Special Article

Parental freedom as a barrier to the advertising of unhealthy food products aimed at children

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Abstract

Undoubtedly, children and adolescents require protection against harmful practices. Minors are vulnerable to predatory and inherently exploitative marketing that occurs in a context of massive rule breaking. Although parents do not have enough nutrition or medical expertise, they value children's health highly and change their buying habits when labelling clearly reveals the unhealthy elements of a product. However, the freedom of parents to reject the offer of unhealthy food is not an effective protection mechanism, because the advertising message of unhealthy food is usually misleading. In the legal sense, setting the debate on the plane of freedom forges the debate. Prior to the moment of the election, there has been an infringement of the right to freedom of enterprise or freedom of commercial expression, given that they only cover the making of honest, truthful and lawful advertising. Therefore, the unlawful status in which the advertising of unhealthy foods has been established must be resolved, due to the continued infringement of Article 4 of Regulation 1924/2006 and the massive breaches of the self-regulation codes, in fraud of the Law of Food Security and Nutrition. The incitement, proposition or invitation to carry out harmful activities should also be limited when said character is misrepresented with suggestions that, in other areas of food presentation, the Courts consider them enough to give rise to the risk of confusion.

Key words:
- Food
- Food Industry
- Legislation
- Marketing
- Obesity
- parental responsibility

Libertad parental como barrera frente a la publicidad de productos alimentarios malsanos dirigidos al público infantil

Resumen

Es indudable que los niños y adolescentes requieren protección frente a las prácticas dañosas. Los menores son vulnerables al marketing depredador e inherentemente explotador que se produce en un contexto de incumplimiento masivo de las normas. Aunque los progenitores no tienen conocimientos nutricionales o sanitarios suficientes, valoran en gran medida la salud de los niños y cambian sus hábitos de compra cuando el etiquetado les revela con claridad los elementos malsanos de un producto. Sin embargo, la libertad de los progenitores de rechazar la oferta de alimentos malsanos no es un mecanismo de protección eficaz, porque el mensaje publicitario de alimentos malsanos es normalmente engañoso. En lo jurídico, situar el debate en el plano de la libertad es falsearlo. Con carácter previo al momento de la elección, se ha producido una infracción del derecho a la libertad de empresa o a la libertad de expresión mercantil, dado que solo amparan la realización de publicidad leal, veraz y lícita. Se debe, por tanto, resolver la situación de ilegalidad en la que se ha instalado la publicidad de alimentos malsanos, por la infracción continuada del artículo 4 del Reglamento 1924/2006 y los masivos incumplimientos del código de autorregulación, en fraude de la Ley de Seguridad Alimentaria y Nutrición. También se debe limitar la incitación, sugerencia o invitación a realizar actividades nocivas cuando dicho carácter sea falseado con sugerencias que, en otros ámbitos de la presentación alimentaria, los Tribunales entienden suficientes para producir riesgo de confusión.

Palabras clave:
- Alimentos
- Industria alimentaria
- Legislación
- Mercadeo
- Obesidad
- Responsabilidad parental

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"*Unfortunately, marketing unhealthy food to children has been proven to be disastrously effective*".

World Health Organization[1]

INTRODUCTION

It is assumed that minors are, in general, unable to protect themselves. It is something that can be inferred from reading countless legal texts. Regarding advertising, there are certain consensuses,[2] such as that up to the age of five, minors are unable to perceive the differences between programs and advertisements or that until approximately eight years of age they do not begin to identify in advertising an interest in persuading. Even after the age of eight years old, it is not guaranteed that minors can identify the messages as biased since, as we adults know, they usually emphasize the positive aspects and avoid the negative aspects of the product.

The World Health Organization (WHO) reported that marketing to children has been described as inherently exploitative because children may be incapable of discerning its commercial intent but are susceptible to its influence.[3] In the words of the former WHO director, Margaret Chan:[4] "Childhood obesity does not arise from lifestyle choices made by the child. It arises from environments created by society and supported by government policies. The argument that obesity is the result of personal lifestyle choices, often used to excuse governments from any responsibility to intervene, cannot apply to childhood obesity."

Protecting children from harmful marketing practices is therefore a matter of relevance to fundamental rights. Marketing of unhealthy products to children (with high fat, salt or sugar content) being non-safe products has relevance to the World Cancer Research Fund (WCRF) on the achievement of children's rights.[5] Parental authority, meanwhile, has evolved as a concept from what was considered a prerogative, an end, a few decades ago, towards a set of obligations[6] that are a means to achieve the welfare of minors and the full exercise of their rights. In lay terms, parental authority is not a right for parents to decide, but instead a right for children to have decisions made that affect them, inspired on their protection.

PARENTAL AUTHORITY OPEN TO DIALOGUE, AND ITS ABUSE

Among the characteristics that doctrine[7] has described to define parental authority are that the actions of the parents must always respect the interest of the minor and that in all cases in which the minor has the capacity for discernment, he must be heard.

This provision of legal origin is also part of the educational standards of our time. Listening to minors, dialoguing with them, is a positively valued activity. Thus, the American Psychological Association insists that "listening and speaking is the key to a healthy connection between parents and their children".[8] The possibility of illegitimately using any predisposition of adults to be receptive to the messages of minors, overcoming thanks to advertising the resistance of parents to buy unhealthy products for their children,[9] has been well described as a nuisance factor (pester power[10] or nag factor).[11]

Thus, on the one hand, we must be formally receptive as adults to the messages of minors who express desire but being aware that certain advertisements directly affect the stimulation of said desire. On the other hand, we should be prepared (ideally through covert control)[12] to know and be able to counter manipulation with obvious commercial interest.

Advertising not only affects the product but encourages with its tactics the overcoming of legitimate resistance: the analysis of the advertising message of certain unhealthy food products denotes the enhancement of traits (such as transgression or challenge) that directly question the

legitimate exercise of parental authority. A transgression or challenge logically oriented to follow the advertiser's dictates, based on the concept "you decide", by which emotional elements are incorporated ("you are free to present yourself as you wish, you have a territory in which to show your signs of identity ") and also rational elements ("new friends, new game challenges, high value prizes"), enhances the transgression ("live how you want, there are no commands"), the challenge ("win or lose, make friends or enemies, it depends on you") and also the differentiation ("define your virtual identity against the rest of the community, mark your territory").[13]

Given all the above, it is not surprising that a recent systematic review of the scientific literature concludes that: "Together, these studies contribute strong evidence to support the restriction of food marketing to children".[14] It has been estimated that one in three European children would not suffer obesity if advertising of unhealthy products had been banned during children's television time.[15] In the words of the Global Cancer Research Fund, "there is a wealth of evidence on the extent, nature and effects of the marketing to children of products high in fat, sugar and salt, which shows that advertising affects children's eating and drinking behaviour, preferences, requests, nutrition knowledge and food intake. Cognitive defences continue to develop through the teenage years, meaning that children require protection from broadcast and non-broadcast media (such as internet gaming and advertising, text advertising, social media and sports sponsorship)".[16]

IS THERE SOME ELEMENT OF PROTECTION PRIOR TO THE PARENTAL "NO"?

The Spanish self-regulation system (the industry itself makes the rules and monitors its compliance) and the existence of children's channels that do not limit advertising aimed at children portray a very lax system. The comparison with the systems of our environment certifies it: what usually happens is that self-regulation and children's channels without advertising limitation do not coexist.[17] From a legal point of view, the self-regulation system for food advertising aimed at children constitutes a short catalogue of prohibited conducts that includes unjustified exceptions. Failure to comply does not produce the effect analogous to that of a legal norm, nor is it controlled by a Public Administration, and breaches are regulated in a somewhat undefined manner, such that there is not as such a list of behaviours that constitute breaches classified as minor, serious and very serious, the objective criteria of which are not determined *a priori*.[18]

Despite all the above, the most serious problem is that the Spanish self-regulation code (PAOS) has basically been worthless: it has never been observed at minimally reasonable levels. The keynote is massive non-compliance. Studies have demonstrated, in addition to a discrepancy between the diet composed of the advertised foods and a normal diet recommended for children (that is, what is advertised is basically, what is unhealthy), the absence of modifications in advertising after the coming into force of the code.[19] Studies by researchers from outside the system built around self-regulation reflect a serious worsening of the situation; it has gone from a degree of non-compliance with the code (PAOS) from 49.3% in 2008[20] to 88.3% in the most recently published studies.[21] The situation of gross non-compliance is currently maintained, as has recently been demonstrated[22] and this occurs in clear breach of the provisions of article 46 of Law 17/2011, of July 5th, on food security and nutrition, which requires that the codes be applied, guaranteeing protection.

The ban on advertising of unhealthy food directed at children is a reality in Portugal, Sweden, Norway, Greece or Quebec. The WHO considers that "settings where children gather should be free from all forms of marketing of foods high in saturated fats, trans-fatty acids, free sugars, or salt".[23]

The conclusion for this point is that we have a very lax protection system against advertising to children, which has not affected, after its implementation, the type of advertisements mainly presented

to children and which is breached on a massive and widespread level. More than a presumption of widespread exposure of minors to illegitimate advertising, it has been proven that the advertising of food products that is presented to children, which includes the offer (that is, what the manifest advertising of the product is to be considered an offer in legal terms), it does so in a deceptive way and using mechanisms that manifestly exceed what is legitimate.

WHAT DO CONSUMERS KNOW ABOUT NUTRITION?

Leaving aside the fact that much of the advertising reaches children through channels not controlled by adults, it could be argued that, if adults had enough knowledge of nutrition, there would be no need to place significant limits on advertising of unhealthy food products. In theory, such knowledge would allow them to protect the minors in their care from such advertising. But do adults benefit from such knowledge?

For the Court of Justice of the European Communities (CJEC) (today the Court of Justice of the European Union, CJEU) and for some of the essential rules regarding the presentation of food products, the relevant consumer when determining when advertising can be declared to be truthful, honest and, ultimately, legal, is not an "unconscious" consumer (Gut Springenheide Judgment),[24] but an mindful and insightful consumer. That is, a consumer who follows the indications with criteria, to the point of discerning, for example, that the extra percentage of a product is that corresponding to the literal percentage indication (10%) instead of that which in relation to the total size of the usual packaging represents the differentiated strip in which the legend is included, and which is greater than 10% of the total product (Mars Judgment).[25] In the opinion of González Vaqué, it refers to an "informed somewhat smart consumer who carefully perceives the information on the marketed product and, therefore, all the indications of the products".[26] Thus, superficial reading[25] has been defined, to a certain extent, as excluding an induction to error: one must read everything and read it with interest to understand.

In the process of constructing the concept, the courts[25] have sometimes assessed the appropriateness of determining the lawful or misleading nature of a presentation or advertisement by means of the corresponding expert evidence, instead of presuming a specific consumer concept first and then representing it in order to conclude. This route, that of certainty determined by study or analysis of the evidence, exists in the rules of food presentation, but has been reserved only for alternative forms of presentation to that which is mandatory: Article 35 of Regulation 1169/2011 establishes that "the energy value and the amount of nutrients referred to in Article 30, paragraphs 1 to 5, may be given by other forms of expression and/or presented using graphical forms or symbols in addition to words or numbers, under the condition that the following requirements are met:

a. They are based on sound and scientifically valid consumer research and do not mislead the consumer as referred to in Article 7.
b. Their development is the result of consultation with a wide range of stakeholder groups.
c. They aim to facilitate consumer understanding of the contribution or importance of the food to the energy and nutrient content of a diet.
d. They are supported by scientifically valid evidence of understanding of such forms of expression or presentation by the average consumer.
e. In the case of other forms of expression, they are based either on the harmonised reference intakes set out in Annex XIII, or in their absence, on generally accepted scientific advice on intakes for energy or nutrients (...)".

That is, in lay terms, before using a certain indication to offer the information, it must be guaranteed that the consumer (plainly) understands it well. The list of requirements that article 35 of R. 1169/2011 establishes for alternative presenta-

tions seems to suggest that the mandatory presentation guarantees that the consumer understands the labelling: changing the presentation requires great deployment, because the system presumes its own effectiveness, which it is the guarantee offered to the consumer like a bastion. However, such presumption is seriously flawed both due to the breach during more than a decade of the obligation imposed by Article 4 of Regulation 1924/2006 by the European Commission: "By 19 January 2009, the Commission shall establish specific nutrient profiles and the conditions, including exemptions, which shall be respected for the use of nutrition and health claims on foods and/or categories of foods," such as the fact that the systems of presentation of the European packaged foods are stagnant, unlike what happens with others, such as that of the Food and Drug Administration (FDA, USA), in permanent evolution so that the consumer understands better (for example, values per unit of service or consumption).[27]

Although the norm presumes that labelling is a good tool, that bad choices are increasingly common makes us suspect otherwise. On the one hand, the high consumption of unhealthy products is the norm in children,[28] in adolescents[29] and in adults.[30] On the other hand, strategies like the Chilean one[31] seem to show that the consumer alters, even in the very short term, the level of purchase of products that he did not think were unhealthy, when this fact is clearly revealed to him in the label.[32] The positive results have been evaluated and accredited.[33] We are aware, in any case, that labelling is only a knowledge tool that affects only one factual aspect of the vast set of multifactorial aspects that allow a serious scientific value judgment of cause-effect relationship between the prevalence of certain serious pathologies at the population level and unhealthy food intake.

Nonetheless, even among a relatively well-educated audience in a best-case scenario, only 4% can identify added sugars by reading the label.[34] It has been revealed that even when the average consumer tries to make healthy dietary choices, increasing, for example, the consumption of fibre and slightly reducing the consumption of saturated fats, he ends up choosing options that involve an intake of salt and sugar which is double of what is recommended.[35] Consumers lack essential knowledge regarding salt (recommended dietary intake, primary food sources, and the relationship between salt and sodium).[36] Nutritional labelling is useful when it is understood, but even a University-level education does not guarantee its understanding: just over half (53.9%) of respondents with a University education of at least four years were able to answer correctly 100% of the four questions in relation to nutritional labelling.[37] In addition to being underused, nutritional labelling generally requires some knowledge: nutritional knowledge is likely to help direct attention to relevant information, promote understanding, and allow more accurate information to be stored in memory and used in decision-making situations.[38]

On the other hand, other surveys indicate the main effect that certain voluntarily undetermined messages very commonly used as "healthy eating", "eating for health", "balanced diet" or "nutritional balance" produce in the public: confusion.[39] The mechanism is recurrent: advertising of unhealthy food that is based on these concepts built to accommodate not one, but countless types of junk food from various multinational companies.[40] The incidence of the lack of basic knowledge, in general, has accredited in public health a great relevance in quality and life expectancy.[41]

Motivation is more relevant than knowledge or handling of concepts when it comes to products with statements (nutritional or of health properties, which the consumer does not generally distinguish): the presence of symbols or drawings is influential.[42] In an investigation carried out with 1,551 parents of children between the ages of 5 and 12, the response of the parents to health claims or to endorsements by famous athletes of announcements of unhealthy products directed at their children was evaluated. Both the nutritional statements and the endorsement of athletes made parents more inclined not only to perceive

unhealthy products as nutritious or of quality, but also to buy them.[43]

THE MESSAGES OF THE HEALTH ADMINISTRATION AND OF THE GOVERNMENT AUTHORITIES IN GENERAL

The value judgment that someone can form after reading the previous section can and should still be put into context with other circumstances that help to understand why the training in nutrition of the average person is so scarce and is at the mercy of confounding factors. The incorporation of the nutritionist dietitian into public health has not yet taken place fully, which means that the authority of the messages of those who must treasure, due to a deontological imperative,[44] greater training in the field of evidence in nutrition, is lost. Nutrition has been considered a residual subject in healthcare training.[45]

What is consequence and what is cause is something that may perhaps find an answer in the fact of the predominance of the healthcare approach to health problems associated with dietary risks, in which preventive or public health treatment is undervalued.[46] The approach of our food policies - the scientific bases that are managed by those responsible in the Administration - have become obsolete, are generally not based on solid evidence, are confusing and impractical for the population and invite the manipulation and commercialization of unhealthy food by the Industry.[47] Lack of knowledge, capacity and will have been identified, in this order, as causes of the lack of development and implementation of effective nutritional policies.[48] Unfortunately, public momentum is more a counterweight than assistance to the consumer.

IS HEALTH SUCH A DECISIVE FACTOR IN CONSUMER DECISIONS?

It is not for all consumers, but such circumstance does not dilute, in relation to each specific product, the obligation that its presentation and advertising comply with what is actually offered. Just as all the units in a given batch must be free of residues in limits higher than those established by legislation (Regulation 396/2005, of February 23rd), the analysis of the healthiest condition of a product cannot be displaced with nutritional claims to others such as the overall quality of the diet, the balanced diet or the energy balance. Thus, it is misleading to present a product with a nutritional declaration of the content of an element that has been added to be able to make said declaration, when said element is amply obtained with the common diet. It is because the product is presented as superior to its analogues without declarations, but, in reality, it is not. When Article 4 of Regulation 1924/2006 begins to be complied with, it will prevent an unhealthy product from being varnished with the patina of a declaration.

With the purchase of a specific food product, a contract comes into force: the purchase is made according to reasonable expectations in exchange for a price. Part of those expectations are also built from advertising, which is part of the contract. Consumer satisfaction is a subjective concept that must be objectified in law in a conformity, which is understood as a set of features among which are that of presenting a quality and usual benefits in products of the same type and, where appropriate (if they exist), of the public declarations on the concrete characteristics of the products made by the seller or the producer, in particular in advertising or labelling.

But to what extent is health a determining factor in food purchases? The conclusions of some studies seem to clear the unknowns around the binomial: interest (interest in health) and knowledge (nutritional knowledge of the population). Consumers seem, for example, willing to pay a premium for health reasons when there is a declaration of reduced fat content in cheese, but they disregard the relevance of a reduction in the salt content to the point of favouring the price in this case.[49] In other words, the consumer is willing to pay more for health but errs outright in characterising fats as being more harmful (the most up-to-

date scientific evidence doubts the pernicious effect that has been attributed to it to date,[50] although there are suspicions)[51] than salt, of which the high intake is being identified as one of the three key factors (along with a low intake of fruits and whole grains) which is attributed to be the estimated cause of up to 11 million annual deaths.[52] But, above all, the result of this study seems to confirm that a certain food industry interested in promoting misleading beliefs with commercial interest invests time, money and resources to ensure success.[53]

Some surveys reveal that the main concern declared by consumers is health. Regardless of whether what is declared coincides or not with specific actions in a real changing context and affected by a multitude of variables (there are studies that indicate that the most determining factor in food choices is the price),[54] the truth is that the consumer declares that health is a high-interest factor,[55]

To what extent the consumer correctly estimates the relationship between unhealthy food intake and decline in health is still to be determined when it seems that reaching such an estimate is not very realistic, not even by governments. Entities such as Cancer Research UK are positioning themselves to use the same strategy with the advertising of these products as with tobacco:[56] "our research has found that children who remember seeing one junk food ad on TV a day could eat an extra 18,000 calories in a year, or almost 350 calories a week ".[57]

There is no real discussion among public health experts about the lack of safety of the specific typologies of products that can be included with no doubt in the concept of junk food, either due to their condition of being ultra-processed, or due to the high amount of fats, salt and sugar. Leaving out culinary ingredients, which are rarely consumed alone (oils or even honey and sugar), and unprocessed or minimally processed foods, which have also not shown to be related to the distancing of the population from recommended intakes,[58] profile systems such as that of the WHO Regional Office for Europe[59] allow to include within the category of non-innocuous products, sugary drinks, "energy" drinks (express or suggested advertising name established despite being contrary to law), juice, cakes, biscuits, pastries, other sweet bakery wares, snacks regardless of the amount of salt that they contain (potato crisps, popcorn, savoury biscuits), ice cream, breakfast cereals with more than 15 grams of total sugars per 100 grams of product or 1.6 grams of salt, sweetened dairy products with more than 10 grams of total sugars or more than 2.5 grams of total fat, and some other categories such as such as fast food or processed meat which, in application of the precautionary principle, sufficiently accredit their relationship with the appearance of certain types of cancer.[60]

Despite the apparent clarity of the definition in article 14, sections 2, 3 and 4 of Regulation 178/2002, evidence of the existence of the previous categories (products high in fat, salt or sugar), also indicated in another essential food standards such as article 4 of Regulation 1924/2006, has motivated the recognition of the particular condition of food safety, defined in this way not in its full sense, but as the inability to make people sick "more or less seriously and above all if it is acute (i.e. the food intake is very close to the health effects)".[61]

The conclusion seems clear: the consumer values health as an essential feature, so when a food product suggests global or partial health properties, it should be understood that this suggestion is essential and integrates the offer for the purposes of compliance with the contract. However, many of the products that are presented as healthy are unhealthy. Its intake contributes to a serious health impairment that the consumer cannot assess.

A REPRESENTATIVE SAMPLE OF THE CRITERIA OF THE COURTS

Not any litigation has the suitability in abstract to end up being resolved by the courts of justice. Jurisprudence in relation to the resolution of con-

tracts by defect of consent (for having been presented an untrue offer or having made a misleading advertisement) analyses cases where the product or item in question has a certain economic value. The costs of a litigation represent a deterrent value and, on the other hand, both the amount and other legally configured constraints limit access not only to a second instance but to both the Supreme Court and the CJEU, which are the Courts that in Spain have been conferred legally the authority to build jurisprudence. The Supreme Court is not going to prosecute - which is logical - the lack of conformity of a pastry product that carries a nutritional statement. Actions for illegitimate advertising are another way to raise the question of the legality of advertising, although this way is not exempt from important substantive and procedural difficulties, as it is focused on burdening individuals with the responsibility (active legitimation) of action and its risks.

Notwithstanding the foregoing, there is a body of jurisprudential doctrine related to the capability of food presentations to mislead the consumer. It has been built, it is easy to deduce it at this point, from the collective interest of producers and marketers with sufficient economic capacity to bear the costs and economic risks of litigation and with great commercial interest in excluding competitors from its market for reasons such as the distinctive geographical location of the producer –not the consumer, which is global–, to which others are added, such as the application of quality standards; these are the protected designations of origin and geographical indications and the brands associated with them.

We speak of jurisprudential doctrine because the normative parameters are quite parallel: where the naming regulations use "error induction" and "evocation", the labelling and advertising regulations use "error induction", "suggestion" or "insinuation".

Thus, the recent judgments of the CJEU, of May 2nd 2019,[62] and of the Supreme Court of July 18th 2019[63] offer us a series of very clarifying criteria. To judge whether the use of a name such as "*Rocinante*" or "*Queso Rocinante*" (Rocinante Cheese) can cause confusion in the consumer regarding the protection of the product by the Protected Designation of Origin (PDO) "*queso manchego*" (Manchego cheese), the CJEU states that "it cannot be ruled out as a matter of principle the possibility that figurative signs are capable of bringing directly to the consumer's mind, as a reference image, the products protected by a registered name due to their conceptual proximity to such name". Both at first instance and on appeal, the Spanish Courts had denied the existence of a risk of confusion. For the Provincial Court, "for there to be an evocation within the meaning of art 13.1 b of Regulation 510/2006, it is necessary to use a name that has a graphic, phonetic or conceptual similarity with the protected designation of origin, without considering the mental link that may arise from sharing both products (the one protected by the PDO and the one marketed by the defendants that is not covered by the PDO) common characteristics ". The CJEU interprets, at the request of the Supreme Court, which has issued the final judgment, that the figurative sign (a drawing) is enough to evoke (without analysing the labelling) the products covered by the PDO. Furthermore, it concludes that "the use of figurative signs that evoke the geographical area to which a designation of origin is linked [...] may constitute an evocation of that designation, even in the event that such figurative signs are used by an established producer in that same region, but whose products, similar or comparable to the products protected by said designation of origin, are not covered by the latter."

Well, for the Supreme Court, "that evocation of the geographical area to which the PDO 'queso manchego' (Manchego cheese) is referred to by using denominative signs (such as the term 'Rocinante') and figurative signs (the figure of Don Quixote, landscapes from the region of La Mancha) in the same product for which the PDO is registered (the cheese) or for services related to that product (the term 'Rocinante' to distinguish the commercial transactions dedicated to the manufacture of

cheese or the transport, storage and distribution services of cheese), provides a sufficiently direct and unequivocal conceptual proximity between the controversial denominative and figurative signs in the main litigation and the PDO 'queso manchego' which determines that the conduct of the defendants infringes the protection that the is granted to the aforementioned PDO by art. 13.1.b of Regulation No. 510/2006 ".

That is, in summary:

- Although there is a reference to the normally informed and reasonably mindful and insightful consumer, it is excluded (implicitly, although clearly), that it is the one (see section IV of this same text) who perceives the information about the commercialized product and, therefore, all the indications of the products. If the product itself does not refer to its status of being covered by the PDO, the mindful and insightful consumer cannot think that it is. In this matter, the information on the label must be discarded: the infringement due to risk of confusion must be analysed even if the information on the label clears the doubts.
- Since the distinctive sign of the PDO is conceptually associated with a location by mental association with a character in the context of the territory and the figurative contested sign is associated with the same territory through the same mechanism, it is inferred from the possibility declared by the CJEU, that there is a risk that the consumer could believe that the presence of the character implies the protection of the PDO and is aware of the traits of quality, reputation and use of traditional methods of production of the PDO cheese. With this, a *de facto* right of exclusive use of the character is conferred for the reference to the specific product category.

The Supreme Court, in conclusion, seems to be quite consistent, in our opinion, with the real concept of consumer, thus establishing protection against the risks of confusion.

Another example is offered by the judgment of the Supreme Court of October 25th 2002.[64] The criteria of this judgment have been reiterated and confirmed by the judgment of the Supreme Court of October 6th, 2003.[65] Purely, a litigation of denominations is judged with application of trademark regulations that protect the rights of a specific Designation of Origin Regulatory Council. In summary, the protected name "manzanilla de Sanlúcar" stands against the granting of a right to use the name "manzanilla", which is claimed by a producer who alleges that the manufacturing municipality, Lebrija, is within the demarcation in which traditionally the wine of the "manzanilla" type has been produced, as well as in several places in Andalusia. With reference to the jurisprudence of the Chamber, it is highlighted that "the spirit and purpose that is imprinted by all the matter of designations of origin is presided over by the protection and guarantee of the specific quality of the wines, preventing from being launched onto the market with possible deception to the consumer, wines protected by the Denomination that are not such". In this case, the judgment grants protection of use of the word "manzanilla" due to the risk of confusion with "manzanilla de Sanlúcar".

This sentence has three private votes that understand that "the word 'manzanilla' is not a geographical name here. Therefore, in this case, the right of exclusive use of the designation 'manzanilla de Sanlúcar' should have been limited to its use as a whole instead of extending it to the term 'manzanilla'. As if that were not enough, a term, 'manzanilla', has been monopolized, which has its own meaning in common language, and in the wine sector, and in this last aspect it does not exclusively incur Sanlúcar de Barrameda, being used previously in other parts of the territory to define wines of certain characteristics. This infringes the right to freedom of enterprise, recognized in Article 38 of The Constitution, by preventing the use of a generic word sign that cannot be exclusively appropriated by a certain wine production sector. In any case, if the appellant has the land located in the production area (Lebrija) referred to in article 4 of the Regulation of May 2nd 1977, it is not under-

stood that the registration of a trademark that protects a type of wine that responds to those who are typical of that area could be forbidden. Even accepting the thesis of the Judgment that protection also extends to the term 'manzanilla', the appropriate thing would be, not to prohibit the brand, but to correct by way of sanction the violation of the requirements established in the Regulation of the production, manufacturing and aging of these wines ".

Note that in the two cases that we have analysed, consumer protection does not have a health foundation, but rather commercial expectations of origin. Even so, the analysed sentences can allow us to establish some criteria:

- The risk of confusion is not mitigated by the existence of clear indications on the label. In application of this criterion, an examination of nutritional labelling should never be necessary to clarify a characteristic suggested by the rest of the presentation.
- Even mere symbols, figures or drawings that may be suitable in abstract so that the consumer can establish a concrete correspondence relationship between multiple concepts (the reference to a literary character in relation to the autonomous and non-state geographic scope, for example) can create a risk of confusion capable of protection.
- Commercial protection (protected brands or designations) allows the entry into play of a concept of a consumer who is normally informed and reasonably mindful and insightful, who no longer needs to perceive carefully the information on the product marketed and, therefore, all the indications of the products.

To sum up, it seems clear, applying *mutatis mutandis* jurisprudential criteria, that there is a risk of confusion, partial or total, regarding the healthy character of an unhealthy food product due to its presentation with nutritional claims (and even healthy properties), use of endorsements and seals of Health Societies, use of indirect health slogans (such as websites with direct health references), or the use of real or fictitious characters which display positive values such as strength, dexterity, sportiness or happiness associated with wellness.

REVIEW OF THE OTHER "FREEDOMS" IN DISPUTE

In short, freedom of expression is built around thoughts, ideas and opinions, while freedom of information protects the communication and receipt of truthful facts. Both freedoms are enshrined in article 20 of the Spanish Constitution (SC) and can be exercised in combination, to the point that it is sometimes difficult to differentiate them in a certain text or speech. In such a case, one must abide by the prevailing type of freedom. Examining the criteria that have been configured to define their practice, the difference between the two can be discovered: while the information refers to facts, it must be examined whether they are truthful (true or, in the case of inaccuracies, issued within the framework of a diligent verification process) to determine if the exercise of freedom has been in accordance with the law. It is what is called the *exceptio veritatis*: the communications of truthful facts do not infringe other rights even if they are dull or extremely critical. The limit to freedom of expression, which has other specific manifestations such as academic freedom or freedom of literary or artistic creation, is in the rejection of "expressions that are undoubtedly injurious without relation to the ideas or opinions that are displayed, and that are unnecessary for their presentation".[66]

Our legal tradition does not admit the attribution to a commercial entity of the ownership of a fundamental right, but a mere instrumental recognition of the ownership that depends not only on the purposes for which the legal entity was established (which are determining factors) but also on the concrete right and context[67] and, specifically, for two purposes: to articulate the exercise of their economic rights and "insofar as it is necessary to protect the corresponding fundamental rights of the individuals who are 'behind' the legal person

[...] . Hence, commercial speech can be limited to a much greater extent than political, religious or simply humorous speech".[68] In this sense, a violation of the right to equality before the law (art. 14 SC), in relation to freedom of information (art. 20.1 d) SC) has been recognized to a radio station that had been vetoed participation in the distribution of institutional advertising, but for the protection of a collective citizen right: "with this unequal treatment, the City Council [...], without known suitable reasons, restricts access to very representative part of citizens, to the information which that public entity considers necessary to transmit, and to the appellant, its foreseeable sources of financing, with the related effects already described ex art. 20 SC".[69]

Having established all of the above, if the advertising of food products were a manifestation of any of the rights of article 20, it would obviously be possible to pass over it the sieve of the *exceptio veritatis*: it would be necessary to check whether the attributed effects are true or not. However, the strictly commercial purposes and the strictly commercial context (advertising or promotion) determine that the advertising activity cannot be considered a manifestation of the exercise of free expression or information, but of freedom of enterprise (Article 38 of the SC). In the European Union, legal assumptions allow us to reach the same practical conclusion: the "commercial use of freedom of expression"[70,71] comes to represent a concept analogous to that of freedom of enterprise in our constitutional order with regards to possibly being subject to justified limitations.

The Constitutional Court has determined the limits of the exercise of the freedom of enterprise, which are none other than those of fair competition: what intuition shows us with the mere validity of rules such as the General Law of Advertising and the Law of Unfair Competition, Royal Decree 1907/1996, of August 2nd or articles 44.1 and 46.2 of Law 17/2011, of July 5th, on food security and nutrition that would have been declared unconstitutional if its provisions had been determined contrary to the SC , is confirmed with the examination of constitutional jurisprudence. Thus, for example, STC 225/1993, of July 8th.[72] The defence of competition and consumer rights (Article 51 of the SC) guarantees a constitutional exercise of the freedom of enterprise. In this sense, the judgment of the Supreme Court of June 6th 2006[73] puts both rights in dispute (38 and 51 SC). Deceptive advertising, unfair advertising and aggressive advertising have the character of acts of unfair competition in the terms contemplated in the Unfair Competition Law.

CONCLUSIONS

Although it is assumed that minors are not capable of judiciously evaluating advertising messages and that the exercise of parental authority requires parents to be receptive, it is accepted that the advertising of non-safe (unhealthy) food products, which are properly identified, address children even when they falsely present the aforementioned products as healthy. The dietary intake of minors has a lot of room for improvement, and marketing directed at them has been reported to worsen their eating behaviour. Most parents do not have enough nutritional or medical knowledge, nor do they have a real ability to counteract manipulation with commercial interest, often aimed at minors transgressing the advice of the adults in charge of their care.

Food presentation systems, such as the Chilean one, which reveal the unhealthy nature of certain products, have been shown to motivate changes in consumer behaviors, who consider health a very relevant factor. The available evidence indicates that parents are not free under the current system, since they are neither fully aware of what they are buying nor are they capable of correctly handling the confusing concepts that Administrations continue to use in most cases, which are in addition obsolete and inaccurate. The courts, for their part, do not always consider a concept of real consumer, which, on the contrary, is the one used to establish the effective protection of interests that are strictly commercial (such as designations of origin).

Placing the debate at the level of freedom by the parent to reject the purchase of unhealthy products aimed at children is a consequence of the desire to misrepresent it, in a scenario of massive and proven breaches of the rules, because before placing himself in the option to choose, the consumer must have received effective protection against unfair advertising, the only one protected by the freedom of commercial expression. The debate about limiting business practices that can affect the increase in public health spending goes beyond the private sphere (advertising of tobacco, alcohol or unhealthy food): it is not a question of putting limits on individual and conscious voluntary activities that may contribute to a reduction in one's health, it is a matter of limiting the enticement, suggestion or invitation to carry out activities that unfairly hide their harmful condition, when the consumer cannot reasonably identify them.

CONFLICTS OF INTEREST

The authors declare that they have no conflicts of interest in relation to the preparation and publication of this article.

ABREVIATIONS

SC: Spanish Constitution • **PDO:** Protected Designation of Origin • **FDA:** Food and Drug Administration (U.S.A.) • **WHO:** World Health Organization • **PAOS:** Publicidad, Actividad, Obesidad, Salud (Spanish code of self-regulation of food and drinks advertising directed at children) • **CJEC:** Court of Justice of the European Communities • **CJEU:** Court of Justice of the European Union • **WCRF:** World Cancer Research Fund.

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