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Signature: *Jennifer Hough*

### Abstract

Health harming industries disproportionately impact children, whose health and development are uniquely vulnerable to corporate-driven harms. Can applying a children's rights lens—rooted in the UN Convention on the Rights of the Child (UNCRC)—help to strengthen arguments that stronger legal mechanisms are required to hold corporations accountable for violating children's right to health?

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## 1.0 Introduction

Drawing on the increased understanding of what are known as the “commercial determinants of health,”<sup>1</sup> this essay will explore the potential of utilising the lens of the United Nations Convention on the Rights of the Child<sup>2</sup> (UNCRC) to accelerate implementation of restrictions on the corporate practices of health harming industries. The essay will in particular consider industries which account for at least a third of deaths globally due to their links to non-communicable diseases (NCDs).<sup>3</sup> The essay will begin by outlining what the commercial determinants of health are and how corporate strategies used by health harming industries undermines public health. It will then set out the relevant children’s rights that are applicable in this area, establishing that states have positive obligations and duties to protect children from “pathological”<sup>4</sup> business practices that run roughshod over children’s rights. The essay will make the case that where the UN Guiding Principles<sup>5</sup> fail, the UNCRC fills the gap, providing a powerful rationale and legal basis for governments to act. The essay will conclude that while a children's rights lens strengthens the rationale for more stringent legal regulation on corporate practices, real change will only occur if governments are willing to take meaningful action and enact robust laws in this area.

## 2.0 Commercial determinants of health

The commercial determinants of health can be described as the “systems, practices and pathways through which commercial actors drive health and equity...”<sup>6</sup> and where some

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<sup>1</sup> Anna B Gilmore and others, ‘Defining and Conceptualising the Commercial Determinants of Health’ (2023) 401 *The Lancet* 1194

<sup>2</sup> UN General Assembly, *Convention on the Rights of the Child* (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3

<sup>3</sup>Supra n 1 Tobacco, ultra-processed food, fossil fuel, and alcohol, account for at least a third of global deaths.

<sup>4</sup> Joel Bakan, *The Corporation: The Pathological Pursuit of Profit and Power* (Constable 2004)

<sup>5</sup> UN Human Rights Council, ‘Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework’ (21 March 2011) UN Doc A/HRC/17/31

<sup>6</sup> Supra 1

commercial actors—notably the largest transnational corporations—are responsible for “escalating rates of avoidable ill health, planetary damage, and social and health inequity.”<sup>7</sup> As stated, just four health harming industries, tobacco, ultra-processed food, fossil fuel, and alcohol, account for at least a third of deaths globally.<sup>8</sup> In respect of this issue, Irish researchers have stated: “Commercial actors, through mechanisms that make these commodities artificially cheap, hyper-convenient, and seductively attractive, are a key driver for ill-health.”<sup>9</sup> The World Health Organisation (WHO) describes the “devastating consequences,”<sup>10</sup> of a political and economic environment that prioritises profit over public health. WHO Europe has highlighted that there are 19 million deaths every year from the four industries set out in the Lancet.<sup>11</sup>

This powerful data and analysis should make governments sit up and take notice. Yet despite the wealth of evidence that exists about preventable health harms arising from powerful industries and their corporate practices, governments are reluctant to impose regulations and laws on them. This points to a deep seated inertia from political leaders to push for the requisite measures to bring about change. There are a variety of reasons for this, not least the incessant corporate lobbying that corporations engage in,<sup>12</sup> and the unwillingness for politicians to stifle business because of an unfounded belief that regulating unhealthy commodity items will have a negative effect on the economy.<sup>13</sup>

Furthermore, commercial actors consistently promote the idea that individuals, rather than businesses, are the problem.<sup>14</sup> These ideas are based on framing individual choice as poor or irresponsible, thus promoting the idea that individuals should be the focus of interventions.<sup>15</sup> Governments are guilty of falling for, perhaps for the sake of convenience,

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<sup>7</sup> *ibid*

<sup>8</sup> *ibid*

<sup>9</sup> Mélissa Mialon and others, ‘The Commercial Determinants of Health in Ireland: Fueling an Industrial Epidemic at Home and Abroad’ (2024) 8(2) BJGP Open

<sup>10</sup> World Health Organization, *Commercial Determinants of Noncommunicable Diseases in the WHO European Region* (2024) World Health Organization Regional Office for Europe

<sup>11</sup> *ibid*

<sup>12</sup> Martin McKee and David Stuckler, ‘Revisiting the Corporate and Commercial Determinants of Health’ (2018) 108(9) *American Journal of Public Health* 1167–1170

<sup>13</sup> Raphael Lencucha and Anne Marie Thow, ‘Intersectoral Policy on Industries That Produce Unhealthy Commodities: Governing in a New Era of the Global Economy?’ (2020) 5(8) *BMJ Global Health*; Raphael Lencucha and Anne Marie Thow, ‘How Neoliberalism Is Shaping the Supply of Unhealthy Commodities and What This Means for NCD Prevention’ (2019) 8(9) *International Journal of Health Policy and Management*; Kelly D Brownell and others, ‘The Public Health and Economic Benefits of Taxing Sugar-Sweetened Beverages’ (2009) 361(16) *New England Journal of Medicine* 1599 514–520.

<sup>14</sup> Cassandra de Lacy-Vawdon and Charles Livingstone, ‘Defining the Commercial Determinants of Health: A Systematic Review’ (2020) 20 *BMC Public Health* 1022; Cassandra de Lacy-Vawdon, Brian Vandenberg and Charles Henry Livingstone, ‘Recognising the Elephant in the Room: The Commercial Determinants of Health’ (2022) 7(2) *BMJ Global Health*

<sup>15</sup> *ibid*

industry myths that perpetuate the status quo at the expense of wider population health.<sup>16</sup> Industry tactics include delaying the adoption of legislation, creating industry groups to promote corporate interests, casting doubt on the role of harmful products in the rise of non-communicable diseases and trying to reframe the debate about an overbearing “nanny state.”<sup>17</sup> Such practices have long been documented in tobacco control, and a growing body of evidence shows that the food and alcohol industries are engaging in similar tactics.<sup>18</sup> According to Kickbusch and colleagues,<sup>19</sup> approaches to health promotion have “totally underestimated globalised corporate power combined with its global marketing onslaught and its transnational influence on political decision making.”

Children are particularly vulnerable in this landscape. Commercial exploitation and widening inequalities in the world were highlighted as some of the major threats to the world’s children in a landmark 2020 report.<sup>20</sup> The report states that: “Industries such as tobacco, alcohol, processed foods, and digital platforms exploit children through targeted marketing. Rising obesity, mental health issues, and exposure to harmful products highlight the need for stricter corporate accountability.”<sup>21</sup> Harmful commercial practices and their impact on children have also been highlighted by Bakan,<sup>22</sup> who outlines how corporations systematically exploit children for profit across various industries, including food, pharmaceuticals and digital media. He argues that unchecked corporate power has led to a decline in children's well-being, as businesses prioritise profit over children's health, development, and rights.<sup>23</sup>

The next section will examine how a focused children’s rights lens, based on a legally binding treaty, can bring about change in what is a highly contested space, where industry actors push back against regulatory reform even in the face of overwhelming evidence that it is required.

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<sup>16</sup> Supra 10, p 19 – The WHO report highlights a range of industry myths. See also: Nason Maani, Mark Petticrew, and Sandro Galea (eds), *The Commercial Determinants of Health* (Oxford University Press 2023)

<sup>17</sup> Amandine Garde, Nikhil Gokani, Juan Collado Perez-Llantada and Jaydon Souter, ‘Lobbying, Transparency and Trust: Power Imbalances and the Failure to Implement Europe’s Beating Cancer Plan’ (2025) 51 *The Lancet Regional Health – Europe*; See also: Nason Maani, Mark Petticrew, and Sandro Galea (eds), *The Commercial Determinants of Health* (Oxford University Press 2023)

<sup>18</sup> Juliette McHardy, ‘The WHO FCTC’s Lessons for Addressing the Commercial Determinants of Health’ (2021) 36(1) *Health Promotion International* i39–i52

<sup>19</sup> Ilona Kickbusch, ‘Addressing the Interface of the Political and Commercial Determinants of Health’ (2012) 27(4) *Health Promotion International* 427.

<sup>20</sup> Supra n 119.

<sup>21</sup> *ibid*

<sup>22</sup> Joel Bakan, *Childhood Under Siege: How Big Business Targets Children* (Penguin Group 2011)

<sup>23</sup> *ibid*

## 3.0 A children's rights lens

### 3.1 Children's right to health

Given that the UNCRC<sup>24</sup> is the world's most ratified human rights treaty, the Convention is a vital tool in challenging corporate practices that are detrimental to children's health.

Furthermore, children's rights are indivisible and interdependent, meaning that no single right can be fully realised without the fulfilment of the others.<sup>25</sup> Children's right to health is a fundamental human right most notably articulated in Article 24 of the UNCRC.<sup>26</sup> Article 24 guarantees a child's right to the highest attainable standard of health and this right is holistic, covering not just access to medical care, but the broader determinants of health, including safe environments, adequate nutrition, clean water, and protection from harmful substances and practices.<sup>27</sup> Articles 17 and 36 of the Convention also protect children from harmful media and economic exploitation.<sup>28</sup> These rights are further bolstered by General Comments.<sup>29</sup> General Comment 15<sup>30</sup> on the right of the child to the highest attainable standard of health says that States must regulate private sector actors, including the food, alcohol, tobacco, and pharmaceutical industries with special attention must be paid to vulnerable and marginalised children. More importantly, General Comment 16 (GC16)<sup>31</sup> provides guidance on implementing measures to prevent and remedy child rights violations caused by business activities, while also stating that corporations fulfil a range of responsibilities in upholding children's rights.<sup>32</sup> Analysing the impact of GC16, researchers note that because children are among the most vulnerable groups in society and can be particularly impacted by the activities of businesses in a variety of negative ways, GC16 "must address these disadvantages faced by children in the realisation of their rights."<sup>33</sup>

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<sup>24</sup> Supra n 2

<sup>25</sup> United Nations, *Convention on the Rights of the Child* (adopted 20 November 1989, entered into force 2 September 1990) UN Treaty Series 1577 art 5

<sup>26</sup> United Nations, *Convention on the Rights of the Child* (adopted 20 November 1989, entered into force 2 September 1990) UN Treaty Series 1577 art 24

<sup>27</sup> *ibid*

<sup>28</sup> United Nations, *Convention on the Rights of the Child* (adopted 20 November 1989, entered into force 2 September 1990) UN Treaty Series 1577 arts 17 and 36

<sup>29</sup> General Comments are official interpretations provided by UN treaty bodies, such as the Committee on the Rights of the Child, to clarify and expand upon articles or provisions in international human rights treaties and offering guidance on how they should be implemented

<sup>30</sup> United Nations Committee on the Rights of the Child, General Comment No. 15 (2013): The Right of the Child to the Enjoyment of the Highest Attainable Standard of Health (2013) CRC/C/GC/15

<sup>31</sup> United Nations 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 (2013) CRC/C/GC/16.

<sup>32</sup> *ibid*

<sup>33</sup> Paula Gerber, Joanna Kyriakakis and Katie 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 Melbourne Journal of International Law 93.

Gerber et al, further note that GC16 will not in and of itself bring an end to the violation of children's rights by business enterprises, but that such a change will only occur if reforms at an international level are mirrored at the domestic level through law and policy. Similarly, Collins argues there is a need to move beyond voluntary corporate social responsibility towards binding legal frameworks that hold businesses accountable for their impact on children's rights.<sup>34</sup> While Collins<sup>35</sup> suggests integrating children's rights with Ruggie's UN Guiding Principles (UNGPs),<sup>36</sup> Deva contends that the UNGPs reflect a neoliberal approach, allowing corporations to maintain self-regulation without meaningful accountability mechanisms.<sup>37</sup> Indeed, the UNCRC perhaps does for children what the UNGPs did not do for anyone— that is to give governments a legal basis to take strong legal action against harmful industry practices. The “draft norms,”<sup>38</sup> a precursor process to Ruggie's guiding principles, included a recommendation around harmful commodity marketing, particularly in relation to vulnerable groups like children. However, that process was rejected.<sup>39</sup> Ironically, the draft norms sought to do, in terms of marketing, what various countries are now, with difficulty, trying to implement for the various industries outlined here. For, as has been proven again and again, appealing to industry to take voluntary action simply does not work.<sup>40</sup> Indeed, stronger calls to action than are contained in the UNGPs – which in any case, are not legally binding— have continually come from human rights advocates in respect of harmful commercial practices. As far back as 2014, the Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, highlighted an “urgent need for States to address structural changes in the food environment, which negatively impact individuals' enjoyment of the right to adequate and nutritious food – an underlying determinant of the right to health.”<sup>41</sup> The Rapporteur pointed to the structural issues at play: “Global trade, increased foreign direct investment (FDI) in the food sector and

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<sup>34</sup> Tara M Collins, ‘The Relationship between Children's Rights and Business’ (2014) 18 *The International Journal of Human Rights* 582.

<sup>35</sup> *ibid*

<sup>36</sup> John Ruggie, ‘Protect, Respect and Remedy: a Framework for Business and Human Rights’ (2008) UN Doc A/HRC/8/5

<sup>37</sup> Surya Deva, ‘Treating Human Rights Lightly: A Critique of the Consensus Rhetoric and the Language Employed by the Guiding Principles’ in Radu Mares (ed), *The UN Guiding Principles on Business and Human Rights: Foundations and Implementation* (Martinus Nijhoff 2012); See also: Surya Deva, ‘Mandatory Human Rights Due Diligence Laws in Europe: A Mirage for Rightsholders?’ (2023) 34(1) *European Journal of International Law* 1.

<sup>38</sup> UN Sub-Commission on the Promotion and Protection of Human Rights, Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (2003) UN Doc E/CN.4/Sub.2/2003/12/Rev.2

<sup>39</sup> In 2008, the UN's Economic and Social Council decided to develop the UN Guiding Principles on Business and Human Rights under John Ruggie's mandate, effectively rejecting the Draft Norms as too prescriptive and legally burdensome on both states and companies.

<sup>40</sup> Elizabeth Handsley & Belinda Reeve, ‘Holding Food Companies Responsible for Unhealthy Food Marketing to Children: Can International Human Rights Instruments Provide a New Approach?’ (2018) 41 *UNSWLJ* 449; *Supra* n 10.

<sup>41</sup> Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health A/HRC/26/31

the pervasive marketing of unhealthy foods have increased the consumption of unhealthy foods, which have been linked to diet-related NCDs.”<sup>42</sup>

### 3.2 Beyond the guiding principles

A rights based approach in this arena demands measures that address the structural factors that impede full and effective realisation of children’s rights. Such an approach “ensures that the cause of the health problem is not automatically located within the person or population group and demands a broader inquiry to assess those external factors that impede the ability to enjoy the highest attainable standard of health.”<sup>43</sup> The evidence base and calls to action are well developed in the area of junk food, where global consensus favours laws to curb marketing. Garde contends that a “child rights approach to unhealthy food marketing offers a powerful and universally applicable way to consider children as rights holders who are central to any policy discourse.”<sup>44</sup> UNICEF has consistently called for action in this area, stating: “The CRC provides the basis for a normative child rights-based approach to obesity and NCD prevention. Through its articulation of a wide array of rights, the Convention establishes a platform to regulate unhealthy food marketing to children by establishing the obligations of governments.”<sup>45</sup> As pointed out by US researchers, under the right to health: “States are especially required to protect vulnerable groups such as children from violations of their right to health. To reduce opportunities for targeted advertisements, some States have instituted laws to ban companies from advertising their products to children below a certain age and to limit the availability of unhealthy foods in schools prevent the obesity epidemic.”<sup>46</sup>

Despite all of this, governmental progress on particular issues, such as junk food, has stalled in recent years.<sup>47</sup> There have been calls for the Committee on the Rights of the Child (CRC) to strengthen its approach by being much more assertive in its recommendations and joining the dots with General Comments and other frameworks calling for action.<sup>48</sup> In respect

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<sup>42</sup> *ibid*

<sup>43</sup> John Tobin, ‘Beyond the Supermarket Shelf: Using a Rights Based Approach to Address Children’s Health Needs’ (2006) 14 *The International Journal of Children’s Rights* 275, 281–2

<sup>44</sup> Amandine Garde and Tatjana Zgaga, ‘Protecting Children from the Harmful Impact of Food Marketing: The Role of the Law’ (2021) 29(2) *European Journal of Risk Regulation* 301

<sup>45</sup> UNICEF, *A Child Rights-Based Approach to Food Marketing: A Guide for Policy Makers* (2018)

<sup>46</sup> Institute of Medicine, *Building Public–Private Partnerships in Food and Nutrition: Workshop Summary* (National Academies Press 2012) 9–22

<sup>47</sup> *ibid*; see also: Amber van den Akker and others, ‘Industry influence on public health policy formulation in the UK: a complex systems approach’ (2024) 39 *Health Promotion International* daae 139

<sup>48</sup> Katharina Ó Cathaoir, Mette Hartlev and Céline Brassart Olsen, ‘Global Health Law and Obesity: Towards a Complementary Approach of Public Health and Human Rights Law’ in Gian Luca Burci and Brigit Toebe (eds), *Research Handbook on Global Health Law* (Edward Elgar Publishing 2018) 449.

of Ireland's most recent concluding observations from the CRC<sup>49</sup> in relation to children's rights and the business sector, the Committee recommended the Irish government: "Introduce mandatory requirements for the business sector to undertake assessments of, consultations on and full public disclosure of the environmental, health-related and children's rights impacts of their business activities and their plans to address such impacts."<sup>50</sup> This is quite a broad recommendation and it remains to be seen how the Irish government will respond. It will, however, be vital to monitor the response and, if it is weak, demand action in respect of health-related harms, for example from social media firms, the alcohol and food industries. It's likely the government will cite work already undertaken such as marketing restrictions under the Public Health (Alcohol) Act 2018<sup>51</sup> and the Online Safety Code,<sup>52</sup> where legal obligations have been placed on social media platforms to protect children from harmful content.

### 3.3 Online world

Of all the industries that harm children, the online world is currently garnering a lot of attention. As signalled by children's rights experts in 2012: "Online data has the potential to threaten a child's safety, development, and social interaction by normalising surveillance and increasing the risk of identity theft, fraud, and profiling. Children and young people are often the first to adopt new digital devices, services, and content, as such they are especially vulnerable, especially to data manipulation through non transparent and biased algorithms"<sup>53</sup> More than 10 years later, a WHO report<sup>54</sup> this year highlighted that it is now becoming more difficult to reverse what has become normalised— that is digital marketing techniques that are immersive, have captivate audiences, and ensure maximum engagement. "The dissemination of marketing content through trusted and authentic channels, including peer recommendations and influencer endorsements, further amplifies its impact."<sup>55</sup> Yet the report states that while regulating harmful digital marketing in a fast moving field where technological innovation is constant is difficult "countries are starting to take action, showing

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<sup>49</sup> United Nations Committee on the Rights of the Child, Concluding Observations on the Combined Fifth and Sixth Periodic Reports of Ireland (28 March 2023) UN Doc CRC/C/IRL/CO/5-6

<sup>50</sup> *ibid*

<sup>51</sup> Public Health (Alcohol) Act 2018, ss 14–19

<sup>52</sup> The Online Safety and Media Regulation Act 2022 established Coimisiún na Meán which has developed binding online safety codes, particularly to protect children from exposure to harmful material on video-sharing and social media platform.

<sup>53</sup> Helen Clark and others, 'A Future for the World's Children? A WHO–UNICEF–Lancet Commission' (2020) 395 *The Lancet* 605.

<sup>54</sup> *Supra* n 10. See also: UNICEF, *Children and Digital Marketing: Promoting Responsible Commercial Practices in a Hyperconnected World* (2018);

<sup>55</sup> *Supra* n 10



that it is feasible.”<sup>56</sup> Tackling online harms could have an effect for all of the other issues mentioned in this essay, as the main vehicle for industry accessing children as markets and commodities is online.<sup>57</sup> General Comment No 25<sup>58</sup> on children’s digital rights includes recommendations for protecting children from harm shaped by business activities. It states: “The harmful effects of targeted marketing, data harvesting, and exposure to inappropriate content all point to the need for businesses to adopt responsible practices that safeguard children’s rights.”<sup>59</sup>

Taking the aforementioned children’s rights requirements together with the associated GC’s, and the evidence of harm to children, all of this provides a powerful platform from which governments could and should take brave action to protect children. As health harming industries use the same tactics and playbooks, what works for one works for the other. The evidence is there, as is the legal basis for acting. What is concerning, is the lack of political will. This becomes even more pressing when taking into account how the online activities of health harming industries are turbo charging how they access children in particular. The realisation of children’s right to health cannot be left in the hands of business.<sup>60</sup> Garde stresses the need for legal measures to counter “power asymmetries” between industry and governments.<sup>61</sup> This means moving beyond voluntary commitments and self-regulation and using “rights based approaches as a vehicle to overcome political barriers and facilitate progressive and life-saving legal innovations.”<sup>62</sup> The next section will demonstrate that people are ahead of politicians in respect of these issues and will conclude by outlining legal frameworks centred around the ‘best buys’<sup>63</sup> – proven, evidence based ways to reduce corporate-driven health harms.

## 4.0 Legal mechanisms required

### 4.1 Public must push for change

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<sup>56</sup> *ibid*

<sup>57</sup> UNICEF, *Children and Digital Marketing: Promoting Responsible Commercial Practices in a Hyperconnected World* (2018); *Supra* 119, 10

<sup>58</sup> United Nations Committee on the Rights of the Child, General Comment No. 25 (2021): *Children’s Rights in Relation to the Digital Environment* (2021) CRC/C/GC/25

<sup>59</sup> *ibid*

<sup>60</sup> *Supra* n 44

<sup>61</sup> Amandine Garde, ‘Global Health Law and Non-Communicable Disease Prevention: Maximizing Opportunities by Understanding Constraints’ in GL Burci and B Toebe (eds), *Research Handbook on Global Health Law* (Edward Elgar Publishing 2018)

<sup>62</sup> *ibid*

<sup>63</sup> See: World Health Organization, *Best Buys and Other Recommended Interventions for the Prevention and Control of Noncommunicable Diseases* (World Health Organization, Geneva, 2017)

Public acceptability for regulation on health harming products and industries has grown in recent years.<sup>64</sup> For example, studies have shown that people are largely supportive of population-health incentives, especially if framed as benefiting children’s health.<sup>65</sup> Parents cite being overwhelmed by environments that promote unhealthy choices,<sup>66</sup> while surveys regularly show public support for regulation on advertising and price regulation,<sup>67</sup> to address tobacco, alcohol, gambling and obesity, again, especially when they benefit children. This demonstrates that despite the narratives about so-called “nanny state” interference into people’s private lives, in fact people want government action in these areas, in particular to protect young people. The nanny state narrative is in itself a barrier to progressive law reform. It has become “a weapon that assists tobacco, alcohol and processed food businesses, and their allies, to resist regulatory threats... Nanny state rhetoric is closely allied to defending the economic interests of corporations that make money from health risks and unhealthy choices.”<sup>68</sup> Perhaps not surprisingly, young people are powerful message bearers in countering the nanny state argument. Research with young people has “documented that they are highly critical of industry tactics and aware of the influence of profit motives on their resistance to reforming their practices.”<sup>69</sup> They also express frustration at constant exposure to harmful marketing.<sup>70</sup>

The voice of the child is yet another powerful factor to help push politicians to take action and must be further harnessed. Indeed, children have the right to be heard in matters affecting their lives and health as per Article 12 of the UNCRC.<sup>71</sup> Examples of this in practice can be found, but also can be found wanting. For example, Scotland has actively engaged children in consultations regarding alcohol policy, particularly focusing on how

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<sup>64</sup> Wrieden W, Levy L, Miles LM, White M, Adams J, “Public acceptability of financial incentives and rewards for encouraging healthy behaviour: a systematic review and narrative synthesis” (2019) 19 BMC Public Health 1054; Sarah Diepeveen, Tim Ling, Michael Suhrcke, Martin Roland, and Theresa Marteau, ‘Public acceptability of government intervention to change health-related behaviours: a systematic review and narrative synthesis’ (2013) 13 BMC Public Health 756

<sup>65</sup> *ibid*

<sup>66</sup> Xiao Ma, Weidong Li and Paul B Rukavina, ‘Challenges Encountered by Parents from Urban, Lower Socioeconomic Class in Changing Lifestyle Behaviors of Their Children Who Are Overweight or Obese’ (2023) 23 BMC Pediatrics 457

<sup>67</sup> Social Market Foundation, ‘Majority support ‘nanny state’ policies to improve Britain’s health outcomes’ (Social Market Foundation, 14 September 2023). UK analysis of public opinion published between 2015-2023 on measures to address tobacco, alcohol, gambling and obesity shows that most policies were supported. On average, 65% of people supported advertising bans – like limiting the exposure of children to alcohol advertising on social media – across 23 polls, SMF analysis finds.

<sup>68</sup> R.S. Magnusson, Case Studies in Nanny State Name-Calling: What Can We Learn? (2017) 38(3) Journal of Law and Medicine 507

<sup>69</sup> Maria Soraghan et al, ‘Harmful Marketing by Commercial Actors and Policy Ideas from Youth’ (2023) 38(6) *Health Promotion International* 1001

<sup>70</sup> *ibid*; see also Collins, *supra* n 34

<sup>71</sup> UN Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3, art 12

alcohol advertising and promotion affect young people.<sup>72</sup> The “Alcohol-Free Childhood” project explored children's experiences with alcohol in their environments, including exposure in homes, communities and advertising. The findings clearly articulated a powerful call for change and received much attention and political engagement.<sup>73</sup> However, in Scotland, despite this, laws have yet to be enacted to protect young people from alcohol marketing.<sup>74</sup> In Ireland, where such an initiative did not take place, laws have been passed in respect of alcohol marketing and children. This raises the question of the influence children’s rights have. As Lundy has articulated, if children are to be listened to, they must really be heard.<sup>75</sup> In other words, voice is not enough.<sup>76</sup> Collins poses the question – “how can and should child rights influence the roles and efforts of business?”<sup>77</sup> Perhaps the better question is: how can and should child rights influence the roles and efforts of elected representatives? As the Scottish example demonstrates, consulting children is all well and good, but without robust political action, the protection of children from commercial exploitation will persist and children’s rights are merely aspirational.<sup>78</sup>

#### **4.2 Law, for all its flaws, is the only way**

Despite growing public concern and increasing awareness about the harms of certain business practices, there is a clear lack of reciprocal political action on these issues. This is because of the close ties between business and politics and the incessant lobbying that takes place at all levels of government.<sup>79</sup> However, it is also increasingly recognised that business models which have proven immensely profitable for commercial actors to the detriment of public health “requires a legal response.”<sup>80</sup> This is because it is abundantly clear that while industry may be willing to take steps to protect against reputational damage by eliminating some

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<sup>72</sup> Children in Scotland, Alcohol Marketing in Scotland – Youth Engagement Project (Children in Scotland, 2023)

<sup>73</sup> *ibid*

<sup>74</sup> The Scottish Government has expressed a desire to reduce the appeal of alcohol to children and young people and reduce alcohol-related harms through marketing restrictions, but the specific measures and their implementation are still under consideration. See: Scottish Government, Restricting Alcohol Advertising and Promotion: Consultation Paper (Scottish Government, 2023)

<sup>75</sup> Laura Lundy, “Voice is Not Enough”: The Role of Children’s Participation in Decision-Making (2010) 28 *Journal of Social Policy* 105. The Lundy Model of children's participation in decision-making emphasises the need for children's views to influence decision-making. According to the Lundy Model, voice alone is not enough. For children's participation to be meaningful, their opinions must be taken seriously and be given due weight in the decision-making process

<sup>76</sup> *ibid*

<sup>77</sup> *Supra* n 34

<sup>78</sup> Amandine Garde and Tana Zgaga, ‘Protecting Children from the Harmful Impact of Food Marketing: The Role of the Law’ in Liza Mialon and Philip Lencucha (eds), *Commercial Determinants of Health* (Oxford University Press 2021)

<sup>79</sup> *Supra* n 33, 19. See also n 87

<sup>80</sup> Amandine Garde and others, ‘Lobbying, Transparency and Trust: Power Imbalances and the Failure to Implement Europe’s Beating Cancer Plan’ (2025) 51 *The Lancet Regional Health - Europe* 101238.

practices “they are unlikely to adopt more comprehensive restrictions on food marketing voluntarily - suggesting the need for government intervention.”<sup>81</sup>

According to the WHO, the best law and policy mechanisms to tackle “the global epidemic of NCDs” centres around tackling price, promotion and availability.<sup>82</sup> This includes politically unpopular interventions such as increasing taxes on tobacco and alcohol, restricting marketing of unhealthy foods, and implementing policies to promote healthier food environments. There are, however, many instances from around the world where governments have taken such measures to protect population health<sup>83</sup>, in particular in respect of children. In response to the country's high obesity rates, Chile's 2016 Food Labelling and Advertising Law is regarded as a successful public health intervention.<sup>84</sup> The WHO and UNICEF have praised it as a model for tackling the commercial determinants of health — particularly in relation to children's rights and studies show that the law led to reformulation of products and changed purchasing behaviour, with reduced consumption of high-sugar drinks and snacks.<sup>85</sup> In Ireland, the PHAA<sup>86</sup> is lauded internationally as a blueprint for how to tackle alcohol harms using the best buys.<sup>87</sup> The legislation is based on proven evidence of what works best at a population level for reducing alcohol use and related harms, as recommended by the WHO. Despite opposition to the legislation that significantly delayed its enactment, the evidence available shows that public support for the Act is high, and there is much interest globally on its impact on alcohol use in Ireland.<sup>88</sup> Ireland's Health Research Board has stated that alcohol advertising is one of the most influential drivers of adolescent drinking, and children in particular are regularly exposed to alcohol marketing. It highlighted that central to the Act is “preventing or delaying alcohol use among children and young

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<sup>81</sup> Supra n 40

<sup>82</sup> World Health Organization, 'Best Buys' and Other Recommended Interventions for the Prevention and Control of Noncommunicable Diseases (WHO 2020); World Health Organization, Tackling NCDs: Best Buys and Other Recommended Interventions for the Prevention and Control of Noncommunicable Diseases (2nd edn, World Health Organization 2024)

<sup>83</sup> For examples see: WHO report supra n 10, at 21, 44, 45, 23, 24, 29, 34.

<sup>84</sup> Ley No. 20,606 sobre la Composición Nutricional de los Alimentos y su Publicidad, 2016, Chile/ Law No. 20,606 on the Nutritional Composition of Food and its Advertising

<sup>85</sup> World Health Organization (WHO), 'Chile's Food Labelling Law: A Model for Tackling the Commercial Determinants of Health' (2020) see also: Cecilia A. Rodríguez-Rodríguez, et al., 'Impact of Chile's Food Labelling Law on the Reformulation of Food Products and Consumption Patterns: A Longitudinal Analysis' (2021) 5(2) Journal of Public Health Policy 34-45

<sup>86</sup> Supra n 51 PHAA.

<sup>87</sup> Joe Barry and John Lyne, 'The Implementation of a Public Health Alcohol Policy in Ireland' (2023) 40(1) Irish Journal of Psychological Medicine 103-106

<sup>88</sup> Anne Doyle, Deirdre Mongan and Brian Galvin, Alcohol: Availability, Affordability, Related Harm, and Policy in Ireland (HRB Overview Series 13, Health Research Board 2024) See also: Joe Barry and John Lyne, 'The Implementation of a Public Health Alcohol Policy in Ireland' (2023) 40(1) Irish Journal of Psychological Medicine 103-106

people.... restricting the sale and availability of alcohol is fundamental to the Act in order to prevent children and young people's alcohol use.”<sup>89</sup>

However, despite the moral imperative driving the legislation, since its passage, the alcohol industry has continued to fight its provisions and enactment. The HRB points out how the act is being circumvented through the use of alibi marketing<sup>90</sup> and that it needs updating due to the changing online world. It stated: “A number of ambiguities exist that undermine the legislation, namely alcohol companies’ ability to use ‘alibi marketing’ and advertise for zero-alcohol products. A further consideration is online alcohol advertising, which is overlooked in the legislation ...no one could have foreseen how social media and online activity would be such a fundamental part of our lives, and especially in children’s and adolescents’ lives.”<sup>91</sup> Researchers who are monitoring the law have also pointed out that “brand sharing” or “alibi marketing” has sprung up on public transport and within the sporting area during events, both places where advertising for regular strength products is now prohibited.<sup>92</sup> “To what extent brand sharing advertising is compliant with the Act, and to what extent exposure to such advertising is detrimental to the aims of the Act, remain issues to consider.”<sup>93</sup> Additionally, enactment of the full suite of measures is painfully slow and “key controls on alcohol advertising are yet to be progressed and there no clear timeline for commencement.”<sup>94</sup> Section 13 of the PHAA is arguably the most contentious as it aims to limit alcohol advertising to factual product information (e.g. alcoholic strength-by-volume) and mandates the presence of health information and warnings in advertising. As researchers with extensive knowledge of the international state of play have highlighted: “Evidence supports the impact these measures may have on consumers and marketing practice. For example, research with young adults in France, where a similar policy already exists under the Évin law, has found that removing characters and wider context, as is broadly proposed in Ireland, reduces the attractiveness of alcohol advertising and limits the potential behavioural impact.”<sup>95</sup>

Delaying legislation – both its passage and then its enactment once passed, is a classic

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<sup>89</sup> *ibid* HRB report

<sup>90</sup> Alcohol brands are engaging in what is known as surrogate and/or alibi marketing which means switching out the alcohol product for either a 0% alcohol product or a word or image synonymous with the brand. This allows them to continue to advertise the brand in places where advertising is restricted.

<sup>91</sup> *ibid* HRB report

<sup>92</sup> Nathan Critchlow and Frank Houghton, ‘The Importance of Continued and Full Implementation of the Public Health (Alcohol) Act: A Comment on Barry and Lyne (2023)’ (2023) 41(3) *Irish Journal of Psychological Medicine* 414–415

<sup>93</sup> *ibid*

<sup>94</sup> *ibid*

<sup>95</sup> *ibid*

part of the global playbook that health harming industries use to impede progressive public health measures.<sup>96</sup> This is because when evidence based laws are passed, they should ultimately have the effect of less product being consumed. This is also why industry actors encourage messages such as ‘drink responsibly’ or education in schools – activities that aren’t likely to have much impact on their bottom line. The most recent industry attack on the implementation of the PHAA has been to use global trading concerns brought on by recent US trade tariffs to call for a review of labelling laws.<sup>97</sup> Labelling is a key measure of the PHAA, ensuring consumers, through labels on products, are given the facts about some of the risks from alcohol including risks in pregnancy, links with fatal cancers and with liver disease. The ferocious way industry seeks to overturn legal regulations that work clearly demonstrates the threat it sees from measures. In the face of industry’s well-worn tactics, it is up to governments to stand up for people’s health and rights. The Irish government has been founding wanting in its reluctance to stand up to the alcohol industry, for example, alibi marketing at the very least contravenes the spirit of the PHAA, if not the letter of the law, yet government appears unwilling to challenge the alcohol industry.<sup>98</sup> According to the WHO, governments must recognise that the primary interest of all major corporations is profit and that health harming industries engage in the “same political and scientific practices as tobacco companies and that voluntary or multistakeholder partnership approaches do not work where conflicts of interest exist... they must regulate other health harming industries, their products and practices, as they do tobacco.”<sup>99</sup> In other words, the alcohol industry should not be protected politically but should be treated just like tobacco, which has no access to government or protected status within society.

What is abundantly clear, is that industry wants to prevent a Framework Convention on Tobacco Control (FCTC) for other health harming products.<sup>100</sup> Adopted in 2003, the FCTC is a binding international treaty with strict measures to limit tobacco industry influence, restrict harmful marketing, and promote public health. It focuses on evidence-based policies and regulatory strategies, prioritising public health and well-being over commercial interests. For example, Article 5.3 of the FCTC explicitly limits corporate

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<sup>96</sup> Supra n 1, 10 See also: Niamh Fitzgerald and Jim McCambridge, ‘Empowering Public Health Advocates to Navigate Alcohol Policy Challenges’ (2018) 39(3) *Nordic Studies on Alcohol and Drugs* 235–251

<sup>97</sup> Alcohol Action Ireland, ‘Urgent Call from More Than 75 Organisations and Advocates for Ireland to Stay on Track and Introduce Alcohol Health Information Labelling as Planned’ (2025)

<sup>98</sup> Alcohol Action Ireland, ‘Legal Challenge Must Be Taken to Decide If Laws Designed to Protect Children Are Being Egregiously Flouted with Zero Alcohol Products’ (Media Release, 20 March 2024)

<sup>99</sup> Supra n10 Anna B Gilmore and Anna van den Akker, ‘Protecting Future Generations from Commercially Driven Health Harms: Lessons from Tobacco Control’ (2024) *The Lancet*

<sup>100</sup> WHO Framework Convention on Tobacco Control: World Health Organization, WHO Framework Convention on Tobacco Control (adopted 21 May 2003, entered into force 27 February 2005)

influence over public health policies. Taxation and price measures within Article 6 recommend excise taxes on tobacco to reduce consumption; Article 13 restricts tobacco advertising, sponsorship, and promotions, particularly targeting children, while Articles 11 and 12 mandate warning labels including graphic health warnings.<sup>101</sup> Why are other industry's so afraid of it? Because despite its flaws, the FCTC has demonstrated that hard law works. Courts have consistently upheld that it is "a human rights treaty that elaborates on the meaning of the rights to health and/or life, or that states otherwise have duties to implement it" and it has stood up to legal challenge, by contrasting commercial rights because of the "more significant incursions on the rights to life and health resulting from marketing and promotion of a product proven to be lethal and addictive."<sup>102</sup>

#### **4.3 Trade law is not a barrier**

Peeling away the layers of resistance is an important factor in achieving change in this arena. The tobacco control experience and the implementation of the WHO FCTC provide a "unique, comprehensive and fully substantiated guide" for how to prevent "industry actors whose profit lies in harming health from wielding influence over the institutions and actors of global and national governance."<sup>103</sup> Yet still, governments appear reluctant to replicate it. There are likely a variety of reasons for this: ideological, economic, or a fear of legal action from industry, perhaps a mixture of all three. As the WHO points out, governments may be concerned that their legal mandate to regulate marketing will be challenged either domestically or under international investment law or trade law, such as through regional trade bodies, or World Trade Organisation (WTO) procedures.<sup>104</sup> But as Joseph states, it is "far more likely that a human rights norm prevails over a WTO norm as a matter of international law than the reverse proposition."<sup>105</sup>

For the legal community, then, it is vital to take away at least any legal excuse for lack of action. Garde contends that global health law can play a strong role in the prevention of non-communicable diseases by focusing on children and vulnerable populations to frame

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<sup>101</sup> *ibid*

<sup>102</sup> Suzanne Zhou and Jonathan Liberman, 'The Global Tobacco Epidemic and the WHO Framework Convention on Tobacco Control—The Contributions of the WHO's First Convention to Global Health Law and Governance' in Gian Luca Burci and Brigit Toebe (eds), *Research Handbook on Global Health Law* (Edward Elgar Publishing 2018), 372-374

<sup>103</sup> Juliette McHardy, 'The WHO FCTC's Lessons for Addressing the Commercial Determinants of Health' (2021) 36 (1) *Health Promotion International*, 39

<sup>104</sup> *Supra* n 10

<sup>105</sup> Sarah Joseph, *Blame it on the WTO? A Human Rights Critique* (Oxford University Press 2011). See chapter 2.

NCD prevention as a human rights issue, not just public health policy.<sup>106</sup> As she asserts: “The question has now become: how can the law be designed to support effective NCD prevention strategies and help States withstand the legal challenges they may face?”<sup>107</sup> Governments seeking to regulate should be able to utilise the law in their favour, just as industry has done for many years.<sup>108</sup> Trade laws should not be seen as absolute, especially when considered against international human rights law. As Joseph highlights: “under international human rights law it is safe to assume that WTO obligations do not absolve a State from its human rights obligations if the obligations should clash.”<sup>109</sup> This has been borne out in practice. For example, Article 168 of the Treaty on the Functioning of the European Union grants a competence in health matters, recognizing the primary responsibility of its Member States in this policy area.<sup>110</sup> So, governments do have the power to introduce public health laws once the legal principles relating to trade are observed and accounted for.<sup>111</sup> In a case<sup>112</sup> taken by the alcohol industry upon the enactment of Minimum Unit Pricing of alcohol in Scotland, the final judgement highlighted that the burden of proof for government to prove public health interest should not be so onerous as to stifle legitimate public health policy initiatives. This was a very positive development and proves again that trade law is not unassailable,<sup>113</sup> nor should it be considered a barrier to enacting progressive laws aimed at protecting population health. Ireland’s aforementioned labelling regulations under the PHAA is another example of this. Despite intensive lobbying<sup>114</sup> where industry actors (including business groups such as the Irish Business and Employers Confederation, IBEC) questioned the science, warned that consumers would be “exposed to fearmongering

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<sup>106</sup> Amandine Garde, ‘Global Health Law and Non-Communicable Disease Prevention: Maximizing Opportunities by Understanding Constraints’ in Gian Luca Burci and Brigit Toebe (eds), *Research Handbook on Global Health Law* (Edward Elgar Publishing 2018) 389, 410

<sup>107</sup> *ibid*

<sup>108</sup> *ibid*

<sup>109</sup> *Supra* n 105

<sup>110</sup> Treaty on the Functioning of the European Union, art 168 OJ C326/13.

<sup>111</sup> *Supra* n 108, 421

<sup>112</sup> Case C-333/14 *Scotch Whisky Association and others v. The Lord Advocate and another*, 23 December 2015 (ECLI:EU:C:2015:845)

<sup>113</sup> Amandine Garde, ‘EU law and children’s rights to healthy diets in the digital environment’ in Claire Fenton-Glynn (ed), *Children’s Rights and Business: Governing Obligations and Responsibility* (Edward Elgar Publishing 2017); Amandine Garde and Tanja Zgaga, ‘Protecting Children from the Harmful Impact of Food Marketing: The Role of the Law’ in Laura Mialon and Phillip Lencucha (eds), *Commercial Determinants of Health* (Oxford University Press 2021)

<sup>114</sup> See: European Commission, ‘Notification: Ireland – Public Health (Alcohol) (Labelling) Regulations 2022’ (EU TRIS, Notification Number 2022/514/IRL)



or misinformation,”<sup>115</sup> and exaggerated EU internal market concerns, the measure was justified on public health grounds.<sup>116</sup>

Public health wins demonstrate that law can be made to work for human health protection and will often prevail. Framing intervention robustly is paramount if proposed measures are to withstand judicial review. This means evidence is essential to “demonstrate that public health measures pursue a legitimate objective and that no less trade-restrictive measures are possible.”<sup>117</sup> This is particularly true when children, “as particularly vulnerable consumers, are the intended beneficiaries of health promoting measures.”<sup>118</sup> Utilising a children’s rights framework shows that the measure in question is not an interference with free markets, rather a fulfilment of States’ binding human rights obligations under the UNCRC.

## 5.0 Conclusion

The tension between children’s rights and the corporate interests of health harming industries has grown in recent years as research and advocacy has exposed how children’s health and development is adversely affected because of business practices that pervade today’s consumer environment. Although evidence and logic clearly demands that measures should be taken to protect public health, very often commercial activity takes precedence over population health. The idea that harmful business practices can’t be curbed despite the damage they do is a neoliberal mindset that must be challenged. Framing corporate harms as a direct threat to children’s lives and futures<sup>119</sup> has the potential to galvanise public and political will to curb the power of modern corporations that function as “pathological entities” with legal structures that prioritise profit over “ethics, social responsibility, and human rights.”<sup>120</sup> Corporate interest and profit can no longer be a valid justification for inaction, and international human rights law, particularly the right to health, provides states

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<sup>115</sup> In respect of health warning labelling, Ireland’s IBEC/Drinks Ireland accused the Department of Health of ‘railroading alcohol labelling legislation.’ This is despite there being a three-year lead in period for health warning labels and the requirement for labels having been law since 2018. In its TRIS process submission, IBEC cast doubt on well-established science. See: IBEC ‘Submission by IBEC regarding the Irish Draft Regulations under the Public Health (Alcohol) Act 2018’ European Commission Technical Regulations Information System, TRIS Notification 2022/441/IRL, 18 August 2022; See also: IBEC, ‘Strong International Opposition to Ireland’s Alcohol Labelling Proposals’ (2022) accessed 25 April 2025.

<sup>116</sup> Labelling was justified under Article 36 TFEU (public health exception). Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/47, art 36.

<sup>117</sup> Katharina Ó Cathaoir, Mette Hartlev and Céline Brassart Olsen, ‘Global Health Law and Obesity: Towards a Complementary Approach of Public Health and Human Rights Law’ in Gian Luca Burci and Brigit Toebes (eds), *Research Handbook on Global Health Law* (Edward Elgar Publishing 2018) 457

<sup>118</sup> Supra n106, 421

<sup>119</sup> Helen Clark and others, ‘A Future for the World’s Children? A WHO–UNICEF–Lancet Commission’ (2020) 395 *The Lancet* 605

<sup>120</sup> Supra n 1

with both an obligation and a justification to adopt strong regulatory measures. As has been demonstrated, children rights law trumps trade law, it's up to those who are so minded – politicians, legal experts and children advocates to fight to swing the pendulum in favour of public health over private profit. The lens of children's rights is not about persuading health harming industries to act ethically– but to provide a rationale for those who are predisposed to act, and a legal basis to compel those who are not. Continuing to allow health harming industry interests to shape policy and stall regulation in the face of overwhelming evidence of the harm their products cause is not just a political failure, it is a human rights – a children's rights, violation.

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