

Misleading and abusive marketing of ultra-processed products and consumer protection: lessons from civil society experiences in Brazil and the call for more South-South exchanges with Caribbean countries

Leonardo Ferreira Pillon,¹ Igor Rodrigues Britto,² Laís Amaral Mais,³ Mariana Ribeiro,⁴ Carolina Gama França⁵ & Mariana Gondo dos Santos⁶

Abstract

Despite Brazil's strong legal framework, multiple corporations find ways to circumvent laws and regulations in order to market their ultra-processed products, which are high in fat, sugar and/or sodium, including through food labels and health and nutrition claims. This paper aims to analyse how strategic litigation can create awareness about industry tactics and galvanize support for government regulatory measures. It also presents lessons from a civil society perspective on how to monitor marketing within the food environment, highlighting the need for more exchange between the Brazilian and Caribbean social movements and civil society organisations to stand up against corporate political activities undermining public policies on healthy food.

Keywords

Misleading marketing; Strategic litigation; Consumer protection; Ultra-processed products.

1 Counselor, Brazilian Institute for Consumer Defense (IDEC), Healthy and Sustainable Food Program Advisory Team. Email: leonardo.pillon@idec.org.br.

2 Director, Institutional Relations, Brazilian Institute for Consumer Defense (IDEC) and Professor of Consumer Law and Business Law, the IESB University Center, Brasília. Email: igor.britto@idec.org.br.

3 Coordinator, Healthy and Sustainable Food Program, Brazilian Institute for Consumer Defense (IDEC).

4 Research Analyst, Healthy and Sustainable Food Program, Brazilian Institute for Consumer Defense (IDEC).

5 Resident in Sanitary Surveillance, Municipal Institute of Sanitary Surveillance, Zoonoses Surveillance and Agricultural Inspection of Rio de Janeiro (IVISA-Rio) and Master's student, Postgraduate Program in Food Science, the Federal University of Rio de Janeiro.

6 Former Senior Lawyer, Healthy and Sustainable Food Program, Brazilian Institute for Consumer Defense (IDEC).

1. The World Health Organization's call to empower consumer protection by restricting the marketing of ultra-processed products

According to a recent study published in the American Journal of Preventive Medicine, the consumption of ultra-processed products (UPPs) was responsible for approximately 57,000 premature deaths in Brazil.⁷ For the purpose of this article, UPPs are considered to be:

“[designed as] ready-to-eat, ready-to-drink, or ready-to-heat, mostly as snacks, which are liable to displace unprocessed or minimally processed foods and freshly prepared dishes and meals. Ultra-processed products typically have minimal content of whole foods and use additives to obtain food-like colo[u]r, texture, flavo[u]r and hyper-palatability, plus complex combinations of salt, sugar and salt, and sophisticated and attractive branding, packaging, multimedia and other intensive marketing to children and adolescents. Many make health claims. They are highly profitable, and leading products are owned by transnational corporations.”⁸

The Pan American Health Organization (PAHO) states that around “44% of deaths in the Americas are caused by high blood pressure, high sugar levels, and obesity and overweight” and unhealthy diets are one of the causes of this situation.⁹ In response, PAHO recommends a series of policies, among which the regulation of UPPs through front-of-package warning labelling (FOPWL) and marketing restrictions.¹⁰

In particular, marketing restrictions can play a complementary role to FOPWL, often grounded on consumer protection. Recently, the World Health Organization (WHO) published a new guideline which states that “children of all ages should be protected from the marketing of foods that are high in saturated fatty acids, trans-fatty

7 Eduardo A.F. Nilson, Gerson Ferrari, Maria Laura C. Louzada, Renata B. Levy, Carlos A. Monteiro, Leandro F.M. Rezende, ‘Premature Deaths Attributable to the Consumption of Ultraprocessed Foods in Brazil’, *Global Health Promotion and Prevention* | Vol. 64, 1, p. 129-136, jan/2023. DOI: <https://doi.org/10.1016/j.amepre.2022.08.013>.

8 Pan American Health Organization (PAHO), *Ultra-processed food and drink products in Latin America: Sales, sources, nutrient profiles, and policy implications*. Washington, D.C.: PAHO; 2019. <<https://iris.paho.org/handle/10665.2/51094>> Accessed 12 May, 2023.

9 Pan American Health Organization (PAHO), *Front-of-package labeling* <<https://www.paho.org/en/topics/front-package-labeling>> Accessed 12 May, 2023.

10 Pan American Health Organization (PAHO), *Ultra-processed food and drink products in Latin America: Sales, sources, nutrient profiles, and policy implications*. Washington, D.C.: PAHO; 2019. <<https://iris.paho.org/handle/10665.2/51094>> Accessed 12 May, 2023.

acids, free sugars and/or salt”.¹¹ Further, WHO recommends the implementation of mandatory policies that are designed to reduce children’s exposure to food marketing, such as restricting food marketing to children, including those older than 12 years old, coupled with policies that use a government-led nutrient profile model to determine the foods for which marketing is to be restricted.¹²

In Brazil, the legal framework on consumer protection against misleading and abusive marketing includes a constitutional norm that allows restrictions on the advertising of products prejudicial to health and the environment.¹³ Moreover, the Consumer Protection Code (In Portuguese, *Código Brasileiro de Defesa do Consumidor*) prohibits misleading and abusive marketing. It establishes that labels cannot mislead consumers about the product’s characteristics and other factors such as quantity, quality, origin, price, etc. It also establishes that they cannot be abusive, including by taking advantage of children’s poor judgement or inexperience, and inducing consumers to act against their own health or safety.¹⁴

General and nutritional food labelling are regulated by the Brazilian Health Surveillance Agency (ANVISA). In 2020, ANVISA adopted FOPWL and indicated how its implementation ought to be rolled out.¹⁵ Years earlier, in 2010, ANVISA had approved specific restrictions on the marketing of products high in fats, sodium and/or sugar. However, this sanitary regulation has not been effectively applied until now due to corporate political activity,¹⁶⁻¹⁷ as the case analysis below will demonstrate.

In order to achieve a political environment that is more conducive to the adoption and implementation of marketing restrictions, this article presents the strategy developed by the Brazilian Institute for Consumer Defense (in Portuguese, *Instituto*

11 World Health Organization (WHO), Policies to protect children from the harmful impact of food marketing: WHO guideline <<https://www.who.int/publications/i/item/9789240075412>> Accessed 12 May, 2023.

12 *ibid.*

13 Constitution of the Federal Republic of Brazil, Article 220 <<https://www.who.int/publications/i/item/9789240075412>> Accessed 12 May, 2023.

14 Consumer Defense Code of Brazil, Article 37 <https://www.planalto.gov.br/ccivil_03/leis/18078compilado.htm> Accessed 12 May, 2023.

15 ANVISA, RDC No. 429, 8 October, 2020.

16 *Corporate political activity* are attempts by corporations to shape government policy in a way that favours private interests through litigation or the threat of litigation, involvement and influence in politics, promoting scientific research with conflicts of interest and multistakeholder initiatives: Mélissa Mialon, B Swinburn, G Sacks, ‘A proposed approach to systematically identify and monitor the corporate political activity of the food industry with respect to public health using publicly available information’ *Obesity Reviews*. 2015; 16(7): 519-30.

17 Mélissa Mialon, Chantal Julia & Serge Hercberg, ‘The policy dystopia model adapted to the food industry: the example of the Nutri-Score saga in France’ (2018) 9(2) *World Nutrition* 109.

Brasileiro de Defesa do Consumidor - Idec) for using legal complaints, and the legal framework itself, to create awareness about industry tactics and to galvanize support for UPPs marketing restrictions. Following the introduction, the second section of this article discusses four cases: industry opposition to health warnings on products high in fats, sodium and sugar, as well as the response of civil society, and three strategic cases denouncing UPPs marketing using general prohibitions of misleading advertising. The third and final section of the article analyses lessons from the Brazilian context that can be useful for Caribbean countries from a South-South perspective.

2. Monitoring and fighting the industry's misleading marketing practices in Brazil: different litigation strategies from a civil society perspective

Idec is an independent, non-profit and non-governmental consumers' rights association founded in 1987 in Brazil. Idec's mission is to orient consumers, raise awareness, and defend their rights in relation to potentially harmful products and practices. Idec is funded by private donations and philanthropic support, without any ties to private suppliers of products or services.¹⁸

To fulfil its mission, Idec publishes news and information on its website for consumers, conducts research and studies evaluating products and services, advocates for the adoption of consumer protection norms and practices, and engages in legal strategies before Brazilian courts to defend consumers' collective rights.¹⁹ One of the key legal tools Idec uses is the *ação civil pública* (in Portuguese), a legal action for public interest litigation which enables the protection of collective rights recognized in the Brazilian Consumer's Protection Code.²⁰

Idec's Healthy and Sustainable Foods Program (in Portuguese, *Programa de Alimentação Saudável e Sustentável*) defends the right to adequate and healthy foods as a means to promote and protect the population's health and the environment. Focused on the prevention of noncommunicable diseases (NCDs), the program works to develop and advocate for the implementation of public policies that ensure the right to consumer information, encourage better business practices, and promote environments that are favourable to adequate and healthy foods, especially with

18 Brazilian Institute for Consumer Defense (IDEC), Quem somos <<https://idec.org.br/quem-somos>>

19 Brazilian Institute for Consumer Defense (IDEC), O que fazemos <<https://idec.org.br/o-que-fazemos>>

20 BRAZIL. Law n. 7.347/1985. It disciplines the public interest civil action for liability due to damage caused to the environment, to the consumer, to goods and rights of artistic, aesthetic, historical, touristic and landscape value, and makes other provisions <https://www.planalto.gov.br/ccivil_03/leis/17347orig.htm> Accessed 12 May, 2023.

regards to advertising and labelling, access to organic food, and the risks of using pesticides.²¹

Historically, Idec has been a relevant social actor participating in the design, approval, and implementation of the Brazilian Consumer's Protection Code, safeguarding the autonomy and independence of the consumers' movement in Brazil. This paper presents four recent cases of litigation on misleading marketing that Idec either monitored or filed, with different consequences toward social change.

2.1 The UPP industry challenges health warnings on products high in fats, sodium and sugar (Resolution from Collegiate Board n. 24/2010)

In 2005, ANVISA created a work group to discuss the regulation of food advertising and present a draft proposal. This work group was composed of representatives from Idec, the public sector (within the Executive, the General Coordination of Food and Nutrition Policy of the Ministry of Health, the Livestock and Supply Department of the Ministry of Agriculture and the Department of Consumer Protection and Defense of the Ministry of Justice; within the Legislative, the Parliamentary Health Front of the Chamber of Representatives and the Social Security Committee of the Senate), the Office of the Federal Public Prosecutor, the Professional Council of Nutrition (CFN), the Brazilian Society of Paediatrics and the private sector (the Brazilian Food Industry Association and the National Council for Advertising Self-Regulation).²²

This work group existed until July 2006, when the draft proposal was presented to the public for consultation. The draft proposal imposed restrictions and prohibitions on the advertising of certain foods and non-alcoholic beverages, which Baiard classifies into four pillars: a) the placement of warnings in advertising; b) restrictions on the content allowed in advertising; c) restrictions on commercials directed at children on television and radio between 9 p.m. to 6 a.m. and also the prohibition of the use of children's characters and advertising in schools; and d) lastly, the prohibition of distributing free samples, discount coupons or tastings.²³ However, the final draft

21 Brazilian Institute for Consumer Defense (IDEC), Programa Temático Alimentação Saudável e Sustentável <<https://idec.org.br/programas-tematicos/alimentacao>>

22 Brazil. Resolution from Collegiate Board n. 73, published in 2005/3/19, from Brazilian Surveillance Agency (ANVISA). Available at: <https://bvsms.saude.gov.br/bvs/saudelegis/anvisa/2005/rdc0073_29_03_2005.html>

23 BAIARD, M. O processo decisório da RDC nº 24/2010 da ANVISA. p. 17 In: MARTINS, A.P.B. Publicidade de alimentos não saudáveis: os entraves e as perspectivas de regulação no Brasil. Instituto Brasileiro de Defesa do Consumidor. Cadernos Idec – Série Alimentos - Volume

proposal suppressed most of the restrictions on advertisement pieces and the fourth pillar altogether.

In 2010, ANVISA approved Resolution n. 24/2010,²⁴ which established the minimum requirements for offering, advertising, marketing, information provision and other related practices whose objective is the dissemination and commercial promotion of foods considered to have high amounts of sugar (15g/100g or 7,5g/100ml), saturated fat (5g/100g or 2,5g/100ml), trans fat (0,6g/100g or 100ml) and sodium (400mg/100g or 100ml), as well as beverages with low nutritional content (soft drinks, artificial refreshments and beverages or concentrates for making beverages based on guarana or currant syrup and ready-to-drink teas).

This regulation would determine two types of restrictions on unhealthy foods and non-alcoholic beverages: a) mandatory marketing restrictions, including the prohibition of the use of expressions indicating or implying in any way that the products in question are healthy or beneficial for health, adopting the definition of (un)healthfulness laid out in the Dietary Guidelines for the Brazilian Population, issued by the Ministry of Health;²⁵ b) mandatory health warnings in the marketing of such products, informing about the health risks associated with their consumption, including merchandising on television or radio shows, internet, movies, stage plays and others. These warnings must be contextualized so that they are pronounced by the main character, and should appear on every advertisement piece, especially when targeted to children, using the following messages:²⁶

“The (name/trademark of the food) contains a lot of sugar and, if consumed in large amounts, increases the risk of obesity and tooth decay.”

“The (name/trademark of the food) contains a lot of saturated fat and, if consumed in large amounts, increases the risk of diabetes and heart disease.”

“The (name/trademark of the food) contains a lot of trans fat and, if consumed in large

2. São Paulo: Idec, 2014, p. 17.

24 Brazil. Resolution from Collegiate Board n. 24, published in 2010/6/15, from Brazilian Surveillance Agency (ANVISA) <https://bvsms.saude.gov.br/bvs/saudelegis/anvisa/2010/rdc0024_15_06_2010.html> Accessed 12 May, 2023.

25 This document compiles diet-related information and a set of recommendations to improve the health of individuals, families, communities and society in Brazil <https://www.gov.br/saude/pt-br/assuntos/saude-brasil/publicacoes-para-promocao-a-saude/guia_alimentar_populacao_brasileira_2ed.pdf/view> Accessed 12 May, 2023.

26 Brazil. Resolution from Collegiate Board n. 24, published in 2010/6/15, from Brazilian Surveillance Agency (ANVISA) <https://bvsms.saude.gov.br/bvs/saudelegis/anvisa/2010/rdc0024_15_06_2010.html> Accessed 12 May, 2023.

amounts, increases the risk of heart disease”.

“The (name/trademark of the food) contains a lot of sodium and, if consumed in large amounts, increases the risk of high blood pressure and heart disease.”

“The (name/trademark of the food or package) contains a lot of [nutrients that are present in high amounts], and if consumed in large amounts, increase the risk of obesity and heart disease.”

Despite the UPP industry participating in the decision-making process, on the same day of the approval of Resolution n. 24/2010 by ANVISA, the National Advertising Self-Regulation Council initiated an administrative proceeding before the Attorney General’s Office, asking them to issue legal guidance to ANVISA on the unconstitutionality (and therefore invalidity) of the above resolution, considering that the Attorney General’s Office is responsible for advising and representing ANVISA in legal matters. In July, a month after the request, the Attorney General’s Office recommended to ANVISA the suspension of the regulation. However, ANVISA did not heed the recommendation and kept the resolution in place, despite refraining from moving forward with its implementation. As a result, the Attorney General’s Office ended up providing ammunition for litigation initiated by the industry sector.²⁷

To date, eleven lawsuits have been filed in several courts by different multistakeholder organizations representing industry interests.²⁸ The main argument challenged ANVISA’s powers to regulate food and beverages’ advertising, based on the understanding that only a law —as opposed to a regulation— could create such restrictions, even when pursuing health protection objectives. In contrast, ANVISA stands on the premise that the law empowers it to restrict the advertising of products subject to sanitary surveillance.

In 2011, in one of such lawsuits, a court granted the Brazilian Food Industry Association a preliminary injunction determining that ANVISA should not monitor and/or sanction its members, who represent 80% of the sector in terms of production, in case of eventual non-compliance with the Resolution n. 24/2010.²⁹ This

27 IDEC; ACT. Dossiê Big Food: como a indústria interfere em políticas de alimentação. 2022, p. 54.

28 MARTINS, A.P.B. Publicidade de alimentos não saudáveis: os entraves e as perspectivas de regulação no Brasil. Instituto Brasileiro de Defesa do Consumidor. Cadernos Idec – Série Alimentos - Volume 2. São Paulo: Idec, 2014, p. 34.

29 *Brazilian Association of the Food Industry v. ANVISA*. Preliminary Appeal n. 0067180-32.2010.4.01.3400, Federal Tribunal of First Region - Sixth Class - Fed. Judge Jirais Aram Meguerian, ruled on

preliminary injunction is still in place. In any case, in 2012, ANVISA dismantled the department responsible for the monitoring of advertising and promotion of products subject to sanitary surveillance, instead integrating this area into market monitoring in general.³⁰

While up to this point the UPP industry has largely bypassed the mandatory compliance with these marketing restrictions using corporate political activities, including those leading to litigation, not all actors within this industry have achieved the same results with the ongoing lawsuits. To date, six lawsuits have been decided against industry actors, reaffirming the regulatory agency's powers to regulate the marketing of food products,³¹ and five of these judicial decisions are definitive. In one such lawsuit, filed by the Brazilian Association of Soft Drink Manufacturers (in Portuguese, *Associação dos Fabricantes de Refrigerantes do Brasil - Afebras*) against ANVISA,³² the Supreme Court denied the appeal, upholding the judicial decision that recognises ANVISA's competence to regulate food marketing. Five other lawsuits filed by industry actors were decided in their favour, although none of these judgments are definitive.³³

In 2021, regardless of the differences between these outcomes, ANVISA stated that since 2010 it had suspended the application of this regulation based on the recommendation of the Attorney General's Office.³⁴

2011/7/8.

30 Brazil. ANVISA. Fiscalização de propaganda, Available at <<https://www.gov.br/anvisa/pt-br/assuntos/fiscalizacao-e-monitoramento/propaganda>>

31 *Union of the Corn, Soybean and Derivatives Industry in the State of São Paulo v. ANVISA*, Appeal n. 59486-81.2010.4.01.3400; *Brazilian Franchising Association v. ANVISA*, Appeal 0006999-94.2011.4.03.6100; *National Restaurant Association (ANR) v. ANVISA*, Appeal n. 0022116.62.2010.4.03.6100; *Brazilian Association of Soft Drinks and Non-Alcoholic Beverages (ABIR) v. ANVISA*, Appeal n. 0055190.16.2010.4.01.3400; *Brazilian Association of Pasta Industries and Industrialised Bread and Cake v. ANVISA*, Appeal n. 0021946-62.2011.4.01.3400; *Association of Soft Drink Manufacturers in Brazil (Afebras) v. ANVISA*, Appeal n. 5024208-14.2010.4.04.7000.

32 *Association of Soft Drink Manufacturers in Brazil (Afebras) v. ANVISA*. Extraordinary Appeal n. 909.358, Rapporteur Min. Luiz Fux, Supreme Federal Court, monocratic decision, ruled on 2019/4/30.

33 *Brazilian Association of the Food Industry v. ANVISA*. Extraordinary Appeal n. 1.480.888 (original case n. 0042882-45.2010.4.01.3400); *National Confederation of Tourism v. ANVISA*. Appeal n. 0047480-42.2010.4.01.3400; *Brazilian Association of the Chocolate, Peanut and Candy Industry v. ANVISA*, Appeal n. 0057288-71.2010.4.01.3400; *Brazilian Association of Entities and Companies of Gastronomy, Lodging and Tourism v. ANVISA*, Appeal n. 0015873-74.2011.4.01.3400; *National Association of Biscuit Industries v. ANVISA*, Appeal 0015965-52.2011.4.01.3400.

34 VOTE Nº 138/2021/SEI/DIRE4/ANVISA, Director Meiruze Souza de Freitas, Fourth Board, ANVISA. Available on: <https://www.gov.br/anvisa/pt-br/composicao/diretoria-colegiada/reunioes-da-diretoria/votos-dos-circuitos-deliberativos/cd-679-2021-voto.pdf>

More recently, in 2023, the Attorney General's Office revised its recommendation, putting forth the understanding that ANVISA's regulation is indeed constitutional.³⁵ This is an important turn of events given the weight that the Attorney General Office carries within the legal community, as well as its mandate to advise and legally represent ANVISA. However, this legal opinion is part of an administrative proceeding and does not override the developments in any of the seven lawsuits that have so far been decided against ANVISA.

As a result of this complex judicial and administrative scenario, the environment of legal insecurity has led to the postponement of the implementation of these mandatory health warnings and marketing restrictions until the legal controversy is resolved. Since then, front-of-package warning labelling has been adopted in Brazil, albeit with no marketing restrictions, as a result of a new regulation issued by ANVISA.³⁶ In parallel, civil society has had to adapt, developing new strategies and selecting strong cases to denounce the misleading and abusive marketing practices of such products. These strategies are presented below.

2.2 Civil society strategies to denounce the misleading and abusive marketing of UPPs in the context of a lack of mandatory, specific restrictions

While the context above creates conditions for the UPP industry to promote unhealthy diets in Brazil, civil society organizations have developed alternatives to denounce marketing, packaging and labelling strategies that undermine consumers' right to make informed and conscious choices. Specifically, Idec created a Food Advertising Observatory (in Portuguese, *Observatório de Publicidade de Alimentos - OPA*),³⁷ a multidisciplinary panel composed of several civil society organizations and research institutions.³⁸

35 BRAZIL. AGU. Parecer da AGU confirma legalidade de resolução da Anvisa que disciplina propaganda de alimentos nocivos à saúde, Available at <<https://www.gov.br/agu/pt-br/comunicacao/noticias/parecer-da-agu-confirma-legalidade-de-resolucao-da-anvisa-que-disciplina-propaganda-de-alimentos-nocivos-a-saude>>

36 Brazil. Resolution from Collegiate Board n. 429, published in 2020/10/8, from Brazilian Surveillance Agency (ANVISA). Available at: <https://www.in.gov.br/en/web/dou/-/resolucao-de-diretoria-colegiada-rdc-n-429-de-8-de-outubro-de-2020-282070599>

37 IDEC. Food Advertising Observatory. Available at: <<https://publicidadedealimentos.org.br/sobre/>>

38 The panel is composed by Consumer Law Research Group at the Pontifical Catholic University of Rio Grande do Sul, ACT Health Promotion, the Child and Consumption Program at the Alana Institute, the Put It on the Label Movement, the Brazilian Childhood and Consumption Network, the Nutrition Research Center on Meals Production at the Federal University of Santa Catarina, the International Network in Defense of the Right to Breastfeed (IBFAN), the

The food and beverage products selected by the Food Advertising Observatory do not fail to comply with minimum requirements, such as nutritional facts, composition and other categories of mandatory information. However, they have a healthy claim, explicit or implicit, capable of misleading consumers in their purchase decision when contrasted with their actual nutrient profile and list of ingredients, as well as their degree of processing. As a result, it is often necessary to strengthen the cases to be presented to the authorities with technical analyses of these products from a nutritional perspective. This led to the establishment of criteria for product analysis, which seeks to answer two questions:

- a) Does the nutritional composition of the product match the advertising information on the packaging?; and
- b) Is the product considered nutritionally adequate, according to PAHO's nutrient profile model³⁹ and the NOVA classification?⁴⁰

Once these questions are satisfactorily answered, the legal analysis comes into play, exploring whether there are sufficient characteristics of misleading or abusive marketing according to the general prohibitions of the Brazilian Consumer Protection Code:

- a) Is the information or advertising false/partly false?
- b) Is the information or advertising capable of misleading consumers regarding the nature, quality, quantity, properties, origin, price or any other characteristic of the product/service?
- c) Is the advertising discriminatory in any way? Does it incite violence, exploit fear or superstition, take advantage of a child's poor judgment and inexperience or disrespect environmental values? Is it capable of inducing the consumer to behave in such a way that is harmful to their health or safety?⁴¹

Group for Studies, Research and Practices in the Food Environment and Health at the Federal University of Minas Gerais and the Observatory of Food and Nutritional Security Policies at the University of Brasília.

39 The nutrient profile model is the criteria used to identify ultra-processed food and beverage products containing excess free sugars, total fat, saturated fat and sodium.

40 "The classification, called NOVA, assumes that the extent and purpose of the processing to which foods are subjected determine not only their nutrient content, but other attributes with the potential to influence the risk of obesity and several other food-related diseases": <<https://www.fsp.usp.br/nupens/a-classificacao-nova/>>

41 BRAZIL. Law n. 8.078/1990, which establishes the legal framework for consumer protection <https://www.planalto.gov.br/ccivil_03/leis/l8078compilado.htm> Accessed 12 May, 2023.

The legal analysis also considers the authorities before whom to file the complaint, taking into account the human and technical resources needed, as well as the past decisions issued by them.

Following the technical and legal analyses, a multidisciplinary board meets to analyse the case's potential of being strategic considering the context, including opportunities to include the topic in the public agenda and to inform consumers about how to make better, healthier dietary choices. Moreover, at this point, the communications team uses social listening to identify what is the level of public interest on the issues raised by the potential complaint.

Lastly, the multidisciplinary board establishes the ideal timing to produce the technical, legal and communication pieces.

2.3 Administrative precautionary measures against misleading packages and labels (Del Valle Fresh case)

One of the most relevant complaints that resulted from this methodology centred on misleading advertising in a product line of Del Valle Fresh®. The illustrations on the front-of-package label included a real fruit image, inducing consumers to assume that the product was actually made from fruit, when in fact fruit did not make up even 1.5% of its content according to the list of ingredients. The use of large images of fruit in the front of the package served as a marketing strategy that influences consumers' perception of healthiness. Furthermore, the product's sales denomination was "fruit-flavoured food" as opposed to beverage — but it was sold next to the juices in the supermarkets and under different categories on the internet. This strategy may have confused consumers about the product's composition, also affecting categorization and identification in marketplaces. This is an example of how insufficient information is a strategy used by industry to confuse consumers, inducing unhealthy choices.⁴²

The complaint was presented to the Procon-DF, a consumer protection body located in the Federal District with competence to order several administrative sanctions with the goal of safeguarding consumers' rights.⁴³ Procon-DF issued a precautionary measure to suspend the manufacturing, sale and marketing of said product. The

42 IDEC. *Del Valle Fresh: parece saudável, mas tem menos de 1,5% de fruta*, published in Food Marketing Observatory <<https://publicidadedealimentos.org.br/caso-documentado/del-valle-fresh-parece-saudavel-mas-tem-menos-de-15-de-fruta/>> Accessed 12 May, 2023.

43 Brazil. NOTA TÉCNICA Nº 44/2022/CSA-SENAÇON/CGCTSA/DPDC/SENAÇON/MJ. Mr. José Guilherme Tanure Bacelar, General-Coordinator of Technical Opinion and Administrative Sanction. 2022/9/6.

administrative decision cited the conclusions of the technical analysis on nutrition presented by Idec experts as one of motives that convinced them about the unhealthy characteristics of the products. In the months that followed, five other Procons from different Brazilian states and municipalities adopted similar measures in relation to the same product, demonstrating the national repercussion of the aforementioned complaint. Idec then filed a new complaint to the National Department of Consumer Rights,⁴⁴ the national authority of the National System for Consumer Protection (SENACON), seeking a uniform decision with national coverage.⁴⁵

Meanwhile, the product's distributor filed a lawsuit challenging the administrative sanction issued by Procon-DF, and the producer did the same against the one issued by Procon-SC (Procon from the state of Santa Catarina), in different courts.⁴⁶ While the first lawsuit was decided in favour of Procon-DF, the second one took another course: the producer reached a Non-Prosecution Agreement with the State Prosecutor and Procon-SC, putting an end to the lawsuit. Importantly, this Non-Prosecution Agreement included a clause that prevents Coca-Cola, the producer, from associating future marketing with natural or healthy bias.⁴⁷ After this, the company filed a motion in the first lawsuit stating the product line will be discontinued due to Coca-Cola Brasil's redesign of Del Valle products.⁴⁸

Different from the case of the Resolution 24/2010 from ANVISA, this experience shows that even in the absence of health warnings on UPPs, technical analyses can provide evidentiary support to the claim that the right to precise and clear information is being violated, strengthening the grounds for administrative sanctions against misleading and therefore illegal marketing.

2.4 The Federal Council of Nutritionists (Conselho Federal de Nutricionistas - CFN) fights the misuse of professional nutritional endorsement claims (the Kibon case)

In this case, the Food Advertising Observatory received information about Kibon popsicle products labelled with the following slogan: "Developed with nutritionists. Made for children." This conveys the idea of healthy products, but, in

44 Brazil. Ministry of Justice and Public Security. *Senacon investiga Coca-Cola*, published in 2022/9/13 <<https://www.gov.br/mj/pt-br/assuntos/noticias/senacoinvestiga-coca-cola>> Accessed 12 May, 2023.

45 Brazil. Ministry of Justice and Public Security. National System of Consumer Protection. Defendant: Brasal Refrigerantes. Interested: Idec. Administrative Process n. 08084.002596/2022-25.

46 *Brasal Refrigerantes S.A. V. Procon-DF*. Rule of Law n. 0705948-84.2022.8.07.0018.

47 IDEC. *Idec é contra a retomada de venda do Del Valle Fresh com enganiosidade no rótulo*, published in 2023/3/31 <<https://idec.org.br/noticia/idec-e-contra-retomada-de-venda-do-del-valle-fresh-com-enganiosidade-no-rotulo>> Accessed 12 May, 2023.

48 BRASAL REFRIGERANTES S/A v. PROCON-DF, Appeal n. 0705948-84.2022.8.07.0018.

reality, these are UPPs with excess sugar. In addition, their advertising targeted children, especially by using child-appealing characters, even though the National Council of Children's Rights had already issued Resolution n. 163/2014 deeming child-directed marketing abusive⁴⁹.

In August 2022, Idec sent a letter to the CFN questioning the professional council regarding this statement. In January 2023, the CFN sent an extrajudicial notification to Unilever, the producer, requesting that it remove from the marketplace and from any means of advertising (including websites, social networks, etc.) the products belonging to Kibon's children line containing the following phrases on the labels: "Approved by nutritionist(s)." or "Developed with nutritionists. Made for children." The CFN also stated that within 120 days these products should no longer include such references on the labels or they would take appropriate legal measures.⁵⁰

In July 2023, the CFN had a meeting with Unilever and the company informed that it would comply with this extrajudicial notification by removing these messages from these products' labels and marketing strategies.⁵¹

In light of this case, it is worth reflecting upon ANVISA's Resolution 24/2010—mentioned above—, which forbids any type of suggestion that food is healthy or beneficial for health when it has high amounts of sugar, saturated or trans fat, or sodium. This case demonstrates that once ANVISA's powers were challenged and limited on the matter of food advertisement and marketing, causing it to hold off on monitoring and sanctioning this type of behaviour, the industry used different variations of healthy claims that would have been explicit violations of Resolution 24/2010 had it been applied.

2.5 Cross-promotion between infant formulas and toddler milk

The final case study consists of violations of the Brazilian Standards for the Commercialization of Infant Food (in Portuguese, *Norma Brasileira de Comercialização de Alimentos para Lactentes e Crianças de Primeira Infância, Bicos, Chupetas e Mamadeiras* -

49 BRAZIL. Resolution n. 163, published in 2014/03/13, from National Council for the Rights of the Child and Adolescent <<https://www.gov.br/participamaisbrasil/blob/baixar/7559>> Accessed 12 May, 2023.

50 IDEC. *Idec alerta CFN e Conselho notifica a marca Kibon para retirar de produtos a alegação "desenvolvido com nutricionistas"*, published in 2023/3/7 <<https://idec.org.br/noticia/idec-alerta-cfn-e-conselho-notifica-marca-kibon-para-retirar-de-produtos-alegacao>> Accessed 12 May, 2023.

51 CFN. *Notificação extrajudicial emitida pelo CFN extingue rotulagem inadequada de produtos da Kibon*. <<https://www.cfn.org.br/index.php/noticias/notificacao-extrajudicial-emitida-pelo-cfn-extingue-rotulagem-inadequada-de-produtos-da-kibon/>> Accessed 12 May, 2023.

NBCAL), which regulates food marketing to infants and toddlers up to six years old, as well as related childcare products (e.g., feeding bottles) to protect breastfeeding, and specifically to prevent the early cessation of breastfeeding.⁵² The development of these standards was largely guided by WHO's International Code of Marketing of Breast-milk Substitutes, a set of recommendations that express the "collective will of governments to ensure the protection and promotion of optimal feeding for infants and young children."⁵³

NBCAL prohibits the commercial promotion of infant formulas for infants from zero to six months old and of follow-up infant formulas for infants from six months to one year old in any media, including indirect or hidden advertising and dissemination by electronic, written, auditory and visual means. It also restricts the commercial promotion of infant formulas for infants from one year old and on, conditioning it to display the following warning message from the Ministry of Health: "The Ministry of Health informs [that] breastfeeding prevents infections and allergies and is recommended up to two years old or more."⁵⁴

While monitoring NBCAL's implementation,⁵⁵ Idec identified the similarity of labels and packaging—the use of similar colours, symbols, brand names and various other elements—between two categories of products, infant formulas and toddler milk (in Portuguese, *composto lácteo*). Yet, corporations in the baby food industry were allowed to market them as part of the same product line, essentially using one to promote the other.⁵⁶ This can negatively affect the health of children, considering that toddler milk can contain sugar and food additives, whose early consumption can

52 BRAZIL. Law n. 11.265/2005 <https://www.planalto.gov.br/ccivil_03/ato2004-2006/2006/lei/111265.htm> Accessed 12 May, 2023. Establishes rules for the marketing of foods for infants and young children, as well as related childcare products.

53 World Health Organization (WHO), International Code of Marketing of Breast-Milk Substitutes 1981 <<https://www.who.int/publications/i/item/9241541601>> Accessed 12 May, 2023.

54 BRAZIL. Decree n. 9.579/2018 <https://www.planalto.gov.br/ccivil_03/Atos2015-2018/2018/Decreto/D9579.htm#art126> Accessed 12 May, 2023. This consolidates normative acts issued by the federal Executive Power that deal with the subject of infants, children and adolescents and apprentices, and on the National Council for the Rights of Children and Adolescents, the National Fund for Children and Adolescents and the programs federal rights for children and adolescents, and makes other arrangements.

55 IDEC. Monitoramento – Em defesa da Amamentação <<https://idec.org.br/defesa-da-amamentacao/monitoramento>> Accessed 12 May, 2023.

56 IDEC. Monitoramento revela infrações da indústria de substitutos do leite materno <<https://idec.org.br/idec-na-imprensa/monitoramento-inedito-revela-infracoes-da-industria-de-substitutos-do-leite-materno>> Accessed 12 May, 2023.

harm eating habits and taste, stimulating preference for sweetness and, in children younger than six months old, increasing the risk of weight gain due to excess protein.⁵⁷

The situation is so serious that the Ministry of Health places a disclaimer in the national dietary guidelines for children under two years old specifically about toddler milk (non-official translation).⁵⁸

“It looks like infant formula or cow’s whole milk, but it is not.

Attention! Products called “toddler milk” should not be confused with infant formulas or cow’s whole milk. They are made with a mixture of milk (minimum 51%) and other dairy or non-dairy ingredients and often contain sugar and food additives.

Although toddler milk’s packaging informs that it should not be used for feeding children under one year old, in fact they are not indicated for children under two years old due to the presence of sugar and food additives. They do not replace breastmilk or infant formulas.

Toddler milk has packaging and labels very similar to those of infant formulas, and they are usually placed side by side on the shelves of supermarkets and pharmacies and have lower prices. Read the label carefully. It has “toddler milk” written on the front or back of the package and the manufacturer has to inform on the label: ‘Toddler milk is not powdered milk.’ or ‘This product is not powdered milk.’”

The WHO defines cross-promotion as “a form of marketing (...) in which customers of one product or service are targeted with promotion of a related product. This can include packaging, branding and labelling of a product to closely

57 Statement “Contraindication of toddler milk consumption for children under 2 years old”. Public-interest Civil Action n. 1050911-24.2022.8.26.0100, 38th Civil Court of the Central Forum of São Paulo, Complementary proofs provided by Idec.

58 See Food Guide for Brazilian Children Under Two Years Old (*Guia Alimentar para Crianças Brasileiras Menores de Dois Anos*), 144 (2019) <http://189.28.128.100/dab/docs/portaldab/publicacoes/guia_da_crianca_2019.pdf>

resemble that of another (...).⁵⁹ In 2016, the World Health Assembly approved Recommendation n. 5 regarding the avoidance of cross-promotion.⁶⁰

“There should be no cross-promotion to promote breastmilk substitutes indirectly via the promotion of foods for infants and young children.

- The packaging design, labelling and materials used for the promotion of complementary foods must be different from those used for breastmilk substitutes, so that they cannot be used in a way that also promotes breastmilk substitutes (for example, different colour schemes, designs, names, slogans and mascots other than company name and logo should be used).
- Companies that market breastmilk substitutes should refrain from engaging in the direct or indirect promotion of their other food products for infants and young children by establishing relationships with parents and other caregivers (for example, through baby clubs, social media groups, childcare classes and contests).”

Literature has also documented cross-promotion.⁶¹ This strategy allows companies to count on the well-established brand names of its infant formulas to push toddler milk to consumers that might otherwise not be interested in this product. It also creates a state of confusion in consumers, who are at risk of purchasing toddler milk by mistake and feeding it to infants and toddlers under their care, thinking it is formula, but cheaper. This state of confusion is experienced by consumers, including those in

59 World Health Organization (WHO), Guidance on ending the inappropriate promotion of foods for infants and young children: implementation manual 30 <<https://apps.who.int/iris/bitstream/handle/10665/260137/9789241513470-eng.pdf>> Accessed 12 May, 2023.

60 World Health Organization (WHO), Guidance on ending the inappropriate promotion of foods for infants and young children: implementation manual. Available on: <<https://apps.who.int/iris/bitstream/handle/10665/260137/9789241513470-eng.pdf>> Accessed 12 May, 2023.

61 C Pereira, R Ford, AB Feeley, L Sweet, J Badham & E Zehner, ‘Cross-sectional survey shows that follow-up formula and growing-up milks are labelled similarly to infant formula in four low and middle income countries’ (2016) 12(S2) Maternal & Child Nutrition 91. D O D Leão & M Gubert, ‘Precisamos conversar sobre os chamados compostos lácteos’ Demetra: Alimentação, Nutrição & Saúde, 14: e43609, 2019 <<https://www.e-publicacoes.uerj.br/index.php/demetra/article/view/43609>> Accessed 12 May, 2023.

vulnerable situations—parents and caregivers who need breastmilk substitutes for their infants or young children, as well as the infants and young children themselves.⁶²

Cross-marketing between infant formula and toddler milk, identified by Idec's monitoring of NBCAL implementation, is therefore a concern shared by government, civil society, international organizations and academia alike, precisely because it circumvents the objectives of legislation to promote and protect breastfeeding, which, in Brazil, prohibits the advertising of infant formulas.

For this reason, in May 2022, Idec filed a lawsuit—a public interest action (in Portuguese, *ação civil pública*)—in the state of São Paulo against Nestlé, Danone and Mead Johnson, all three subsidiaries of multinational companies headquartered in other countries. This lawsuit sought to halt and redress damages caused by the defendants' unlawful marketing practices related to toddler milk, which confuse, mislead and ultimately harm Brazilian consumers. Such practices include using extremely similar packaging and labelling for different products with different age indications (namely infant formula and toddler milk), which puts the health of the final consumers of these products (namely infants and young children) at risk. Idec is the plaintiff in this case, representing the collective interests of Brazilian consumers as permitted under Brazilian law.⁶³

Idec requested, among other things, that the court declares the violation of the Constitution, the Consumer Protection Code, NBCAL and other applicable norms, and orders compensatory and punitive damages derived from the breach of the defendants' duties to consumers and the public. Idec also requested that the court provide injunctive relief, ordering the defendants to change the packaging and labels of said products to avoid future consumer confusion, and also to place warnings on the toddler milk packaging, clearly visible to consumers, as well as in all forms of advertising regardless of the type of media.

In July 2022, the court issued a decision, partially granting Idec's request for injunctive relief and determining that only Nestlé, considering that the other companies' products have small differences of sizes and colours, include stickers on

62 Mylena Melo & Nathália Iwasawa, *Pesquisa do Joio com mães confirma pressão para substituir leite materno e muita influência da indústria*, O Joio e o Trigo (Aug. 20, 2020) <<https://ojoioeotrigo.com.br/2020/12/pesquisa-do-joio-com-maes-confirma-pressao-por-substitutos-ao-leite-materno-inclusive-em-maternidades-e-muita-influencia-da-industria/>> Accessed 12 May, 2023.

63 IDEC, *Idec processa Nestlé, Mead Johnson e Danone por promoção cruzada entre fórmulas infantis e compostos lácteos* <<https://idec.org.br/release/idec-processa-nestle-mead-johnson-e-danone-por-promocao-cruzada-entre-formulas-infantis-e>> Accessed 12 May, 2023.

the lids of its products with a message warning consumers about the differences between the products within 60 days.⁶⁴ The decision covered the products available for purchase at physical stores and on e-commerce marketplaces.⁶⁵

Both Nestlé and Idec appealed this decision, the latter seeking to extend the effects of the decision to Danone and Mead Johnson as well.

In August 2022, a judge in the court of appeals granted Nestlé's request to suspend the preliminary injunction against them and denied Idec's. The decision is not final and others appeals still ongoing.

While these legal proceedings were happening in court, other authorities took notice of the controversy. For example, following the first-instance judge's granting of injunctive relief, the National Department for Consumer Protection notified Nestlé to provide clarification on the similarity between the labels and packaging of infant formula and toddler milk.⁶⁶ In parallel, Idec received a letter from the Public Prosecution Office of the state of Bahia requesting information about this public interest action in order to send input. This led to new information on previous misleading practices involving similar labelling between toddler milk and powdered milk. In 2018, Procon-SP (the consumer protection body from the state of São Paulo) had sanctioned an infraction by Nestlé, imposing a fine in the amount of R\$4,810,686.67 (approximately USD 957,293 at the time of publication) due to this same practice.⁶⁷

Additionally, the Federal Public Prosecutor from the state of Goiás analysed the general market practice of adopting similar labels between different category of products in 2022. The authority recommended to the Ministry of Agriculture⁶⁸

64 ESTADO DE SÃO PAULO. Injunction relief in Public-Interest Civil Action n. 1050911-24.2022.8.26.0100 ordering Nestlé do Brasil to insert informative warnings about the differences between “composto lácteo” and infantil formulas in the label of the products. Judge Danilo Mansano Baroni. 38th Civil Court of the Central Forum of São Paulo. São Paulo. Published in 2022/6/6.

65 IDEC, *Justiça determina que Nestlé sinalize de forma clara diferença entre fórmulas infantis e compostos lácteos* <<https://idec.org.br/release/justica-determina-que-nestle-sinalize-de-forma-clara-diferenca-entre-formulas-infantis-e>> Accessed 12 May, 2023.

66 BRASIL. Ministry of Justice and Public Security. National Secretary of Consumer Defense. *Senacon pede esclarecimentos à Nestlé sobre produtos com rótulos semelhantes* <<https://www.gov.br/mj/pt-br/assuntos/noticias/senacon-pede-esclarecimentos-a-nestle-sobre-produtos-com-rotulos-semelhantes>> Accessed 12 May, 2023.

67 ESTADO DA BAHIA. Public Prosecution Office of Bahia State. Civil Inquiry n. 003.9.227612.2022.

68 UNIÃO FEDERAL. Federal Public Prosecution Office in State of Goiás. Preparatory Procedure n. 1.18.000.001939/2022-15. <<https://www.mpf.mp.br/go/sala-de-imprensa/>>

establishing administrative procedures to inspect the similarity of milk product labels with other products derived from milk, such as milk drinks, milk mixes and condensed milk mixes, cottage cheese and others that have the potential to confuse consumers, urging companies to promote changes in easily identifiable colours and product names, including warnings about the differences.

There are still great challenges to achieve significant change in this food environment, in which consumer choices are clouded by mistakes and confusion due to misleading marketing. However, litigation has the potential to promote public debate around such practices, particularly generating an institutional environment of accountability in response to consumers' demands for action.

3. Lessons learned from the Brazilian cases useful for Caribbean countries

In filing these complaints, Idec sought that companies be required to adopt more transparent food marketing practices, thus ceasing to mislead and abuse Brazilian consumers. The fact that Brazil has strong consumer laws, including specific and enhanced protection to children, does reduce the power asymmetry between the UPP industry and the consumers movement in the context of these complaints.

However, in order to get to this point, huge efforts were needed; for instance, the creation of multidisciplinary, independent panels, such as the Food Advertising Observatory, to monitor the marketplace and provide technical input in assessing how and when a case could be strong enough to support multilevel debate in different forums responsible for taking actions.

The first complaint showed that even when the legal framework guarantees regulatory power, the industry can create enough doubt within judiciary and administrative bodies to stop very transformative regulation of UPP marketing in Brazil. The discussion about how ANVISA —the regulatory agency in Brazil— could employ strategies to better inform consumers on unhealthy food was stalled, only picking up speed again with the FOPWL debate almost ten years later.

Considering that until now ANVISA has not applied the marketing restrictions on UPPs, strategic litigation is playing a key role regardless of the final rulings in these complaints and lawsuits. Its key role is to create conditions to inform consumers about the proprieties of foods that are harmful for health, generating awareness to avoid the consumption of UPPs and protecting the right to accurate information, essential for better food choices.

In this context, it is important to empower consumers with knowledge about the real composition of UPPs, especially those with claims that generate natural, healthy, homemade bias, creating false familiarity and trust in the consumers' perception. By building a portfolio of relevant cases of misleading and abusive food marketing, as well as developing communication strategies around them, Idec sensitizes not only the population, but also the legal authorities in Brazil. In turn, this favours more robust legislation to restrain such harmful marketing practices in the long term.

All the while, the exposure to and power of UPPs marketing counter national NCD prevention and control public policies. Voluntary nutritional and health claims are industry tactics that highlight supposedly positive aspects of foods in an ostensive and consumer-friendly way, which may create an overestimated perception of a product's healthiness and have a significant influence on consumers' purchase decision.

These cases from Brazil can provide relevant lessons for Caribbean countries from a South-South perspective, allowing for more exchange between civil society organisations around the power of consumer movements. As transnational corporations monitor a great number of public policies debates on healthy food in countries where they have economic activities or concerns, there is a need for more dialogue between civil society organisations that are facing similar opposition tied to corporate political activities. As a result, civil society organisations would be better prepared to stand up to the UPP industry's attempts to undermine these public policies or distort control activities.

Finally, this could contribute to building public awareness about the impossibility to conciliate the commercial interest of the UPP industry and the promotion of healthy, sustainable and inclusive food diets.