while larger attempts to subvert the agenda carry on, such as the massive resistance against soda taxes in the United States and the wholesale attack of

marketing standards proposed by the Interagency Working Group. Other examples include tactics such as the soft drink industry giving the Children's Hospital of Philadelphia a US\$10 million gift, at a critical time the city of Philadelphia was considering a soda tax. Such public-sector interaction with industry could be predicted to undermine public health goals and protect industry interests. Worst perhaps is the issue of marketing food to children. The industry launched the Children's Food and Beverage Advertising Initiative designed to ".shift the mix of foods advertised to children under 12 to encourage healthier dietary choices and healthy lifestyles". Objective reports, however, have shown a tidal wave of marketing of calorie-dense, nutrient-poor foods to children, and if any change is occurring, marketing is on the increase. Companies boast of introducing healthier options, and at least one report cites this as evidence that market forces (e.g., consumer demand for better foods) will be the best motivator for companies to change.[9]

But introducing healthier processed foods does not mean unhealthy foods will be supplanted, and might simply represent the addition of more calories to the food supply. Furthermore, the companies have not promised to sell less junk food. Quite the contrary; they now offer ever larger burgers and portions, introduce ever more categories of sugared beverages (sports drinks, energy drinks, and vitamin waters), find ever more creative ways of marketing foods to vulnerable populations (e.g., children), and increasingly engage in promotion of unhealthy foods in developing countries. The food industry, like all industries, plays by certain rules - it must defend its core practices against all threats, produce short-term earnings, and in doing so, sell more food. If it distorts science, creates front groups to do its bidding, compromises scientists, professional organizations, and community groups with contributions, blocks needed public health policies in the service of their goals, or engages in other tactics in "the corporate playbook", this is what it takes to protect business as usual. An emerging area in need of scrutiny is the food industry's attempts to create foods engineered in ways that thwart the human body's ability to regulate calorie intake and weight. Whether overconsumption is a consequence simply of hyper-palatability brought about by extreme processing and/or an addictive process, overconsumption is a predictable consequence of the current food environment. The arresting reality is that companies must sell less food if the population is to lose weight, and this pits the fundamental purpose of the food industry against public health goals. Everybody needs food, but the obesity crisis is made worse by the way industry formulates and markets its products. [9]

The food industry, like other industries must be regulated to prevent excesses and to protect the public good. Left to regulate itself, industry has the opportunity, if not the mandate from shareholders, to sell more products irrespective of their impact on consumers. Government, foundations, and other powerful institutions should be working for regulation, not collaboration.

If history is to look back positively on current times, the future must bring several things. Respectful dialogue with industry is desirable, and to the extent industry will make voluntary changes that inch us forward, the public good will be served. But there must be recognition that this will bring small victories only and that to take the obesity problem seriously will require courage, leaders who will not back down in the face of harsh industry tactics, and regulation with purpose."

The impact of industry self-regulation of advertising of fast food to children on Australian television concluded that children's exposure to unhealthy fast-food advertising has not changed following the

introduction of self-regulation, and some fast foods advertised for children's consumption contain excessive energy. The limited impact of self-regulation suggests that governments should define the policy framework for regulating fast-food advertising to children. [10]

The ubiquitous marketing of energy-dense, nutrient-poor food and beverages is a key modifiable influence on childhood dietary patterns and obesity. Much of the research on television food advertising is focused on identifying and quantifying unhealthy food marketing with comparatively few studies examining persuasive marketing techniques to promote unhealthy food to children. This review identifies the most frequently documented persuasive marketing techniques to promote food to children via television. A systematic search of eight online databases using key search terms identified 267 unique articles. Thirty-eight articles met the inclusion criteria. A narrative synthesis of the reviewed studies revealed the most commonly reported persuasive techniques used on television to promote food to children. These were the use of premium offers, promotional characters, nutrition and health-related claims, the theme of taste, and the emotional appeal of fun. Identifying and documenting these commonly reported persuasive marketing techniques to promote food to children on television is critical for the monitoring and evaluation of advertising codes and industry pledges and the development of further regulation in this area. This has a strong potential to curbing the international obesity epidemic besieging children throughout the world. [11]

4. RATIONALE

For the Department of Health to achieve the policy aim of reducing the impact of con-communicable diseases of lifestyle on children, the following should:

- set nutrition standards for the kinds of food that can and cannot be promoted to children of different ages; and
- implement restrictions on the marketing and promotion of any foods that fall below these nutrition standards (energy dense, nutrient poor foods).

5. IMPLICATIONS

Commercial marketing means a multifaceted, integrated mix of marketing communications, campaigns and techniques that focuses on branding and building relationships with consumers and includes but is not limited to-

- a) advertising as defined by the Foodstuffs, Cosmetics and Disinfectant Act, 1972 (Act No. 54 of 1972), through any media in any manner, directly or indirectly (e.g., using the happy, caring family scenario), combining traditional media, digital marketing, packaging, online sweepstakes, outdoor advertising, food companies' websites, search engines, social networking sites and blogs, around or in films and media clips viewed online, around or in online and downloaded games and music, print media, in-school marketing and all other marketing techniques;

- b) radio, television, the internet, any other electronic online medium, e-mails and text messages, mobile and viral marketing, digital marketing, packaging, online sweepstakes; and
- c) cross promotions (e.g. linking foods with popular children's movies and television characters), product placement, sales promotion, promotional activities such as redemptions, under-the-cap offerings, advergames, text message/SMS contests, etc offering prizes or rewards, cross-promotions using celebrities including sport stars, brand mascots or characters popular with children.
- d) Sponsorship of TV and radio programmes, music videos, celebrity product endorsement, sponsorship of community and school events and contests, corporate gifts of educational materials and equipment, corporate support of health campaigns, sports clubs, school meals.

6. CRITERIA

- (1) Any unhealthy food offered for sale, whether prepacked, non-prepacked or ready-to-eat, shall not be permitted to market it commercially in any manner, directly or indirectly-
- a) to children during their entire school-going years from grade 0 to 12, including nursery and pre-school ages, using a child actor 18 years or younger; or using any celebrities, sport stars, cartoon-type character, puppet, computer animation or similar strategy; or
 - b) using, a competition or a token, gift, or collectable items which appeal to children, in order to encourage the use of such unhealthy foodstuffs.
- (2) No energy dense, nutrient poor food and non-alcoholic beverage, which are too high in any one of the following; fat, saturated fats, *trans*-fatty acids, total sugar, or total Sodium (hereafter called unhealthy food), shall be marketed commercially to children in any manner, whether prepacked, non-prepacked or ready-to-eat, if the foodstuff –
- a) firstly, does not pass the screening criteria of the Nutrient Profiling Model, using the electronic calculator, by clicking on Nutrient Profiling Model Calculator at the bottom of the web page of the Directorate: Food Control on the website of the Department of Health; <http://www.doh.gov.za> or <http://www.health.gov.za>
 - b) secondly, contains added fructose, added non-nutritive sweeteners, added fluoride or added aluminium through an additive or ingredient; and
 - c) thirdly, exceeds the nutrient levels in the food or beverage per 100 g/ml as indicated in the table below, based on the UK Food Standards Agency Criteria (per 100g/100ml) (Published January 2007):

Undesirable	Nutrient levels in food (per 100 g)	Nutrient levels in non- alcoholic beverages
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Nutrient		(per 100 ml)
Total sugars	5 g	2.5 g
Fat	3 g	1.5 g
Saturated fat	1.5 g	0.75 g
Sodium/salt	120 mg Sodium/0.3 g salt	120 mg Sodium/0.3 g salt

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

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

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

(4) Food business operators shall not abuse positive family values such as portraying any happy, caring family scenario, in order to advertise unhealthy foods.

(5) Settings where children gather shall be free from all forms of commercial marketing of unhealthy foods. Such settings include, but are not limited, to nurseries, school premises, pre-school centres, playgrounds, family and child clinics and paediatric services or during any sporting and cultural activities that are held on these premises. Food operators shall not engage in any direct commercial activity in both pre-school, primary and secondary schools and shall not sell any unhealthy food. Suitable beverages such as pure water, 100% fruit juices and milk may be made available in appropriate container sizes* that allow for portion control. All food business operators shall respect the commercial-free character of schools by providing, where directly responsible for final distribution of products, unbranded vending machines, preferably including educational images and messages promoting balanced diets and healthy and active lifestyles. Third-party distributors shall be made aware of these commitments in such cases where a food business operator is not directly responsible for the final distribution of their products to schools. School districts and bottlers are expected to provide only packaged water as regulated under the Act (Act 54 of 1972), 100 percent fruit juice and milk to school students.

*Suitable serving sizes for non-alcoholic beverages are:

Pure packaged water (still or carbonated) as defined under the Regulations Relating to all Packaged Water, R 718/2006 as	250 to 1000ml
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amended by R455/2010 and promulgated under the Foodstuffs, Cosmetics and Disinfectants Act, 1972 (Act No 54 of 1972) as amended.	
100% Fruit juices	200 to 250 ml
Unflavoured, unsweetened milk	250 ml

- (6) Any food and beverage advertisements, at all times-
- (a) shall not encourage or condone excess consumption and portion sizes should be appropriate to the setting portrayed. Any promotional activities (e.g. redemptions, under-the-cap offerings, text message/SMS contests, et cetera) offering prizes or rewards which will require consumers to eat and drink excessive quantities of products in order to participate, shall be avoided.
 - (b) shall, where presented in the context of a meal, show a reasonable variety of foods to reflect generally-accepted good dietary practice.
 - (c) shall not undermine the promotion of healthy, balanced diets.
 - (d) shall not encourage or promote an inactive lifestyle; encourage or promote unhealthy eating or drinking habits (immoderate consumption, excessive or compulsive eating) and shall not omit undesirable aspects of a food's nutritional profile, contain any misleading or incorrect information about the nutritional value of the product.
 - (e) Food and beverage advertisements shall not undermine the promotion of a healthy, active lifestyle in any way.
- (7) Food products not intended to be substitutes for meals shall not be represented as such. Commercial advertising to children representing mealtimes shall clearly and adequately depict the role of the product within the framework of a balanced diet.
- (8) The same principles which are applicable to general advertising also apply to advertising directed to children. Advertising is a valuable source of information to them as well, but advertisers must take into account the abilities and judgment that children at various stages of development can be expected to bring to the understanding of communications.
- (9) Advertisements shall not mislead about potential benefits from the consumption of a food product.
- (10) Food product advertisements shall not undermine the role of parents and other appropriate adult role models in providing valuable dietary guidance.

(11) Advertisements shall not include any direct appeal to children to persuade their parents or other adults to buy advertised products for them. Avoid any direct appeal to children to persuade parents or other adults to buy food products for them or to do anything else that goes expressly against the wishes or authority of a parent, guardian or educator.

(12) Commercial marketing in any form directed toward children shall not create a sense of urgency.

(13) Care should be taken in communication with younger as well as older children, not to exploit a child's imagination in a way that can encourage poor dietary habits.

(14) Broadcast or print media personalities (live or animated) shall not be used to sell food products, premiums or services in a way that obscures the distinction between program or editorial content and commercial promotion. For example, commercials or advertisements featuring characters from programs or publications primarily directed to children shall not be adjacent to programs or articles in which the same personality or character appears.

(15) Commercial marketers offering food and beverages to children via electronic media shall respect provisions on marketing and advertising to children in the ICC International Code of Advertising. Practice and other codes mentioned above and in particular observe the following:

- not exploit the inexperience or credulity of children or strain their sense of loyalty towards their parents and guardians;
- refrain from using content which might result in harm to children;
- collect only the information reasonably required to allow the child to engage in the activity;
- encourage parents and/or guardians to participate in and/or supervise their children's interactive activities;
- encourage children to obtain their parent's and/or guardian's permission before they provide information via electronic media, and make reasonable efforts to ensure that parental consent is given;
- refrain from using the data collected from children to advertise and promote products or services other than those designed for/appropriate for children;
- not collect from children data related to the financial situation or to the privacy of other members of the family;
- only disclose identifiable personal information of children to third parties after obtaining parental support for operational purposes of the web site and who do not use or disclose a child's personal information for any other purpose.

Advertisers/marketers are expected to make available information to parents and/or guardians about ways to protect their children's privacy when using electronic media.

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