

ARTICLE

'Sugar Kills': Towards a Duty to Warn in Respect of High-Sugar Products?

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Vytopil explores whether (developments in) the regulatory framework provide for a duty to warn regarding the health risks associated with the (excessive) consumption of sugar-rich products such as soft drinks and sweets, similar to the duty to warn the consumer in respect of health risks associated with tobacco. Vytopil concludes that despite the undeniable health risks associated with (excessive) consumption of sugar-rich products, the parallel between sugar-rich products and tobacco only carries so far. This is mainly because both the Dutch government and the EU assume a restrained regulatory role with regard to warnings in respect of unhealthy food. Consumers could be better informed about the health risks associated with consumption of sugar-rich products, if the Dutch government would make better use of its options for regulation. In that case, a transparent, graphic system of information provision would be preferable.

Keywords: duty to warn; health; sugar; tobacco; regulatory framework

1. The battle against high-sugar products: are they the 'new tobacco'?

Cookbook author Yotam Ottolenghi – famous from cookbooks such as *Plenty* and *Simple*, in which vegetables play a starring role – recently called upon governments to fight unhealthy foods as they do tobacco.¹ Ottolenghi is not alone in his plea for the stricter regulation of unhealthy foods.² In the past few years, a fierce societal debate has flared up in relation to the way countries should deal with unhealthy food. Between 2010 and 2017, the – liberal – government policy in the Netherlands could be summed up by the motto: 'lifestyle is a choice'. For a long time, therefore, the Dutch government did little to regulate health-related lifestyle choices, in relation to smoking, alcohol and food.³ The question arises whether – based on regulatory developments – a parallel can be drawn between tobacco and high-sugar products. Is there reason to believe that food producers will soon be under an obligation to warn consumers about the health risks associated with high-sugar products such as lemonade and candy? Can a trend be discovered in laws and regulation that the information that is to be provided to consumers should be treated the same in respect of both tobacco and sugar-rich products?

In this exploratory article, I describe the regulatory developments in the Netherlands in respect of the duty to warn consumers in respect of health risks associated with smoking and consumption of unhealthy foods, such as high-sugar foods. I do not discuss the *effectiveness* of labels and warnings, nor do I discuss

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¹ 'Yotam Ottolenghi, winnaar van de Johannes van Damprijs: bestrijd ongezond eten net als roken', *De Volkskrant*, 1 November 2017.

² P. Teule & H. Boersma, UvA, 'Overheid, grijp in op ons bord', *De Volkskrant*, 30 March 2018, <<https://www.volkskrant.nl/nieuws-achtergrond/overheid-grijp-in-op-ons-bord~b15862c1/>> (last visited 25 September 2019).

³ 'Het preventiebeleid steekt de kop weer op: de overheid wil na de sigaret ook de verkoop van drank, vet en suiker aan banden leggen', *De Volkskrant*, 18 October 2018, <<https://www.volkskrant.nl/nieuws-achtergrond/het-preventiebeleid-steekt-de-kop-weer-op-de-overheid-wil-na-de-sigaret-ook-de-verkoop-van-drank-vet-en-suiker-aan-banden-leggen~bd9b0800/>> (last visited 25 September 2019).

regulatory alternatives to warning labels, such as the taxation of unhealthy products.⁴ I describe which information requirements tobacco manufacturers and producers of high-sugar products must meet in respect of Dutch consumers. Such information not only includes consumer warnings (as in the case of tobacco), but also ‘neutral’ product information (such as information on ingredients). Additionally, I discuss which advertising regulations producers must adhere to in selling their products. I investigate what development the regulations in this area have gone through and to what extent whether the development that regulations regarding both products go through can be compared. I conclude that a parallel between the two only holds to a limited extent. Both the EU and the Dutch government are reluctant to take stringent measures to regulate ‘unhealthy’ products such as sugar-rich foods.

I conclude that the public could benefit from a clear strategy and vision when it comes to regulating unhealthy food. After all, it is clear that there are indeed health risks associated with the (excessive) consumption of high-sugar products. Despite any scientific difficulties regarding the method and determination of the dietary guidelines, a clear and simple visual system may contribute to the education of consumers and assist them in making healthier choices. It remains to be seen whether the new ‘visual guidelines’ that may be implemented in the Netherlands in the nearby future will effectively serve such a purpose.

These questions should be considered in light of the fact that in this day and age, most people eat too much fat, salt and sugar. The average Dutch person weighs substantially more than they did 35 years ago. This is in part attributable to changes in our diet. The Dutch Central Bureau for Statistics (CBS) reports that the percentage of Dutch people with severe overweight or obesity (defined as a Body Mass Index (BMI) of 30 or more) has grown exponentially: in 1981, 4.4% of the Dutch population qualified as obese; in 2016 that number had risen to 12.3%.⁵

Experts agree that not one single factor is single-handedly responsible, but that the ‘obesogenic’ environment in which we live (in which energy-rich food is readily available) certainly contributes to the increase in overweight people among the Dutch population.⁶ Being (seriously) overweight poses considerable health risks. It increases the risk of diabetes, cardiovascular disease, high blood pressure and various types of cancer. In addition, high-sugar drinks contribute to the build-up of caries and dental decay. In general, unhealthy eating patterns are – after smoking – the leading cause of death and contribute to a seriously reduced life expectancy.⁷ In the media, with some regularity, the question arises whether consumers should be warned about the health risks associated with the consumption of high-sugar products such as soda and candy.

Due to the health risks associated with an unhealthy diet, the parallel with tobacco is one that is frequently drawn. For quite some time, until well into the 1950s, smoking was widely accepted in society. In 1958, as many as 90% of Dutch men smoked. This percentage rapidly declined once a public discussion about the impact of smoking on health was initiated in the mid-1950s. In 1957, Minister of Social Affairs and Public Health Suurhoff explained the link between smoking and lung cancer and – for the first time – warned against the dangers of smoking.⁸ Shortly after, it became clear what the health-impact of smoking tobacco was. Thereafter, Dr. Meinsma initiated annual anti-smoking campaigns, the tax on tobacco was increased and as of 1 March 1982 tobacco producers were obliged to warn about the health consequences.

⁴ It should be noted that the effectiveness of labels and warnings depends strongly on the product at hand, the type of consumer and the type of information included. See in respect of tobacco, inter alia: K. Gallopel-Morvan et al., ‘The use of visual warnings in social marketing: The case of tobacco’, (2011) *Journal of Business Research*, 64 pp. 7–11; in respect of unhealthy foods: S. Shang-guan et al., ‘A Meta-Analysis of Food Labeling Effects on Consumer Diet Behaviors and Industry Practices’, (2019) *American Journal of Preventative Medicine*, 56, pp. 300–314, R.D. Lacañilao et al., ‘Heterogeneous consumer responses to snack food taxes and warning labels’, (2011) *Journal of Consumer Affairs*, 45 pp. 108–122; T. Effertz et al., ‘Adolescents assessments of advertisements for unhealthy food: an example of warning labels for soft drinks’, (2014) *Journal for Consumer Policy*, 37 pp. 279–299; in respect of alcohol: D.J. Ringold, ‘Boomerang effects in response to public health interventions: some unintended consequences in the alcoholic beverage market’, (2002) *Journal of Consumer Policy*, 25 pp. 27–63. Alternatives to warnings, such as the taxation of unhealthy products, are discussed elsewhere in this issue; see also M. Faure et al., ‘“Smart instrument mixes” voor de aanpak van legale maar gezondheidsbedreigende producten en diensten. Een rechtseconomische benadering’, in A.L.M. Keirse et al., (eds.), *Ongezonder (on)geoorloofd. Publiek- en privaatrecht & legale maar gezondheidsbedreigende producten en diensten* (2018), pp. 135–167.

⁵ CBS Statline, database ‘Lengte en gewicht van personen, ondergewicht en overgewicht; vanaf 1981’, 12 June 2017, <<http://statline.cbs.nl/StatWeb/publication/?DM=SLNL&PA=81565NED>> (last visited 25 September 2019).

⁶ Website Voedingscentrum, <<http://www.voedingscentrum.nl/encyclopedie/overgewicht.aspx>>, (last visited 12 November 2018).

⁷ GBD 2016 Mortality Collaborators, ‘Global, regional, and national under-5 mortality, adult mortality, age-specific mortality, and life expectancy, 1970–2016: a systematic analysis for the Global Burden of Disease Study 2016’, (2017) *The Lancet*, Vol. 390, pp. 1084–1150.

⁸ J. van Reek & H. Adriaanse, ‘Smoking policy in the Netherlands since the fifties: one factor in the social dynamics of changes in smoking behaviour’, (1987) *7 Health policy*, p. 361.

2. A duty to disclose information regarding tobacco and sugar

The EU has granted itself a fairly limited role when it comes to regulating public health. The EU primarily plays a supporting role: it supports its member states to 'achieve common objectives, pool resources and overcome shared challenges', such as in respect of 'coordinating any serious health threats involving more than one EU country (...) [including] actions against cancer and responsible food labelling'.⁹ As a result, European rules are supplemented with local rules. The Netherlands has adopted both legislation (such as the Tobacco Act and the Commodities Act) and alternative regulation (in the form of the various non-binding advertising codes).

In the following paragraphs I will discuss which duties to disclose information exist for manufacturers to inform consumers of tobacco and high-sugar products, first within the context of information on the packaging (such as ingredients and warnings to the consumer) and then in the context of advertising.

3. Duties to disclose information in relation to tobacco: packaging

As discussed *supra*, since the 1950s but in particular since the mid-1970s, it has become clear which risks are associated with tobacco consumption. However, it took quite some time before the Dutch government adopted legislation to regulate tobacco. An interdepartmental committee was appointed in 1979,¹⁰ which recommended measures that could be taken to reduce smoking. Four principles served as a starting point for this committee: that tobacco use was harmful to health; that children needed special protection from tobacco smoke; that physical integrity required protection and, finally, that the undesirable social consequences of tobacco use should be prevented.¹¹ In 1982, a warning appeared on the packaging of tobacco products for the first time.¹² The warning read as follows: 'Smoking threatens health. The Minister of Health and Environmental Hygiene.' In 1986, the warning language was further extended.¹³

In 1988 – nine years after the committee was established – the Dutch government adopted first Tobacco Act.¹⁴ The act came into force on 1 January 1990¹⁵ and took a broad approach to discourage smoking: it combined an advertising ban with a ban on smoking in public spaces, while adopting a (more extensive) duty to warn consumers. At the same time, legislative measures were taken at a European level, with the aim of better informing consumers about the risks associated with tobacco consumption. In addition, various additional measures were taken to reduce advertising for tobacco (which are discussed in paragraph 3.2).

3.1. Tobacco and (objective) duty of disclosure towards consumers

The first European regulation on tobacco information was adopted in 1989.¹⁶ Since then, the warning and duty to disclose information has been significantly modified and extended. Directive 89/622/EEC on the harmonisation of national laws concerning the labelling of tobacco products was the first act of legislation that applied in the Netherlands.¹⁷ This directive provided, *inter alia*, that a general warning should be presented on tobacco packaging. Article 3 provided at the time that any such warnings should be presented in clearly legible letters on a contrasting background in such a way that at least 4% of the surface of the side is covered. Producers were obligated to publish the warning 'Seriously damages health' on all tobacco products. Finally, according to Article 4, the tar and nicotine content of the cigarettes were to be stated on the packaging. From 1992 onwards, it became required to include both a general and a varying warning

⁹ 'Supporting public health in Europe', website of the EU, <https://europa.eu/european-union/topics/health_en> (last visited 19 May 2019).

¹⁰ J.I.M. Vollebregt, 'De Tabakswet', (1990) 4 *Ars Aequi*, 39, p. 231.

¹¹ *Ibid.*, pp. 231–232.

¹² The Netherlands was quite late in this respect: in the US, warnings on tobacco packaging were obligatory as of 1965 and in France, this was the case from 1976 onwards.

¹³ Decree of 29 April 1981, Stb. 329 (*Aanduidingsbesluit sigaretten en shag (Warenwet)*); Besluit van 9 december 1986, Stb. 1986, 642.

¹⁴ De Wet van 10 maart 1988 houdende maatregelen ter beperking van het tabaksgebruik, in het bijzonder de ter bescherming van de niet-roker (*Stb.* 1988, 342).

¹⁵ Vollebregt, *supra* note 10.

¹⁶ It should be noted, in this respect, that it was not until quite late that the European regulator was permitted to impose public health-related regulations. Although national regulation had been adopted in various European countries, it was not until the late 1980s that the European regulator was able to take measures.

¹⁷ Council Directive 89/622/EEC of 13 November 1989 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the labelling of tobacco products.

on cigarette packs. An additional warning was to be presented not only in respect of cigarettes, but also in respect of other tobacco products.¹⁸

Nine years later – in 2001 – the first Tobacco Products Directive was adopted (First Tobacco Products Directive). This directive contained rules in relation to the production, presentation and sale of tobacco products.¹⁹ According to Preamble 19, one of the motives for the adoption of this directive was that:

there are still differences between Member States in the way warnings and information on tar, nicotine and carbon monoxide levels are published. As a result, consumers in one Member State may be better informed about the risks of tobacco products than in another Member State.

This directive therefore sought to harmonise the Member States' provisions on the production, presentation and sale of tobacco products, so that obstacles to the functioning of the internal market would be removed. Based on this directive, rules were laid down, inter alia, in relation to health warnings, ingredient information and maximisation. This included the prohibition of the use of 'mild' and 'light' qualifications, since these were deemed misleading.

Article 5 of the First Tobacco Products Directive re-established the general obligation to warn consumers of tobacco products: 'The tar, nicotine and carbon monoxide yields of cigarettes measured in accordance with Article 4 shall be printed on one side of the cigarette packet (...), so that at least 10% of the corresponding surface is covered.' This meant that the size of the warning on the package noticeably increased when compared to Directive 89/662/EC, which required a warning that covered 4% of the surface.

Pursuant to Article 5(2)(a) of the First Tobacco Products Directive, one of the following warnings was to be used: '1. "Smoking kills/Smoking can kill," or 2. "Smoking seriously harms you and others around you."' These two warnings were to be rotated so that they were used alternately. Moreover, an additional warning from a list of attachments was to be used on the packaging. These warnings had to cover at least 30% of the front or back. The warning thus grew in size – compared to 4% when first required in 1990 – and took up a considerably more prominent place on the packaging of tobacco products.

The First Tobacco Products Directive allowed Member States to adopt stricter rules for tobacco products if they considered it necessary for the protection of public health. The First Tobacco Products Directive also contained a provision that the European Commission would 'lay down rules for the use of color photographs or other illustrations to depict and explain the health consequences of smoking'. This list was to be used if Member States themselves would prescribe stricter rules that would require the printing of a colour photograph on the packaging. In terms of information requirements, the Netherlands adopted the EU standard; the Netherlands did not impose stricter obligations (for example in the form of more information, larger warnings or photo warnings).

Approximately ten years after entry into force of the First Tobacco Products Directive, the European Commission started preparing for an update of the directive, in response to various scientific and market developments. The First Tobacco Products Directive was to be adapted to fulfil the obligations entered into under the WHO Framework Convention on Tobacco Control of May 2003,²⁰ to which the EU is bound.

After a rather slow legislative procedure,²¹ the second Tobacco Products Directive (Tobacco Products Directive)²² was adopted in 2014. This directive aimed to harmonise the labelling of tobacco products within the EU, in order to achieve a properly functioning internal market for tobacco products. Under the First Tobacco Products Directive, for instance, it would be possible for tobacco producers to simultaneously be subject to various, non-uniform reporting obligations in respect of tar, nicotine and carbon monoxide emissions in different markets. As a result, they could use 'a wide range of formats for the information' (Preamble 14), which was considered an undesirable development. Harmonisation was therefore desirable. For the purposes of this article, the most relevant sections of the Tobacco Products Directive are contained in chapter II.

¹⁸ Amendment of Directive 89/622/EEC on the approximation of the laws, regulations and administrative provisions of the member states concerning the labelling of tobacco products, COM(1990)538, Art. 3.

¹⁹ Directive 2001/37/EC of the European Parliament and of the Council of 5 June 2001 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco products.

²⁰ WHO Framework Convention on Tobacco Control – FCTC.

²¹ Obstacles and discussions during the regulatory procedure have been described by *inter alia* R.A. Fröger & K. de Weers, 'Herziening Tabaksrichtlijn: Over de nieuwe tabaksrichtlijn en de implicaties voor de Nederlandse rechtsorde', (2014) 6 *NtEr*, p. 180.

²² Directive 2014/40/EU of the European Parliament and of the Council of 3 April 2014 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products and repealing Directive 2001/37/EC.

According to the European Commission, the purpose of those labelling obligations is that the label reflects the product: 'a product that has negative health consequences, is addictive, and is not for the consumption of children and teenagers'. Article 13(1) of the Tobacco Products Directive declared that 'labels shall not include any information about the nicotine, tar or carbon monoxide content of the tobacco product'.²³ Any such statement of these contents would be misleading because according to Preamble 25 of the Tobacco Products Directive, it could give the impression that certain types of cigarettes would be less harmful than others.

As a result of new labelling obligations, tobacco packaging was now to combine textual warnings with photos. Combined, such warnings should cover 65% of the surface of the front and rear of the package. The label should also include 'smoking cessation information such as telephone numbers, e-mail addresses or Internet sites intending to inform consumers about the programmes that are available to support persons who want to stop smoking' (Article 10 of the Tobacco Products Directive).²⁴ The latest size requirement, it should be noted, may be further adjusted if the market behaviour of young people would justify a larger warning. Photographic warnings already existed in ten Member States (if not in the Netherlands). The reason for the size increase was the fact that 'there are also indications that large combined health warnings, i.e. text combined with a colour photograph, are more effective than warnings that consist solely of text', according to Preamble 25 of the Tobacco Products Directive. The size was adapted for the sake of visibility and effectiveness. Simultaneously, Member States are still permitted to take stricter measures with regard to labelling.

Additionally, Article 6(1) of the Tobacco Products Directive prescribes that 'enhanced reporting obligations shall apply to certain additives contained in cigarettes and roll-your-own tobacco that are included in a priority list' apply. Finally, Article 6(2) provides that tobacco producers must carry out in-depth studies into certain additives and send the reports of those studies to the Commission and the Member States. Such studies (which may be carried out jointly) pertain to additives to make cigarettes more attractive, by (inter alia) masking the bitter taste of tobacco and making smoke taste milder. Although such additives have been approved for human consumption and are safe if they are processed in – for example – cosmetics, there is insufficient clarity about the use in tobacco products. Tobacco producers are thus forced to investigate such the health aspects in respect of those additives.

In other areas, the Tobacco Products Directive also aims to make smoking less attractive. Effective from 20 May 2020, for example, the addition of tobacco flavourings such as menthol is prohibited; moreover, it will no longer be allowed to add additives that are usually associated with vitality or good health (such as caffeine or vitamins).²⁵ The new measures are expected to lead to a 2% decrease in tobacco consumption in five years' time.

Member States were to transpose the Tobacco Products Directive into national law by 20 May 2016 at the latest. In the Netherlands, the Tobacco Products Directive was implemented on 20 May 2016 through amendment of the Tobacco Act.²⁶ In addition to the changes in the Tobacco Products Directive, the Tobacco Act was amended to add that schoolyards must be completely smoke-free by 1 January 2020. Besides this requirement, in terms of a duty to disclose information towards consumers, the Netherlands opted not to impose stricter rules than the EU rules. However, the Netherlands has taken a different approach with respect to tobacco advertising.

3.2. Tobacco and (commercial) disclosures: legislation concerning tobacco advertising

The Tobacco Act – briefly discussed *supra* – came into force in the Netherlands on 1 January 1990.^{27,28} While the Tobacco Act does not require more than the EU-minimum with regard to warnings or a duty to disclose information towards consumers, this is different in respect of advertising. In this section I describe the devel-

²³ This clause reads as follows: 'The labelling of unit packets and any outside packaging and the tobacco product itself shall not include any element or feature that: (a) promotes a tobacco product or encourages its consumption by creating an erroneous impression about its characteristics, health effects, risks or emissions; labels shall not include any information about the nicotine, tar or carbon monoxide content of the tobacco product.' The maximum levels of tar, nicotine and carbon monoxide still hold, see Preamble 10.

²⁴ Previously, warnings were to cover only 30% of the front of the package and 40% of the rear. Those percentages still apply to other smokeable tobacco products (Art. 11 of the Tobacco Directive) and for non-smokeable tobacco products (Art. 12 of the Tobacco Directive).

²⁵ The Tobacco Directive contains new clauses in relation to the online sale of tobacco products and in respect of electronic cigarettes.

²⁶ Act of 26 April 2016, *Stb.* 2016, 175 (Kamerstukken 34 234) and Implementing Decree of 4 May 2016, *Stb.* 2016, 178.

²⁷ Wet van 10 maart 1988 houdende maatregelen ter beperking van het tabaksgebruik, in het bijzonder de ter bescherming van de niet-roker (*Stb.* 1988, 342).

²⁸ Vollebregt, *supra* note 10.

opments in the rules regarding tobacco advertising since 1990. Because this subject matter for quite some time was not regulated on an EU-level, I will discuss both Dutch and European regulations where relevant.

Since the entry into force of the Tobacco Act in 1990, the Netherlands has had a legal ban on the advertising of tobacco products in radio and television programmes. Article 3 of the Tobacco Act provided for the possibility to impose requirements in respect of in-shop-tobacco advertising. Advertising requirements could be posed based on Article 7 of the Tobacco Act, both with respect to the content of the advertising and the place where and the manner in which advertising is made.

Simultaneously, on a European level, the first tobacco advertising regulations were created. On 6 July 1998, the (first) Tobacco Advertising Directive was adopted.²⁹ However, this directive – which contained rules on advertising and sponsorship of tobacco products – did not last long. On 5 October 2000, the Court of Justice of the EU (CJEU) annulled the Tobacco Advertising Directive. The CJEU ruled that the wrong legal basis had been used for the Tobacco Advertising Directive, and that the prohibition of most forms of advertising could not be justified.³⁰ In its verdict, the court held that in this case:

such distortions [in competition], which could be a basis for recourse to Article 100a of the Treaty in order to prohibit certain forms of sponsorship, are not such as to justify the use of that legal basis for an outright prohibition of advertising of the kind imposed by the Directive.³¹

In the time frame between the annulment of the First Tobacco Advertising Directive and the adoption of the second Tobacco Advertising Directive in 2003, tobacco advertising was only regulated on a national basis.³² The Netherlands, with its Tobacco Act, already had legislation in place that was partly stricter than the European rules in this area. The Tobacco Act was amended in the late 1990s in line with the first Tobacco Advertising Directive. These changes were effective from 17 July 2002 onwards – despite the fact that the first Tobacco Advertising Directive was annulled. When the second Tobacco Advertising Directive was later adopted, the Tobacco Act did require substantial changes; the legislative changes effective as of 2002 already took a stricter approach than required on the basis of the second Tobacco Advertising Directive.

As a result, as of 7 November 2002, any form of tobacco advertising or sponsorship was prohibited. Article 5(3)-(5) of the Tobacco Act allowed for a few exceptions; those exceptions included ‘sponsorship of radio programmes (...) if this is done by companies whose principal activity is not formed by the manufacture or sale of tobacco or related products’ (paragraph 3), as well as the:

advertising (...) for other products or services with the same name as a tobacco product or related product, (...) if the name of those other products or services is already being used in good faith for both a tobacco product or related product and another product or service

as described in paragraph 4 (for example clothing from the brand Marlboro Classics) and (paragraph 5) regular advertising at points of sale of tobacco.

The Tobacco Act applies a very broad definition of the concept of ‘advertising’: advertising is defined as:

any action in the economic sphere with the aim of promoting the sale of tobacco products and related products and any commercial communication intended to promote or promote a tobacco product or related product directly or indirectly, including advertising which, without directly mentioning the tobacco product or related product, seeks to circumvent the prohibition of advertising by using a name, brand, symbol or any other distinctive sign of a tobacco product or related product.

²⁹ Directive 98/43/EC of the European Parliament and of the Council of 6 July 1998 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products.

³⁰ The first Tobacco Advertising Directive was based on Art. 95 of the EG (currently Art. 114 of the Treaty on the Functioning of the European Union (TFEU)) regarding the internal market, supplemented by Arts. 47 of the EG (Art. 53 of the TFEU) and 55 of the EG (Art. 62 of the TFEU) regarding the free movement of goods and services. A large portion of the prohibited advertising was nonetheless done within country borders, without any cross-border aspect (such as advertisements on parasols and ashtrays). See also S.M. Goossens, ‘Het tabaksreclameverbod: is de rook opgetrokken?’, (2010) *SEW* (6), p. 219.

³¹ C-376/98 (*Germany/European Parliament and Council*), Court of Justice EU 5 October 2000, *Jur.* 2000, p. I-8419.

³² See also Goossens, *supra* note 30, in respect of the tobacco advertisement ban and the legislation in this respect.

As a result of this broad definition, virtually every act by a tobacco producer could qualify as advertising.³³ The Netherlands Food and Consumer Product Safety Authority is responsible for enforcing the Tobacco Act and can impose a fine of up to EUR 450,000 in case of violations of the law.

In 2003 the second Tobacco Advertising Directive was adopted.³⁴ This directive was based on the same principles as the first Tobacco Advertising Directive, but is more limited in scope. On the basis of the second Tobacco Advertising Directive, only advertising in print media and on the internet is prohibited, as well as cross-border sponsorships. Advertising in cinemas, advertising on ashtrays and sun umbrellas, for example, are no longer banned.

A separate source of (self-)regulation regarding advertising for tobacco products in the Netherlands is to be found in the Advertising Code and the Tobacco Advertising Code. The latter entered into force on 1 March 1982 and thus existed prior to the entry into force of the Tobacco Act. At the time of entry into force, the Tobacco Advertising Code stipulated (inter alia) that the tar and nicotine content of tobacco products should be indicated on the packaging; additionally, it provided that no connection could be made between a certain (positive) type of lifestyle and the use of tobacco products.

Since its entry into force, the Tobacco Advertising Code has been updated a number of times. As of 18 April 2002, the Tobacco Advertising Code only applies to advertising and sponsorship insofar as permitted under the Tobacco Act. This means that it only applies to advertising in tobacco outlets (as this is the only permitted form under the Tobacco Act). The Tobacco Advertising Code stipulates, among other things, that such advertising must be provided with a health warning and that it may not contain statements from a publicly known person (Article 4). Additionally, it is 'in no way [permitted to make] a positive connection with health be made' (Article 6(1)). Advertisements should not be aimed at influencing youth (Article 8(1)); for example, the advertising may not display persons under the age of 30 (Article 8(3)). If one believes that a company does not comply with the Tobacco Advertising Code, it may file a complaint with the Advertising Code Committee. The Advertising Code Committee then assesses whether the complaint amounts to a violation of the Advertising Code; if that is the case, the Advertising Code Committee recommends the advertiser not to advertise in this manner. After such a decision, the compliance department of the Advertising Code Committee verifies whether the advertiser has followed its recommendation; research indicates that 97% of all companies sign a form that states they will comply with the ruling of the Advertising Code Committee.³⁵

3.3. Some conclusions I: tobacco information and advertising

With regard to tobacco advertising, it can be concluded that the Netherlands has taken a fairly strict approach: for decades, tobacco manufacturers have been forbidden to advertise their products on, for example, radio and television. The Netherlands is less strict about consumer warnings in relation to the health risks associated with tobacco consumption. The Netherlands follows EU-legislation in the field of consumer information and warnings regarding tobacco. However, for a very long time, the Dutch legislator did not go *beyond* EU regulations. Only with the Prevention Accord in late 2018 did the Dutch government take steps toward a stricter approach to tobacco legislation. As of 2020, it would no longer be permitted in to – for example – print a brand logo on a cigarette pack. The Netherlands now adopts an approach similar to Australia's 'plain packaging' rules, by requiring cigarette packaging in an unattractive, dark green-brown colour. Moreover, cigarettes and tobacco are to be removed from sight at supermarkets. Although it has – at last – adopted stricter measures, the Dutch stance should still be qualified as a 'light' tobacco policy; it is a trend follower in view of its tobacco legislation rather than a leader.

4. Are high-sugar products destined for the same fate as tobacco?

The question that is at the core of in this article, is whether the Dutch rules regarding a duty to inform consumers, and advertising rules in relation to high-sugar products are evolving in the same way as the rules relating to tobacco products. As with tobacco products, an important source of regulation in the field of nutrition information is formed by EU regulations. The following sections discuss which information must be printed on the label of food products and which advertising rules food producers must comply with.

³³ Goossens, *ibid.*, pp. 220–221, provides examples where the broad definition surpasses the goal of the act.

³⁴ Directive 2003/33/EC of the European Parliament and of the Council of 26 May 2003 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products.

³⁵ Foundation Advertising Code, *Annual report 2016*, <<https://www.reclamecode.nl/wp-content/uploads/2018/04/Jaarverslag-2016.pdf>> (last visited 25 September 2019).

4.1. Regulations: labelling of high-sugar products

The Netherlands first adopted the Commodities Act in 1919. The Commodities Act regulates foodstuffs and was intended to prevent food fraud (for example through the use of inferior ingredients). The Commodities Act criminalised the sale of 'forged goods'; a department was set up that would inspect foodstuffs. In 1935, the Commodities Act was amended.³⁶ The Commodities Act of 1935 contained regulations related to the labelling of foodstuffs and specified that the ingredients of a product must be listed on the label.

In 1979, a European directive on food labelling was adopted. This directive was later amended in 1989.³⁷ Article 3 of the amended directive provided that the packaging of foodstuffs was to mention 'the name under which the product is sold (...), the list of ingredients and instructions for use, if the foodstuff could not be used properly without'. Article 6 of that directive furthermore provided that the list of ingredients was to mention all ingredients of the foodstuffs in descending order of weight in which they are used. In addition, specific rules were included regarding the way in which, for example, technological additives had to be mentioned on labels. There was no mention of an indication of (for example) calories.

This changed in 1990 when Directive 90/496/EEC on nutrition labelling for foodstuffs was adopted. Articles 1 and 6 of that directive provided that the energy value of the product per 100 ml or 100 grams was to be listed on the label, including the protein-, carbohydrates-, fats-, dietary fibres-, and sodium-content. From then onwards, the European Commission could also lay down additional rules regarding nutrition claims relating to, for example, the energy value (calorific value) of the product, or a reduced or increased energy value of the product ('light' products).

In December 2014 the Food Information Regulation was adopted in the EU.³⁸ This regulation aims to ensure that the information presented food is standardised on packaging so that consumers in all EU Member States have access to the same information. The Food Information Regulation poses requirements in respect of the information that is to be provided to consumers; in the Netherlands these requirements are included in the Commodities Act. The Food Information Regulation aims to achieve a high level of health protection for consumers and to guarantee their right to information. According to the Food Information Regulation, this is achieved by providing consumers with the information they need to make an informed choice about foods. In Preamble 10 of the Food Information Regulation, the Commission White Paper of 30 May 2007 on an EU strategy cited for Europe on Nutrition, Overweight and Obesity Related Health Issues is cited; this white paper declared that nutrition labelling is one of the main methods to inform consumers and help them make a well thought-out choice. Preamble 26 of the Food Information Regulation states that food labels must be clear and comprehensible, in order to 'assist consumers who want to make better-informed food and food choices'. It is therefore crucial that this information is legible; too small fonts or an unclear background should be avoided.

The Food Information Regulation requires food manufacturers to report the ingredients contained in foods. Those ingredients should be listed in the order in which they occur (from most to least). In addition, Article 29 of the Food Information Regulation provides that the label must state how much energy per 100 grams or 100 millilitres a product contains, as well as indicating how much fat, saturated fat, carbohydrates, sugars, proteins and salt per 100 grams or 100 millilitres the product contains. Effective 13 December 2014, this mandatory nutrition declaration applies to all pre-packaged foods (i.e., not to food consumed in a restaurant). It is, however, permitted to list different types of sugar as different ingredients in the list of ingredients, although they simultaneously should all be classified as 'sugars' in the nutritional value table.

Pursuant to Article 4 of the Food Information Regulation, the packaging must state whether the food contains substances that may be dangerous for certain groups (for example in case of allergies or intolerances). In addition, according to Article 4(1)(b)(iii), information on the protection of consumers' health and the safe use of a food must be provided. This includes 'the health impact, including the risks and consequences related to harmful and hazardous consumption of a food'. Apparently, such regulations are based on the notion of a balanced diet; it does not take into account any unhealthy eating habits, such as the fact that – when high-sugar products are consumed in excess – the risk of, for example, diabetes strongly increases. At the same time, it is common knowledge that very few people manage to stick to a perfectly balanced and healthy diet.

³⁶ Wet van 28 december 1935, houdende voorschriften betreffende de hoedanigheid en aanduiding van waren.

³⁷ Council Directive 79/112/EEC of 18 December 1978 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs for sale to the ultimate consumer, amended by Directive 89/395/EEC.

³⁸ Regulation (EU) No 1169/2011 of the European Parliament and of the Council of 25 October 2011 on the provision of food information to consumers.

Article 39 of the Food information Regulation provides that Member States are allowed to 'adopt measures requiring additional mandatory particulars for specific types or categories of foods, justified on grounds of [inter alia] (a) the protection of public health; [or] (b) the protection of consumers'. The Dutch government at the time opted for a private initiative in the form of Stichting Ik Kies Bewust (Foundation I Choose Consciously/the Foundation). The Foundation carried two types of ticks or 'check-marks': green check-marks (for healthy basic products such as wholemeal bread) and blue check-marks (for a healthier choice within a certain product group, such as soft drinks with less sugar or snacks with less fat). Frequent criticism of this system was that at the first glance it was not clear which check-mark related to which category, which caused confusion among consumers. Another point of criticism was that the Foundation was sponsored and paid for by food producers, who paid for the use of check-marks on their products. The blue check-marks were therefore mainly found on products from sponsors of the Foundation. At the same time, many truly healthy foods that could typically be consumed virtually without limitation as part of a healthy diet – such as water, fruit and vegetables – were not 'touted' as being healthy. They were not advertised through a check-mark, because they were not marketed by sponsors of the Foundation. The response of the Foundation in relation to this criticism was the following:

The check-mark is not mandatory. So there are companies that are not members of Stichting Ik Kies Bewust, but who do make products which meet the criteria [for inclusion]. This means that a product with the check-mark is not the only responsible choice. The advantage of check-marked products is that they are immediately recognizable among the large range on the shop shelf. All products with the check-mark are in any case tested against criteria for salt, sugar and saturated fats. These products are among the top twenty percent [in terms of health] of all products on the market.³⁹

The Foundation was therefore aware of the risk of this type of confusion, but at the same time did nothing to prevent such confusion among the general population. The Consumers' Association (*Consumentenbond*) reported earlier that only 15% of the population would understand the difference between the two check-marks. It was therefore not unlikely that the blue check-marks would (wrongly) give the impression that blue-check-mark-products were truly healthy and that these could be eaten indefinitely as part of a healthy diet, despite these check-marks only representing the 'healthier choice' within a product group. The Foundation's response to such criticism was: 'The blue check-mark indicates that that such a product is not part of the Food Pyramid and plays a minor role in a healthy diet. It is therefore not the case that you can eat these products without restriction.'

In 2014, the Scientific Council for Government Policy (*Wetenschappelijke Raad voor Regeringsbeleid/WRR*) described the problem of confusion in its report, *Towards a Food Policy*. The WRR described it as a 'forest of quality marks' and noted that consumers ran the risk of getting lost.

The check-mark of the Foundation 'I choose consciously' distinguishes between the 'healthier' products within a product group that the manufacturer has registered – against payment – out of more than 6600 foods that can be found in the store, and uses another colour check-mark for products that are really healthy.⁴⁰

Where the difference between blue and green check-marks is not clear, the impression could be created that 'blue check-mark' products are inherently healthy. That is not the case. Partly as a result of public annoyance and confusion about this system, in October 2016, it was announced that the check-marks would disappear. The Foundation was dissolved in October 2018.

The question is whether another system will replace the check-mark system. There is room for this, given the Food Information Directive. Former Minister of Health, Schippers, initially suggested to create a mobile app which would provide health-related information in respect of particular foods. This proposal was received with little enthusiasm. At the time of presenting the Prevention Accord, in November 2018, Secretary of State Blokhuis announced that a new food logo would be introduced, although six months later, no steps in that direction have been taken.⁴¹

³⁹ Stichting Ik Kies Bewust, <<https://www.hetvinkje.nl/organisatie/stichting-ik-kies-bewust/>> (last visited 12 November 2018).

⁴⁰ *Naar een Voedselbeleid (Wetenschappelijke Raad voor Regeringsbeleid)*, WRR-Rapport 93, 2 October 2014, p. 85.

⁴¹ The new national Prevention Accord might provide more insight, once presented.

In the meantime, through its Food Information Regulation, the EU has opted for a strictly objective information duty for producers in respect of consumers: consumers who are so inclined are free to read the packaging and find out which ingredients are in their food, and which calorific value is associated with the consumption of that food. In addition, the Food Information Regulation provides room for potentially further-reaching obligations for food producers. At this moment, the Dutch government has not taken any regulatory measures in this respect.

This is problematic if we take into account that a strictly objective or neutral manner of presenting information can in itself confuse consumers: after all, ingredients can be included under different names.

The same rules do not apply when producers make claims on the packaging of food products. On the basis of the Regulation on nutrition and health claims made on foods (Regulation 1924/2006/EC, the Claims Regulation), producers are only permitted to make claims regarding nutritional or physiological effect of nutrients if certain conditions have been met. Preamble 4 of the Claims Regulation states that it applies to 'all nutrition and health claims made in commercial communications' and that it 'should not apply to claims which are made in non-commercial communications, such as dietary guidelines or advice issued by public health authorities and bodies, or non-commercial communications and information in the press and in scientific publications'.

Article 3(a) of the Claims Regulation states that nutrition claims are not permitted to be false, ambiguous or misleading. Paragraph (c) states that it is not permitted to 'encourage or condone excess consumption of a food'. It is also not allowed (paragraph c) to 'state, suggest or imply that a balanced and varied diet cannot provide appropriate quantities of nutrients in general'. Additionally, the Annex to the Claims Regulation contains a definition of certain terms, including 'light', 'high fibre' and 'natural'.

The Claims Regulation provides for the use of certain nutrient profiles for certain types of products. According to Preamble 10, this aims 'to avoid a situation where nutrition or health claims mask the overall nutritional status of a food product, which could mislead consumers when trying to make healthy choices in the context of a balanced diet'. Nutritional claims could therefore no longer be made with respect to foods that contain a lot of sugar, fat or salt. As a result, candy that consists of 99% sugar could therefore no longer be advertised as being '100% fat-free'. Despite the fact that these nutrient profiles should have been adopted by the Commission by 19 January 2009, this has not yet happened. In the meantime, NGOs such as Foodwatch as well as producers from the food industry and consumer organisations have already called for the Commission to publish these food profiles.

The terms 'sugar-free', 'low-sugar' and 'with no added sugars' are among the terms included in the annex. The annex provides when such terms may be used. In the case of 'with no added sugars', for example, the following is stipulated:

A claim stating that sugars have not been added to a food, and any claim likely to have the same meaning for the consumer, may only be made where the product does not contain any added mono- or disaccharides or any other food used for its sweetening properties. If sugars are naturally present in the food, the following indication should also appear on the label: 'CONTAINS NATURALLY OCCURRING SUGARS'.

In conclusion, the Claims Regulation only regulates information pertaining to foods that carry a nutrition or health claim. It does not regulate other food-related information, nor does the Claims Regulation provide for a kind of general warning as to whether a food fits in a healthy diet; the possibility to establish nutrient profiles leaves this option open, but no implementation measures have (yet) been taken. The lack of political consensus has not led to a clear regulatory choice in this respect. The question is whether marketing-related rules contain more stringent obligations with regard to the health of foods (or the lack thereof).

4.2. Regulations: advertising for high-sugar products

When it comes to the marketing of products, it is – in general – not permitted to mislead consumers by providing misleading or incorrect information. This follows, inter alia, from Regulation 178/2002/EC;⁴² Article 8 of that regulation provides that the aim is 'the protection of the interests of consumers' and that the Regulation 'shall provide a basis for consumers to make informed choices in relation to the foods they

⁴² Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety.

consume'. This prohibition to mislead consumers has been further elaborated in the Claims Regulation and the Food Information Regulation.⁴³

With regard to advertising for high-sugar or otherwise unhealthy foods, there are few special regulations at a European level. Producers must adhere to the Audiovisual Media Services Directive,⁴⁴ which stipulates in Article 9(2) that:

media service providers [are] to develop codes of conduct regarding inappropriate audiovisual commercial communications, accompanying or included in children's programmes, of foods and beverages containing nutrients and substances with a nutritional or physiological effect, in particular those such as fat, trans-fatty acids, salt/sodium and sugars, excessive intakes of which in the overall diet are not recommended.

However, the Audiovisual Media Services Directive does not prohibit such marketing towards children.

Supra, I briefly discussed the Advertising Code, a source of 'alternative regulation', which (despite its non-binding nature) is generally adhered to by companies. And where European law prohibits the advertisement of tobacco products, this is not the case with regard to unhealthy food. In general, such advertisements are permitted; at least where marketing is aimed at adults. Regulations are stricter when it comes to advertising unhealthy food to minors. The Advertising Code for Foods provides particular rules in this respect. For example, Article 8(1) of the Advertising Code for Foods states that food advertisements directed at children up to and including 12 years of age are not permitted, unless (paragraph 2) such advertisements have been made in collaboration with the government and/or another recognised authority in the field of nutrition, health and/or exercise; examples of the latter are for example the Nutrition Centre and the Diabetes Fund. Also excluded are "advertisements for foods aimed at children aged 7 to 12 which meet the nutritional criteria as included in the [associated] table'. In addition, the Advertising Code for Foods imposes certain requirements on advertising for foods that display children's idols. This relates to foods that are 'associated with television and/or radio programmes specifically intended for children'. Such advertising cannot be shown in advertising blocks during and immediately after the broadcast of the television programme the food is associated with (for example, an advertisement for Paw Patrol chocolate paste at the end of a Paw Patrol television programme). Children's idols may also not promote particular foods for commercial purposes.

Articles 12–14 of the Advertising Code for Food Products contain provisions with regard to advertising in schools. Advertising for foodstuffs is not permitted at nurseries, day care centres and primary schools (with the exception of public information campaigns). In order to prevent unhealthy dietary patterns, it is not permitted to offer maximum or king-sized food variants in secondary schools. Rules concerning sponsoring in schools are included in the Covenant for primary and secondary education and sponsorship. Additionally, on the basis of the Prevention Accord, as of 2020, at least 950 schools will offer students healthier options in cafeterias.

In conclusion, the Netherlands is not a shining example or frontrunner when it comes to requiring that producers provide objective health-related information about high-sugar, unhealthy foods to consumers. Only in respect of advertising to children does the Netherlands pursue a fairly restrictive policy; in this area, the Netherlands offers more protection than the bare minimum provided by European legislation.

5. Conclusion: is there a parallel between warnings in respect of tobacco and in respect of high-sugar products?

I can now answer the question whether we can draw a parallel between tobacco and high-sugar products, when it comes to health-related warnings towards consumers. In respect of tobacco, the health-risks associated with smoking are widely known and (scientific) consensus exists. The same does not (yet) hold true in respect of high-sugar products. All the same, there is a call to provide consumers with better information in respect of the health risks associated with consumption of high-sugar products.

The foregoing shows that the Netherlands in general is not a forerunner in the regulation of duties to disclose information and warnings in respect of tobacco: when it comes to warning and informing consumers, and allowing producers to advertise tobacco products, it generally does not impose stricter rules than

⁴³ Regulation (EU) No 1169/2011, *supra* note 38.

⁴⁴ Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services.

those that apply on the basis of EU law. When compared to other EU member states, the Netherlands is to be regarded as a 'light' legislator.

By and large, this also applies to high-sugar foods, with one exception: the Netherlands deviates from the EU-norm, since the Advertising Code contains stricter provisions with regard to unhealthy products marketed at children. Apart from this, the Netherlands has adopted a fairly reticent role in issuing warnings or limiting the advertising of such products in order to protect consumers in respect of the health risks related to tobacco and high-sugar products. The Dutch government sees such regulatory measures as just one component of a regulatory framework at its disposal; one that includes stimulating private and non-binding regulation. In many cases, the Dutch government prefers such self-regulation over government-imposed rules. Such an assessment could make sense if the other regulatory instruments are used optimally. That is, if the regulator actively encourages alternative regulation, if it adequately informs consumers, and if companies voluntarily participate in the creation of alternative (private) regulation. Those aspects, however, are underdeveloped in the Netherlands when it comes to warning consumers about health-risks associated with unhealthy foods. The I Choose Consciously check-mark-system described above is an example of the ineffective use of regulatory measures at the disposal of the government. To that extent, I am convinced that there is room to improve upon the Dutch policy in this respect. It remains to be seen whether the measures imposed by the Prevention Accord will serve their purpose.

5.1 Obligation to prevent damage?

Although recent years have led to more stringent requirements for producers to disclose information regarding the ingredients and nutritional values of their products, and producers are decreasingly permitted to advertise unhealthy foods towards minors, the following question remains: is the average consumer sufficiently aware of the health risks associated with regular consumption of high-sugar products?

There is increasing scientific consensus about the fact that from a health perspective – no matter which way we look at it – there is nothing to be gained from the daily consumption of a glass of cola or energy drink. That does not mean that such products should be banned, but it could mean that consumers should be better informed about the adverse health effects of consumption of such products. The question is whether the requirement to provide information to consumers has developed in accordance with the state of the scientific art in this respect. After all, it would be undesirable if we look back on sugar as the tobacco of the 21st century.

Van Boom, among others, wrote about the degree of certainty that would be required to justify intervention in uncertain risks.⁴⁵ Although high-sugar products to a limited extent can be consumed without causing health-damage, it is clear that there is no health *gain* achieved by the consumption of these products. The question is whether such a conclusion would be sufficient to justify regulatory intervention in the sense that food producers are under a precautionary duty to warn.⁴⁶

5.2 Social responsibility of tobacco and food producers

Simultaneously, many companies proactively take on a more pronounced role when it comes to their social responsibility. Such a development is in line with current societal expectations towards companies. The argument that purely because it is legal, particular behaviour should be permissible or even morally justified, is – at least in respect of major social problems such as obesity – considered less and less acceptable. It is not without reason that many countries now require that companies (in particular large, listed companies) report on the impact of their business operations on a variety of stakeholders, that they carry out due diligence to assess the impact of their operations on human rights, and – to a lesser extent – take steps to prevent such harm.⁴⁷ Since for food producers, consumers would qualify as stakeholders, and the right to

⁴⁵ W.H. van Boom, 'Anticiperen op nieuwe gezondheidsrisico's', (2001) *AV&S*, pp. 3–12.

⁴⁶ In respect of the duty to prevent damages, see, inter alia: A.L.M. Keirse, 'De schadevoorkomingsplicht', in: E.F.D. Engelhard et al. (eds.), *Handhaving van en door het privaatrecht* (2009); A.L.M. Keirse, 'Alterum non laedere; voorkom schade! Grondbeginsel van het aansprakelijkheidsrecht', in: S.D. Lindenberg (ed.), *Een nieuwe aanpak* (2010); A.L.M. Keirse, *Schadevoorkomingsplicht. Rapportage over de mogelijkheden van de schadevoorkomingsplicht via het aansprakelijkheidsrecht in het kader van het programma Bewust Omgaan met Veiligheid* (2017); T. Hartlief, 'Kopie van Leefbaar Nederland', (2017) 1753 *NJB*, afl. 32.

⁴⁷ See, for instance, the EU Directive on the Publication of Non-Financial Information, as a result of which large companies that qualify as public interest organisations are required to publish certain non-financial information, pertaining to – inter alia – environmental, social and human rights aspects of their business. See A.L. Vytopil, 'Implementatie van de Richtlijn Niet-Financiële Informatie in Nederland', (2016) 119 *Ondernemingsrecht*, pp. 589–598; A.L. Vytopil & F. Verburg, 'Accountantscontrole van Niet-Financiële Informatie: Wijziging Besluit Niet-Financiële Informatie', (2017) 43 *Ondernemingsrecht*, pp. 254–255.

health qualifies as a human right, it would not seem extraordinary to expect that these companies will have to account for the way in which their products may impact on consumer's health.⁴⁸ An illustration of this social responsibility of food producers can be found in the fact that, on 6 September 2017 UNESDA – the organisation representing the European soft drinks industry – announced that sugar-based soft drinks will no longer be sold in secondary schools as of late 2018.⁴⁹ Compliance with the agreements will be monitored by means of 'third -party auditors'. Apparently producers of soft drinks – high-sugar products *par excellence* – are now also aware of their responsibilities towards (young) consumers. Additionally, as part of the Prevention Accord, food producers have agreed that they will make foods such as soda, candy and milk products healthier, for example by removing sugar from these products.⁵⁰

5.3 Next steps? On informing the consumer

The mere awareness of a social responsibility that companies could have, in my perspective, in and of itself does not bring about sufficient improvement in the provision of information towards consumers. The question then arises how consumers are sufficiently informed on the health implications of the food they eat. In this context, it may make sense to implement a system similar to that proposed by the Scientific Council for Government Policy: a 'double traffic light system' for healthy food.⁵¹

The notion that producers could provide additional health-related information on the packaging of unhealthy foods becomes more attractive when taking into account that provision of such compulsory information is generally considered cheaper, easier to enforce and – in general – less invasive than other regulatory interventions.⁵² In addition, communication requirements are less restrictive than other regulatory measures, since such requirements do not deny access to the market to the producers of unhealthy products.⁵³ According to Allemanno and Garde, a distinction can be made between 'neutral, objective' messages – which only inform the consumer about the characteristics of the products bought or consumed – and 'negative' messages, which actively aim to discourage particular behaviour or certain consumptions.⁵⁴ The warnings in respect of tobacco are an example of the latter category.

Critics of information requirements note that such requirements would be ineffective, since only a small proportion of consumers would actually read the information provided and an even smaller part of the information would actually process such information in the manner required for this information to be effective.⁵⁵ Additionally, it may prove quite difficult to effectively communicate towards *all* consumers of a given product: after all, the group of consumers that reads the label is heterogeneous, and each consumer takes in and processes information differently. An 'overload' of information, just for the sake of completeness, would also be problematic. Allemanno and Garde are therefore supporters of the photographic warnings on tobacco products.⁵⁶

In that respect, it would be preferable to present health-related information in respect of food in the simplest way imaginable, and preferably by means of a graphical presentation. A clear and transparent warning regarding unhealthy or less healthy products, such as the 'traffic light system' recently dismissed by the

⁴⁸ The right to the protection of public health has been laid down in inter alia the UN International Covenant on Civil and Political Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms, and the right to the highest attainable degree of health has been laid down in inter alia the UN International Covenant on Economic, Social and Cultural Rights and the European Social Charter.

⁴⁹ UNESDA Soft Drinks Europe, 'European soft drinks industry to stop sales of sugary drinks in secondary schools across the EU', <<https://www.unesda.eu/news/european-soft-drinks-industry-to-stop-sales-of-sugary-drinks-in-secondary-schools-across-the-european-union/>> (last visited on 25 September 2019)

⁵⁰ *Nationaal Preventieakkoord* (2018), p. 40, <<https://www.rijksoverheid.nl/onderwerpen/gezondheid-en-preventie/documenten/convenanten/2018/11/23/nationaal-preventieakkoord>> (last visited 22 May 2019).

⁵¹ *Naar een Voedselbeleid*, supra note 40, p. 146. Note that the Dutch Consumers' Association has vouched for the adoption of the Nutriscore logo, which is used in France; see <<https://www.consumentenbond.nl/acties/weet-wat-je-eet/voedselkeuzelogos-en-nutriscore-wat-vaarom-en-hoe>> (last visited 22 May 2019).

⁵² A. Alemanno & A. Garde, 'The Emergence of an EU Lifestyle Policy, The Case of Alcohol, Tobacco and Unhealthy Diets', (2013) 50 *Common Market Law Review*, 6, referring to inter alia O. Ben-Shahar & C.E. Schneider, 'The Failure of Mandated Disclosure', (2011) 159 *U. Pa. L. Rev.*, pp. 658–664.

⁵³ Alemanno & Garde, *ibid.*, p. 8.

⁵⁴ Alemanno & Garde, *ibid.*, p. 8.

⁵⁵ S. Schwarcz, 'Rethinking the Disclosure Paradigm in a World of Complexity', (2004) 1 *U. Ill. L. Rev.*, pp. 1–35. See also E.L. Vyth et al., 'Actual use of a front-of pack nutrition logo in the supermarket: consumers' motives in food choice', (2010) 13 *Public Health Nutrition*, 11, pp. 1882–1889.

⁵⁶ Alemanno & Garde, supra note 52, p. 9.

European Parliament, could be appropriate. Designing any such system will not be easy: not only will the interests of all players in the food industry need to be taken into account, but to make matters more complicated, the (scientific) state of the art (in relation to nutritional science, as well as in respect of health sociology and psychology and the effectiveness of warnings) will change. Nonetheless, public health deserves that serious attention is paid to effective warnings.⁵⁷ It remains to be seen whether the measures taken on the basis of the Preventative Accord be sufficient to bring about a change in protection public health in an adequate manner.

Competing Interests

This article was written before the author joined FrieslandCampina N.V. as a senior counsel business conduct. The article was written in a private capacity and the viewpoints of the author were not influenced by her employer.

⁵⁷ In behavioral sciences, much research has been carried out into the effectiveness of warnings; see also supra note 4. In addition, I refer to inter alia E.L. Vyth, *Evaluation of a front-of-pack nutrition label: Effects on consumer behavior, product development and public health* (Diss. UvA, 2012), p. 175.

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